(2010) 09 BOM CK 0002

In the Bombay High Court

Case No : Writ Petition No. 831 of 2005

Union of India (UOI) APPELLANT

Vs

The Customs and Central Excise Settlement Commission and Others RESPONDENT

Date of Decision : 15-09-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 37
Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 127A, 127B, 127B(1), 27, 74
Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 — Rule 3(1), 3(2)

Citation : (2010) 112 BOMLR 4575

Hon'ble Judges : V.C. Daga, J;K.K. Tated, J

Bench : Division Bench

Advocate : R.V. Desai and R.B. Pardeshi, for the Appellant; Vikram Nankani, instructed by P.K. Shetty, for the Respondent

Final Decision : Dismissed

Judgement

V.C. Daga, J.—This petition, under Article 226 of the Constitution of India, is filed by the petitioner Union of India to challenge the order dated 23rd November, 2004 passed by the Settlement Commission, Additional Bench, Customs & Central Excise at Mumbai ("the Commission" for short) contending that the Commission has no jurisdiction to settle the proceedings initiated by the Customs for the recovery of drawback.

Factual Backdrop:

2. The factual matrix giving rise to the present petition, in nutshell, is that the proceeding were initiated against respondent Nos. 2 to 7 and others by the Revenue by issuing show-cause-notice, inter alia; for recovery of duty drawback amounting to Rs. 2,07,71,436/- with interest, said to have been obtained fraudulently by respondent No. 2 on the projected claim of Rectified Spirit (Ethyl

Alcohol) having minimum strength of 94.68% v/v at 15.6?C under two shipping bills during the months of September, 2000 and February, 2001 respectively when, factually, the goods exported were "Solvent Mixture" (i.e. mixture of Ethyl Alcohol and Ethyl Acetate), which do not qualify for duty drawback under S.S. No. 22.01 of the Drawback Table forming part of Customs and Central Excise Duties and Service Tax Drawback Rules, 1995 ("Drawback Rules" for short).

3. The respondent Nos. 2 to 4, instead of responding to the show cause notice, preferred to file an application before the Commission u/s 127B(1) of the Customs Act, 1962 ("Act" for short) for settlement of the case. In the said application, without accepting their liability in terms of Section 127B(1) of the Act, the respondent No. 2 admitted additional duty liability of Rs. 2,07,71,436/- i.e. amount of drawback received with a view to put end to the litigation by a peace of mind.

4. On being noticed, the Revenue appeared and objected to the jurisdiction of the Commission to entertain and consider the case relating to recovery of duty drawback erroneously granted; contending that such type of cases do not fall within the definition of ''case'' stipulated u/s 127A(b) of the Act. The Special Bench of the Settlement Commission passed an order by majority of four against one ruling that Settlement Commission has jurisdiction to entertain such case.

5. The Commission, vide its majority order dated 27th January, 2004 overruled the objection taken by the Revenue challenging jurisdiction of the Commission and vide its final order dated 23rd November, 2004 settled the case at duty liability of Rs. 2,07,71,436/- with interest thereon at the rate of 10% per annum for the time lag i.e. between the date of receipt of duty drawback amount and the date of its pay back. Immunity from fine, penalty and prosecution also granted to all the applicants under the said order.

6. The aforesaid order of the Settlement Commission is a subject matter of challenge in this petition as indicated in the opening para of this judgment.

Rival Submissions:

7. Mr. R.V. Desai, learned senior counsel appearing for the petitioner Revenue urged that the respondent Nos. 2 to 4 ("Exporters" in short) were not entitled to drawback since the claim had not exported goods under the Drawback Schedule. He placed reliance on the judgment of the Settlement Commission in the case of Tolani Shipping Co. Pvt. Limited reported in 2004 (178) ELT 1072 (Sett. Comm.); wherein the Commission held the drawback duty application is beyond the realm of the Settlement Commission.

8. Mr. Desai further submits that the recovery of duty drawback under Drawback Rules does not involve levy, assessment and collection of customs duty as envisaged u/s 127A(b) of the Act, consequently, the said proceedings are not covered within the meaning of ''case'' stipulated u/s 127A(b) of the Act.

9. Mr. Desai further submits that the Settlement Commission failed to appreciate

that there was no assessment of duty involved, on the shipping bills presented by respondent No. 2 for export of goods under claim of duty drawback, as the goods exported were not subject to any export duty, but were tendered under only a claim of drawback, which required verification of certain parameters to sanction the drawback amount.

10. Mr. Desai further submits that the erroneous interpretation the Commission conferred jurisdiction unto itself to settle cases relating to recovery of duty drawback erroneously paid, on the premises that assessment involved quantification of duty and went on to further holding that without assessment, erroneous payment of duty drawback cannot be detected. Mr.Desai further urged that the Commission erroneously held that recovery of drawback is nothing but recovery of duty element along with declarations made in the shipping bill and, therefore, covered within the meaning of Section 127A(b) of the Act. According to him, the Commission has failed to appreciate that verification of amount of drawback is carried out with reference to parameters under which said drawback is permissible i.e. whether the goods are of the description/ specification mentioned in the Drawback Table and the amount claimed is as per the rate specified in the Drawback Table and not with reference to duty initially assessed at the time of import or manufacture of goods, on which drawback is considered.

11. Mr. Desai, alternatively, submits that assuming but not admitting that the Commission had jurisdiction to entertain the application for settlement of cases relating to recovery of duty drawback erroneously paid, it ought not to have entertained the application since the respondent No. 2 had neither admitted any duty liability, nor the manner in which such liability was incurred as required in terms of Section 127B(1) of the Act in respect of subject goods, as such the primary requirement contemplated u/s 127B(1) for an application to be considered by the Commission was not met. He, thus, submits that the impugned order is bad and illegal and is liable to be quashed and set aside.

12. Per contra, learned Counsel appearing for respondent Nos. 2 and 3 submits that word "duty" appearing in the definition of "case" is required to be given a wide meaning in the background of the claim of the Act. While the Act provides for levy of customs duty, it also provides for a refund thereof. The provisions relating to refund of duty contained in Section 27 of the Act also extend to drawback. This is because drawback is the return of the customs duty, in whole or in part, paid on the goods used in the manufacture of export goods and that is why it is covered by the same provision for refund of duty. Reliance is placed on the definition of word "drawback" defined in Drawback Rules. Reliance is placed on Sub-rules (1) and (2) of Rule 3 of the Drawback Rules to establish direct nexus between duty paid and the amount of duty to canvass that duty drawback is part of duty itself. He further submits that since the duty drawback is directly related to duty, all cases which deal with drawback also can be settled before the Settlement Commission. He further submits that exclusion of jurisdiction must not be inferred easily. This more so when the Parliament has consciously left

certain matters out of the scope of the Settlement Commission. In support of his submission, he pressed into service fourth proviso to Sub-section (1) of Section 127B of the Act to contend that statutory exclusions which are mentioned therein do not exclude the cases dealing with drawback. He further submitted that the Revenue is seeking to narrow the jurisdiction of the Settlement Commission by contending that the drawback cases cannot go before the Settlement Commission. There is no warrant or decision for taking this narrow view. He placed reliance on the decision of the Apex Court in the case of Bhatia International Vs. Bulk Trading S.A. and Another, and pressed into service para-15 thereof. He, thus, contended that the drawback has not been excluded from the purview of Section 127B of the Act and, therefore, the Settlement Commission can entertain applications relating to drawback where additional duty liability is admitted. It is, thus, submitted that the petition is without any substance and liable to be rejected.

Consideration :

13. Having heard rival contentions, we must observe that while considering the contentions raised by the parties before the Settlement Commission at the stage of preliminary hearing of the proceedings, there was difference of opinion between the members of the bench. In view of difference of opinion, a Special Bench was constituted by the Chairman of the Settlement Commission consisting of five members. By majority judgment, i.e. four against one, the Special Bench of the Settlement Commission came to the conclusion that as the application can be made in terms Section 127B(1) of the Act in respect of a "case" which, in turn, is defined u/s 127A(b), ibid as ''any'' proceeding under this Act or any other act of the levy, assessment and collection of customs duty, a proceeding for recovery of drawback of duties could be treated as a "case" as defined in the Act and that application before the Settlement Commission was very much maintainable in accordance with law.

14. The Settlement Commission while considering the issue before it, relied upon the term "drawback" as defined in Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995 and the Drawback Rules and also Section 74 of the Act dealing with the imported material used in the manufacture of goods which are exported. They also considered sweep of Section 127B of the Act and relied upon the Apex Court judgment in the case of Chemicals and Fibres of India Ltd. Vs. Union of India (UOI), to consider the scope and purport of the "drawback" in the Act. The Settlement Commission also considered the definition of the word "case" as defined in Section 127A(b) and after referring to the various judgments of the Tribunal came to he conclusion that the Settlement Commission had jurisdiction to deal with the application for settlement moved by the respondent Nos. 2 to 4. It is not necessary to again repeat the reasons given by the Settlement Commission in support of its order which are in consonance with the law laid down by the Supreme Court in the case of Liberty India Vs. Commissioner of Income Tax, ; wherein the Supreme Court has observed as

under:

17. The next question is - what is duty drawback? Section 75 of the Customs Act, 1962 and Section 37 of the Central Excise Act, 1944 empower Government of India to provide for repayment of customs and excise duty paid by an assessee. The refund is of the average amount of duty paid on materials of any particular class or description of goods used in the manufacture of export goods of specified class. The Rules do not envisage a refund of an amount arithmetically equal to customs duty or central excise duty actually paid by an individual importer-cum-manufacturer. Sub-section (2) of Section 75 of the Customs Act requires the amount of drawback to be determined on a consideration of all the circumstances prevalent in a particular trade and also based on the facts situation relevant in respect of each of various classes of goods imported. Basically, the source of duty drawback receipt lies in Section 75 of the Customs Act and Section 37 of the Central Excise Act.

18. Analysing the concept of remission of duty drawback and DEPB, we are satisfied that the remission of duty is on account of the statutory/policy provisions in the Customs Act/Scheme(s) framed by the Government of India. In the circumstances, we hold that profits derived by way of such incentives do not fall within the expression "profits derived from industrial undertaking" in Section 80IB.

(Emphasis supplied)

15. Reading of the aforesaid para and the analysis made by the Apex Court with respect to the concept of "duty drawback", one cannot dispute that it is nothing but a remission of duty on account of the statutory provisions in the Act and scheme framed by the Government of India. Under these circumstances, the duty drawback or claim for duty drawback is nothing but a claim for refund of duty may be as per the statutory scheme framed by the Government of India or in exercise of statutory powers under the provisions of the Act.

16. For the reasons recorded hereinabove, we concur with the view taken by the Commission which is in consonance with the law laid down by the Hon''ble Supreme Court referred to hereinabove.

17. We, thus, hold that the Settlement Commission had jurisdiction to deal with the question relating to the recovery of drawback erroneously paid by the Revenue. Petition is, thus, liable to be dismissed.

In the result, rule is discharged. No order as to costs.