2013 (4) ECS (159) (Tri – Chen)

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL**
**SOUTH ZONAL BENCH, CHENNAI**

**Big Bags International Pvt. Ltd.**

**Versus**

**Commissioner of Customs (Seaport - Exports), Chennai**

**Application Nos. C/EH/379, 380/11, C/S/102, 103/11,**
**in C/128, 129/11**
**C/S/104/11 in C/130/11**
**C/S/105/11 in C/131/11**

Date of Hearing : 28.8.2013
Date of Decision:28.8.2013

PRESENT :

Smt. B.N. Gururaj, Advocate — For the Appellant

Shri K. S. V. V. Prasad, JC (AR) — For the Respondent

**CORAM :**

**Hon'ble Shri P.K. Das, Judicial Member**
**Hon'ble Shri Mathew John, Technical Member**

MISC ORDER NO. 42149 – 42150/13 dated 28.8.2013
42151 – 42154/13 dated 28.8.2013

**"Ld. AR for Revenue draws our attention to condition 13 (i) of Notification 103/08 – Cus, which notified the drawback rates. It is specially mentioned therein that All Industry Rates are available only to goods which are manufactured without availing Cenvat credit and this condition is not with reference to person exporting but with reference to the goods. In the present case, it is very clear that goods were manufactured availing Cenvat credit. In the ARE forms filed by the applicants at the time of export to**

**claim drawback in which it has been declared jointly by the applicant – exporter as well as their manufacturer as follows:**

**"We hereby certify that the above mentioned goods have been manufactured:**
**(a). without availing Cenvat credit under Cenvat Credit Rules, 2001" [Para 9]**

**"Ld. AR submits that the first declaration is a wrong declaration which is straightaway identifiable. He points out that incidence of excise duty at the final product stage was lower than the duty drawback amount and that is the reason why manufacturer has not chosen not to claim rebated of terminal excise duty but has chosen to claim higher amount of the duty @10% to 12% notwithstanding the prohibition under clause (16) of notification 32 / 05 – Customs dated 8.04.2005." [Para 10]**

**"We find that the restriction in condition 13(i) of Notification 103/2008 – Cus (N.T) is with reference to the goods manufactured and not with reference to the person who is claiming drawback. Further in the present situation, if the manufacturer was to export the goods and claim drawback he would not have been eligible to get the drawback (excepting the customs component)."[Para 12]**

**Per Mathew John. Mr. :**

1. There are two early hearing applications for hearing of stay petitions and appeals by applicants No. 1 and 2. Since early hearing of stay petitions are taken up order are being passed these are disposed of as infructuous.

2. There are four stay petitions in four appeals being considered in this proceeding. Out of four applicants, Applicant 1 and 2 are exporters from whom duty drawback amounts sanctioned to them are demanded back along with interest and penalties. Applicant No. 3 is the Chief Executive Officer of both Big Bangs International Pvt. Ltd. and Big Bags (India) Pvt. Ltd. Applicant No. 4 is the manufacturer of the goods exported for which drawback has been claimed. On Applicant No. 3 and applicant No. 4 only penalties stand imposed.

3. The facts involved in these petitions are common and are arising out of a common impugned Order – in – Original. Therefore, all the four stay petitions are taken up together for disposal. There are also two MISC petitions for early hearing of stay petitions. As we are disposing the stay petitions, the early hearing applicants have become infructuous. Accordingly, the EH applications are dismissed.

4. The applicant – exporters exported Flexible Intermediate Bulk Containers and claimed duty drawback under Sl. No. 6305 of the Drawback Schedule under which entry, the rate of drawback for customs and excise components of drawback put together was 10.3% to 12.2% of FOB value during the relevant period. These goods were manufactured by M/s Bishen Saroop Ram Kishen Agro (P) Ltd. (BSRKAL), who had imported the raw material required for manufacture of the goods using Duty Free Credit Entitlement Scheme read with notification No. 32/05 – Cus. dt. 8.4.05. BSRKAL sold the goods to the applicant on payment of duty and the applicant exported the goods and claimed drawback. Revenue was of the view that for claiming All Industry Rate as claimed by applicant, the goods should have been manufactured without availing the benefit of cenvat credit scheme. Since in this case, the goods were manufactured by BSRKAL availing the benefit of Cenvat credit scheme, Revenue proposed to recover the drawback sanctioned during the period 26.02.2009 to 30.07.09. after adjudication, drawback amount of Rs. 2,20,92,837/- and 1,21,92,730/- stands confirmed against the applicant – exporters, M/s. Big Bags International (P) Ltd. and M/s. Big Bags India (P) Ltd. along with interest and penalties. There is a penalty of Rs. 50,00,000/- each imposed on other two applicants. Aggrieved by the order, the applicants have filed these appeals and petitions for waiver of dues arising from the impugned order for admission of the appeals

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5. Arguing for the applicants, the learned advocate relies on condition (13) of Notification 103/08 – Cus (NT) dated 29.08.2008 notifying the duty drawback rates and conditions under which such drawback can be claimed. Condition (13) is reproduced below :-

> "The expression "when Cenvat facility has not been availed", used in the said Schedule, shall mean that the exporter shall satisfy the following conditions, namely: -
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> (i) The exporter shall declare, and if necessary, establish to the satisfaction of the Assistant Commissioner of Customs or Assistant Commissioner of Central Excise or Deputy Commissioner of Customs or Deputy Commissioner of Central Excise, as the case may be, that no Cenvat facility has been availed for any of the inputs or input services used in the manufacture of the export product."

6. According to him, the applicant – exporters had not claimed any Cenvat credit and therefore the All Industry Rates are to be sanctioned. He further submits that Cenvat credit availed by the manufacturer has been utilized for payment of final product duty on the goods manufactured and sold to the applicants and therefore

there cannot be a bar on the applicant – exporters in claiming All Industry Rates. He points that the applicant had not claimed rebate of duty on final products exported.

7. He also relies on the circular No. 16 /09 – Cus. dated 25.5.2009 which reads as under :-

> "Sub: - Grant of All Industry rate of duty drawback to merchant exporters– reg.
>
> I am directed to refer to Para (vi) of Ministry's Circular No. 64/98-Cus dated 01.09.1998, where it was clarified that in the case of merchant exporter who procures the export goods from the open market, the benefit of All Industry Rates of Duty Drawback shall be restricted to the Customs allocation only, if any. Export goods purchased from the market shall be treated as having availed the Modvat facility and would not be entitled to the Central Excise allocation of the All Industry Rate of Drawback.
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> 2. In this regard, references have been received in the Board from the Directorate General of Foreign Trade (DGFT), Federation of Indian Export Organizations (FIEO) and exporters stating that some Custom Houses were insisting on non-availment of Cenvat declarations from merchant exporters of garments who were not purchasing their goods from manufacturers but were sourcing their export goods from traders. The Custom Houses were denying full All Industry rate of duty drawback (including the excise rate) in case exporters were not able to furnish such declarations. The FIEO/DGFT and the exporters have represented that the merchant exporters without supporting manufacturers cannot give non-Cenvat availment declarations as they are not aware of the manufacturers and can at best declare the names of traders from whom the goods have been purchased. Further, most of the garments are being manufactured by petty manufacturers/small scale cottage industries/largely unorganized sector outside the Cenvat chain and, therefore, the higher rate of drawback may be given on garments without insisting on any Cenvat non-availment declaration.
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> 3. The matter was discussed with some field formations. A view was expressed that the proviso to Rule 3 of the Drawback Rules does not permit full drawback (both customs and central excise portions) if Cenvat has been taken on inputs used in the manufacture of export goods and therefore full drawback (including the excise portion) cannot be granted to such goods.

4. The matter was referred to the Committee constituted by the Government to formulate All Industry Rate of Duty Drawback for the year 2008-09. The Committee in its report for the year 2008-09 has recommended that the merchant exporters who source their export goods from the market should be given higher rate of drawback without any declarations as "they have to purchase the products from the manufacturer after excise clearance i.e. after payment of excise duty. Therefore as far as merchant exporters are concerned, the full drawback rate has to be made available to him for neutralization of excise duty paid when clearing the goods from the manufacturer's premises". The Committee has further remarked that "in case of manufacturer exporters there could be a possibility of double benefit if he were to claim both Cenvat benefit as well as full duty drawback. Therefore, the only cases for checking whether Cenvat has been availed or not, can conceivably pertain to manufacturer-exporters and not to merchant exporters".

5. The report of the Drawback Committee has been examined in the Board. The goods available in the market are deemed to be duty paid goods. Hence they bear an element of central excise duty, which needs to be reimbursed, if such goods are exported. Ideally, the terminal central excise duty paid at the time of clearance from factory should be refunded. However, that is not possible in case of export of goods purchased from the market as the trader exporter doesn't have duty paying documents. The next best option is to grant All Industry Rate (AIR) of duty drawback as AIR drawback represents average incidence of taxes suffered by inputs used in the export product. Granting this rate on the condition that the exporter would furnish Cenvat non availment declaration may not be proper as such goods may have changed several hands before exports and the final exporter may not be aware of the actual manufacturer and whether Cenvat credit was availed on such goods.

6. As regards the proviso to Rule 3 of the Drawback Rules, it is viewed that the interpretation that this proviso, permits only customs portion of drawback to goods exported by merchant exporters, unless they have a supporting manufacturer, is not correct. As mentioned earlier, the goods available in the market are deemed to be duty paid. Even if it is assumed that such goods had availed Cenvat, then such Cenvat would have been used to pay the duty on final products cleared for home market. The Cenvat availed has therefore been 'given back' to the Government when such goods were cleared for local market. The only possibility of double benefit would arise only when the exporter is able to take the drawback of the central excise portion and also the rebate of terminal excise duty paid

on goods at the time of their clearance to the local market. Such rebate is presently not possible in terms of No.19/04- CE (NT) and 20/04-CE (NT) as the rebate is granted only if goods are exported directly from the factory/ warehouse and not from the market. However, as an abundant precaution, the merchant exporters 'sourcing their goods from the market and claiming central excise portion of duty drawback may be asked to specifically declare, at the time of export, that no rebate (both input rebate and final product rebate) shall be taken against the exports made against these shipping bills.

7. In view of the above, the Board has decided to accept the recommendation of the Drawback Committee in this regard. Thus merchant exporters who purchase goods from the local market for export shall henceforth be entitled to full rate of duty drawback (including the excise portion). However, such merchant exporters shall have to declare at the time of export, the name and address of the trader from whom they have purchased the goods. They shall also have to declare that no rebate (input rebate and also the final product rebate) shall be taken against the Shipping bills under which they are exporting the goods. The merchant exporters who purchase goods from traders may therefore furnish the declaration, at the time of export, in the format annexed with this circular. This is issued in supersession of para (vi) of Circular No. 64/98-Cus dated 01.09.1998.

8. The Custom Houses shall get the veracity of such declarations verified at random and recover excess drawback in case the verification reveals that the declaration filed by the exporter was false or double benefit has been availed of.

9. Suitable public notice for information of the trade and standing order for the guidance of staff may be issued accordingly. Difficulties if any, noticed in implementation of this circular may be brought to the notice of the Board.

10. Receipt of this Circular may kindly be acknowledged."

8. According to him. This circular supports his case and he is eligible to claim All India Industry Rates since he is not the manufacturer and he has not claimed Cenvat Credit. He relies particularly para – 6 of the above circular.

9. Opposing the prayer, Ld. AR for Revenue draws our attention to condition 13 (i) of Notification 103/08 – Cus, which notified the drawback rates. It is specially mentioned therein that All Industry Rates are available only to goods which are

manufactured without availing Cenvat credit and this condition is not with reference to person exporting but with reference to the goods. In the present case, it is very clear that goods were manufactured availing Cenvat credit. He drew our attention to ARE forms filed by the applicants at the time of export to claim drawback in which it has been declared jointly by the applicant – exporter as well as their manufacturer as follows:

> "We hereby certify that the above mentioned goods have been manufactured:
> (a). without availing Cenvat credit under Cenvat Credit Rules, 2001"

10. Ld. AR submits that the first declaration is a wrong declaration which is straightaway identifiable. He points out that incidence of excise duty at the final product stage was lower than the duty drawback amount and that is the reason why manufacturer has not chosen not to claim rebated of terminal excise duty but has chosen to claim higher amount of the duty @10% to 12% notwithstanding the prohibition under clause (16) of notification 32 / 05 – Customs dated 8.04.2005. He submits that draw back claim was wrongly availed. Further he points out that the applicant is relying on para 6 of the Circular dated 25.05.2009 and ignoring para 7 of the same circular which prescribed that the merchant exporter had to give declaration as prescribed which statement was not correctly given.

11. He further relies on proviso to Rule 3 of Draw Back Rules, 1995. He also relies on the decision of Nanki Fashions Vs. CC (Export) New Delhi – 2012 (282) ELT 577 (Tri. Del.) wherein applicant had been asked to deposit 100% of the drawback amount disbursed based on such declarations.

12. We have considered the submissions on both sides. We find strong merit in the arguments of the Ld. AR inasmuch as we find that the restriction in condition 13(i) of Notification 103/2008 – Cus (N.T) is with reference to the goods manufactured and not with reference to the person who is claiming drawback. Further in the present situation, if the manufacturer was to export the goods and claim drawback he would not have been eligible to get the drawback (excepting the customs component). However, considering that the customs component would have been available to the exporter we are not inclined to call for 100 % pre – deposit of the amount confirmed. Considering the overall facts of the case and law applicable, we direct applicant 1 and 2 to make a pre – deposit of 50% of the drawback amounts demanded from each of them within 8 weeks. Subject to such pre – deposit the balance dues arising from the impugned order from these appellants and the other two appellants shall be waived for admission of the appeals and there shall be stay on collection of such dues during pendency of the appeals.

13. Compliance with this order is to be reported on 7.11.2013

(Dictated and pronounced in open court)