

(2014) 08 DEL CK 0192

In the Delhi High Court

Case No : W.P. (C) 136/2014 and C.M. No. 247/2014

Vishal Beverages Pvt. Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 04-08-2014

Acts Referred:

Customs Act, 1962 — Section 51, 74

Citation : (2014) 309 ELT 43 : (2014) 47 GST 541 : (2015) 31 GSTR 253

Hon'ble Judges : Vibhu Bakhru, J;S. Ravindra Bhat, J

Bench : Division Bench

Advocate : Prem Ranjan Kumar, Advocate for the Appellant; Jatan Singh, CGSC and Satish Kumar, Sr. Standing Counsel, Advocate for the Respondent

Final Decision : Dismissed

Judgement

S. Ravindra Bhat, J.

C.M. NO.247/2014 (for exemption)

Allowed, subject to all just exceptions.

W.P.(C) 136/2014

1. The writ petitioner is aggrieved by the order dated 18.11.2013 of the second respondent, the Central Board of Excise and Customs ("the CBEC"), made in compliance with the order of this Court in W.P.(C) 136/2014 Page 2 W.P.(C) 1862/2013 dated 12.8.2013, by which it was required to dispose of a request seeking relaxation of time in respect of a plea for unclaimed portion of drawback on the re-exported goods. The first respondent, the Union of India though the Ministry of Finance, exercises control over the second respondent, the CBEC.

2. The petitioner is a small scale manufacturer-exporter exporting PET Perform, whose manufacturing came to a standstill due to a breakdown of some of their machinery. Since the machine was unavailable in the domestic market and its procurement was causing a halt in the functioning of the factory, the petitioner's

supplier agreed to send the machinery so that production could continue. The usual practice was to temporarily deploy this machine on rent. The petitioner thus imported the equipment through bill of entry no. 1394934 dated 25.5.2007, under the declaration "Trial Basis to be Exported", for which a rental amount of Rs. 4,78,920/- was agreed to between supplier and petitioner. On import, necessary duty, additional duty, education cess, CVD and S&H Education Cess amounting to Rs. 11,69,640/- was paid, with the declaration that the equipment would be re-exported to the supplier u/s 74 of the Customs Act. The petitioner claimed CENVAT credit amounting to:

a. Rs. 3,34,093/- comprising of 50% excluding Additional Customs Duty Import, (i.e. Basic Excise Duty Rs. 3,24,362/- + Ed. Cess Rs. 6,487/- + S&H Cess Rs. 3,244/-) for financial year 2007-08 in entry No. 1, in CENVAT credit register dated 31.05.2007, and

b. Rs. 5,24,143/-, comprising of remaining 50% (i.e. Rs. 3,34,093/-) + 100% Additional Customs Duty of Import of Rs. 1,90,050/-, on 30.7.2007, in entry no. 11

3. Re-export of the equipment was carried out on 12.8.2007 within 3 months from date of import. After this, the petitioner approached the Office of the Commissioner of Customs (Export) ("CC(E)") by application of 25.9.2007 claiming drawback of basic customs duty only, and not of the Central Excise duties. The claim was settled to the extent of 93.67% of the basic customs duty paid and payment was accordingly received.

4. However, during an internal audit by the Central Excise Commissionerate for the period 2007-08 and 2008-09, the audit team noted that the petitioner had wrongly availed of CENVAT credit of the Excise duty, contrary to Rule 3(5) of the CENVAT Credit Rules, 2004, as the goods were temporarily imported capital goods, meant to be re-exported. This was conveyed to the petitioner by the letter dated 6.8.2009.

5. A show cause notice dated 1.5.2012 was issued to the petitioner by the Department of Central Excise on the basis of the audit note regarding the wrongful availing of CENVAT credit amount of Rs. 8,58,235/-; the petitioner deposited the entire amount along with interest and 25% penalty, totaling to Rs. 16,63,308/-.

6. In this regard, the petitioner submits that if Rule 4 of the Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995("Re-export Rules" or "Rules") is complied with, and the exporter is entitled to drawback, then the same can be claimed by the mechanism under Rule 5. The time limit to advance the claim is 3 months from the date on which the export is ordered by the Customs Officer, extendible by another three months by the Assistant Commissioner of Customs/Deputy Commissioner of Customs and, by a further six months by the Commissioner of Customs or Commissioner of Customs and Central Excise. Rule 7A empowers the respondents to relax the Rules and allow

drawback if an exporter has failed to comply with any of the requirements under the rules, for reasons beyond his control, and is thus entitled to drawback, and makes a representation to this effect.

7. The petitioner submits that there is no period of limitation inherent in this rule for a drawback claim, as the respondent is conferred an enormous power to exempt any exporter from complying with any condition. Since the prescribed time period for claiming drawback lapsed and now a claim for drawback can only be made after the second respondent relaxes the provision on the time limit under Rule 7A, the petitioner represented as required, on 26.10.2009. Simultaneously, a letter was written to the second respondent requesting that the matter be kept in abeyance, on account of the representation, on 15.12.2009. The second respondent then wrote to the CC(E), marking a copy to the petitioner, on 9.11.2009 requesting a report on the petitioner's representation. The petitioner responded with a copy of the representation on 30.11.2009 with all relevant documents to enable the CC(E) to send the report to the second respondent. On failure of the CC(E) to send the report, the Petitioner sent another letter on 2.2.2010; likewise, the Government of India sent a letter on 25.3.2010 to the CC(E), requesting that the report be sent. The CC(E) wrote back on 5.7.2011 asking the petitioner to forward a copy of the original letter dated 26.10.2009 in order to enable them to prepare the report and send it to the Ministry. The petitioner responded by its letter of 23.7.2011 accordingly.

8. In the meantime, a show cause notice dated 1.5.2012 ("the 2012 Show Cause Notice") was received from the Department of Central Excise, on the wrongful utilization of CENVAT credit, and the petitioner paid the entire demand of Rs. 16,63,308/-.

9. Having received no responses to its representations, the petitioner sent a representation dated 1.2.2013 requesting decision in this matter, but received no response. Consequently, the petitioner filed a writ petition before this Court seeking a direction to the respondent to relax the time period under rule 7A of the Re-export Rules. The Court by its order of 12.8.2013 directed the respondent to decide the application. A personal hearing was held on 3.10.2013 and the petitioner was queried whether the export was made under bond procedure and whether the adjudicating order on wrong utilization of CENVAT credit amount had been appealed or not. The petitioner by its letter of 17.10.2013 informed the second respondent that no bond procedure was followed as the import and clearance of the factory were made with a clear declaration that the export was going to be made under the claim of drawback. It was also informed that the adjudicating order had been accepted with the duty, penalty and interest deposited. The second respondent finally rejected the petitioner's application by its order of 18.11.2013 ("the impugned order") holding that the condition that the reasons ought to be 'beyond the control of the exporter' was not fulfilled, as required by Rule 7A.

10. Aggrieved by this order, the petitioner is before this Court. The petitioner

firstly argues that it has a clear entitlement to drawback, as the goods were re-exported within the prescribed time period. The entitlement being a substantive right cannot be curtailed due to failure to comply with procedural formalities. The petitioner submits that the entitlement to drawback was never in dispute. The petitioner had claimed a lesser drawback under the bona fide belief that it was entitled to CENVAT credit. As a result, it is submitted that it has suffered a double loss, because of having paid the duty on import as well as the CENVAT credit amount demanded subsequently (at nearly double the amount, with interest and penalty) while not having claimed the drawback amount of re-export, to which they were entitled.

11. The petitioner next contends that the respondent erred in holding that removal of export goods without complying with bond procedure was akin to removal without payment of duty, since the second respondent authorities were aware that the imports were made under the claim of drawback. The issue of removal of the export goods was not in question before the second respondent, since the petitioner had received the drawback after proper scrutiny of documents. The petitioner further argues that the respondent is mistaken in its assumption that the petitioner's actions lacked bona fides as allegedly evident from the petitioner's intention to consciously gain 5% financial advantage accruing from retaining 100% of the CENVAT credit, since reversal of credit at the time of removal of the goods would only result in a 95% drawback. It is submitted by the Petitioner that if it had possessed such knowledge of the CENVAT Credit Rules, it would not have wrongfully claimed CENVAT credit of the excise duty on the re-exported goods. The petitioner fourthly urges that the respondent is also wrong in its assumption that the utilization of balance credit on 30.7.2007 (when the good was removed from the factory) was with the knowledge that full CENVAT credit on capital goods is allowed in the same financial year if the goods are cleared in the same financial year.

12. The petitioner admits its liability to pay the entire duty along with interest on this capital machinery. The petitioner also admits to the fact that its utilization of CENVAT credit was wrongful. It states that Central Excise duties paid on import were treated as capable of CENVAT credit, like other "cenvatable products", without going into the details of the excise rules and procedures, and consequently, full CENVAT credit of the central excise duty was availed. The petitioner has been seeking a relaxation of the time period to claim duty drawback since 2009, by when the time period for claim of duty drawback had already expired. However, the time relaxation was not allowed and the petitioner has consequently, suffered a double tax, being unable to claim a drawback of duty.

13. The respondents, on the other hand, argue that the bill of exchange for the imported goods indicated that they were imported on a "Trial Basis to be re-exported", thus necessitating that the petitioner reverse the credit availed of at the time of removal from the factory/re-export. Not doing so is a clear

contravention of Rule 3(5) of CENVAT Credit Rules. Specifically, the respondent argues that the petitioner was shrewd in making calculated decisions that would result in greatest financial gain, and that their actions were mala fide to this extent. Neither the detection by auditors of its wrongful claim, nor the petitioner's ignorance of CENVAT Credit Rules can be considered reasons beyond its control, to merit the invocation of the relaxation powers under Rule 7A of the Re-export Rules.

14. Rule 3(5) of the CENVAT Credit Rules reads

(5) When inputs or capital goods, on which CENVAT credit has been taken, are removed as such from the factory, or premises of the provider of output service, the manufacturer of the final products or provider of output service, as the case may be, shall pay an amount equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred to in rule 9:

xxx xxx xxx

15. Rule 5 of the Re-export Rules reads

5. Manner and time of claiming drawback on goods exported other than by post.
- (1) A claim for drawback under these rules shall be filed in the form at Annexure II [See Customs Series Form No. 109 in Part 5] within three months from the date on which an order permitting clearance and loading of goods for exportation under Sec. 51 is made by proper officer of customs :

Provided that the [Assistant Commissioner of Customs or Deputy Commissioner of Customs] may, if he is satisfied that the exporter was prevented by sufficient cause to file his claim within the aforesaid period of three months, allow the exporter to file his claim within a further period of three months.

xxx xxx xxx

16. Rule 7A reads:

7A. Power to relax. - If the Central Government is satisfied that in relation to the export of any goods, the exporter or his authorised agent has, for reasons beyond his control, failed to comply with any of the provisions of these rules, and has thus been entitled to drawback, it may, after considering the representation, if any, made by such exporter or agent, and for reasons to be recorded in writing, exempt such exporter or agent from the provisions of such rule and allow drawback in respect of such goods.

17. The essence of this dispute is that the petitioner wrongly availed of CENVAT credit in 2007, which came to its notice after the audit by the Excise Commissionerate as early as 2009. The petitioner contends that it has suffered a double tax by virtue of having paid duty at the time of import in 2007, and then having complied with the CENVAT demand along with penalty and interest in 2012, to make good its wrongful utilization of CENVAT credit. Aggrieved, it seeks

to claim a duty drawback by challenging the impugned order denying it a time relaxation under Rule 7A.

18. It is pertinent to note the respondent informed the petitioner by way of the letter as early as on 6.8.2009 that the audit revealed that CENVAT credit had been wrongly availed of, a fact which the petitioner admits in the writ petition. Furthermore, the 2012 Show Cause Notice refers to a show-cause notice sent as far back in time as 13.11.2009 (Annexure F of the Show Cause Notice of 1.5.2012) asking for an explanation for the non-reversal of credit on removal of goods, and demanding Rs. 8,58,235/-. It furthermore stated that the petitioner replied by its letter of 23.11.2009, with a representation made to the Ministry of Finance but did not supply reasons for not having reversed the CENVAT credit amount. It is thus apparent that the petitioner was aware as early as August 2009 that it was liable to reverse the CENVAT credit that it had wrongly availed of, and was even asked to show cause in this regard in November 2009.

19. While it is clear that the time period to claim a duty drawback had expired by 2009, it is also equally clear that the petitioner could have reversed the CENVAT credit it had claimed in August 2009, while it awaited a relaxation of the time period under Rule 7A. The petitioner, had it paid the CENVAT demand when it received the Show Cause Notice in November 2009, would not have incurred any penalty. The petitioner was, in fact, only liable to an amount of Rs. 8,58,235/- at that time, with interest. However, the petitioner did not reverse the CENVAT credit amount in 2009, but instead only paid the CENVAT credit amount after it received the Show Cause Notice of 1.5.2012. The Show Cause Notice of May 2012, in paragraphs 6 and 7, also clarified that a penalty was being imposed for the Petitioner's failure to respond to the November 2009 Show Cause Notice. Regardless of the petitioner's possible entitlement to a drawback, it did not reverse the CENVAT credit in 2009 despite its awareness that it had wrongly availed of the same in 2007, and thus acted contrary to Rule 3(5) of the CENVAT Credit Rules. This Court thus need not labour to discern that the petitioner had willfully retained the CENVAT credit from November 2009, when its wrongful utilization was brought to its notice, all the way up to May 2012. During this period, this credit could have in all probability been used by the petitioner for whatever purposes necessary, as all availed credit accumulates in the CENVAT credit account, which is a common account used to pay service tax, central excise duty etc. Such wrongful utilisation of CENVAT credit amounts to a loss to the Revenue, as tax owed to the Revenue is in effect being withheld.

20. It is a settled principle that a party seeking relief must come to the Court with clean hands. See *S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others*, . The petitioner is before this Court for the relief of time-relaxation, so that it may claim duty drawback. It is sought to be argued on its behalf that it could not claim drawback within 3 months of the date of re-export, in July 2007 since it was only made aware of the wrongful claim of CENVAT credit in November 2009, about a year and a half after the date of re-

export. This, the petitioner seeks to argue, are reasons beyond its control, due to which duty drawback could not be sought in time. However, while awaiting the decision on time relaxation, the petitioner continued to profit from the wrongly utilized CENVAT credit till May 2012, clearly in contravention of Rule 3(5) of the CENVAT Credit Rules. The petitioner cannot be allowed a drawback on the Excise duty as that would tantamount to allowing it to profit from its unjustly derived benefit of the CENVAT credit till May 2012. This Court is thus of the opinion that the petitioner cannot be granted relief as its claim to relief is not made with clean hands.

21. For the above reasons, this writ petition is dismissed.