IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present :- Hon'ble Mr. Justice Md. Nizamuddin

WPA No. 2600 of 2020

M/s. Narendra Tea Company Private Limited
Vs
Union of India & Ors.

For the Petitioners :- **Mr. Saurabh Bagaria, Adv.**
Mr. Sayan Ganguly, Adv.
Mr. Indranil Banerjee, Adv.
Mr. Subhransu Ganguly, Adv.

For Union of India :- **Mr. Vipul Kundalia, Adv.**
Mr. Sujit Mitra, Adv.

For the Customs Authority :- **Mr. Bhaskar Prosad Banerjee, Adv.**
Mr. Tapan Bhanja, Adv.

Judgement On :- **05.01.2024**

MD. NIZAMUDDIN, J.

Heard learned advocates appearing for the parties.

Relevant facts involve in brief according to the petitioner as appears in this writ petition are as hereunder.

Main issues which require adjudication in this writ petition are as follows:

(i) Whether on the facts and in the circumstances of the case impugned order of the revisional authority is erroneous both in law and in facts and in

disregard to the Notification No. 39(RE-01)/1997-2002, New Delhi dated 22nd November, 2001 issued by the DGFT (Government of India, Ministry of Finance) by holding that the petitioner being 100% EOU could not claim duty Drawback on bulk tea in question procured by it from the bulk tea manufacturer and supplier which has admittedly paid the Excise Duty and that it is the supplier which is only entitled to claim duty Drawback and not the petitioner in spite of the fact that the said bulk tea manufacturer has not claimed the Duty Drawback on such deemed export which took place within the period from 01.06.2000 to 31.03.2001?

(ii) Whether revisional authority is justified in passing the impugned order allowing the revisional application of the respondents customs authority by setting aside the order of the appellate authority holding in favour of the petitioner, on a new ground which was neither the part of the show cause notice, nor the part of the adjudication order nor the same was the case of the customs authority before the appellate authority?

(iii) Whether submission of the respondents customs authority for the first time before this Court in course of hearing that petitioner's representative's concession on its statutory right of entitlement of such drawback in course of adjudication proceeding disentitles it to make such claim, is sustainable in law when nowhere this was the case or ground of the respondents customs authority either in the show cause notice or before the Appellate authority or before the revisional authority or even in its affidavit-in-opposition to the writ petition?

(iv) Whether on the facts and in the circumstances of the case impugned order of the revisional authority dated 20th December, 2019 allowing the revisional application of the respondents customs authority against the order of Commissioner of Customs (Appeals), Kolkata allowing the appeal of the petitioner by holding in its favour by setting aside the order-in-original raising the deemed of Rs.10,23,000/- towards Duty Drawback, on the ground that the

same was erroneously allowed by the Appellate authority to the petitioner being 100% EOU, is legal and valid?

By this writ petition, petitioner has challenged the legality and/or validity of the impugned Order dated December 20, 2019 passed by the Revisional Authority (Respondent No. 2) relating to the petitioner's drawback claims filed in respect of 22 shipping bills in question during the period from June, 2000 to August, 2000 setting aside order-in-appeal passed by the Commissioner of Customs (Appeals), Kolkata, which had held in favour of the appellant-writ petitioner by allowing the appeal of the petitioner.

Petitioner submits that petitioner is a 100% Export Oriented Unit (EOU), exported 22 consignments of tea during the period from June 02, 2000 to August 26, 2000 and claimed duty drawback on Central Excise duty paid on purchases in question, under Section 75 of the Customs Act, 1962 (hereinafter referred to as the "Act") read with the Customs, Central Excise Duties and Services Tax Drawback Rules, 1995 (hereinafter referred to as the "Rules"), Foreign Trade Policy and the relevant notifications issued by the Director General of Foreign Trade. Chapter 9 of the Foreign Trade Policy/Export and Import Policy governed the entitlement of EOUs like the writ petitioner to claim drawback at All Industry Rates (AIR).

Petitioner submits that on December 01, 1999, the DGFT issued Notification No. 36 (RE-99)/1997-2000 dated December 01, 1999 wherein sub-paragraph (c) was added after paragraph 9.13(b) of the relevant Export & Import Policy 1997-2002. The said sub-paragraph (c) is as under:-

"(c) *Central Excise duty paid on bulk tea procured from licence amount since EOU/EPZ unit would be reimbursed by Development Commissioner of the concerned zone at all industry rates so long as levy on bulk tea in this regard is enforced."*

Petitioner submits that on November 22, 2001, the DGFT issued Notification No. 39 (RE-01)/1997-2002 wherein the All Industry Rate of Duty Drawback for

the period June 01, 2000 to March 31, 2001 was specified at Rs. 2 per kg. The Notification further stated that *"This rate shall be applicable only in cases where excise duty has been paid on procurement of bulk tea by 100% Export Oriented Units and Units in Export Processing Zones, considered as deemed exports in terms of Chapter 10 of the Export and Import Policy 1997-2000".*

Petitioner submits that the petitioner being a 100% EOU which exports tea, sought duty drawback in accordance with the said Notifications and the duty drawback amount of Rs.10,23,000/- was duly granted to the petitioner by the department.

Petitioner submits that subsequently the Customs Department issued a show cause notice dated August 20, 2004 upon the petitioner for recovery of the said duty drawback of Rs.10,23,000/-. In the said show cause notice there was only allegation that the relevant shipping bills were filed for exportation of tea under drawback serial No.9.21 (i.e., 9.021 and export was done after May 31, 2000. It was alleged that with effect from June 01, 2000, drawback was not admissible on tea and the same was erroneously paid by the petitioner.

Petitioner submits that the said show cause notice was confirmed by order-in-original dated September 06, 2004. After a series of proceedings the Revisional Authority (Respondent No. 2) vide order dated April 30, 2014 remanded the case back to the Commissioner (Appeals) (Respondent No. 3) for de-novo consideration.

Petitioner submits that the Commissioner (Appeals) while disposing the petitioner's appeal against the original order dated September 06, 2014 pursuant to the remand by the Revisional Authority by his order dated April 30, 2014 took note of the DGFT Notification dated November 22, 2001 wherein the specific rate of drawback on bulk tea for the period from June 01, 2000 to March 31, 2001 was specified at Rs.2 per kg and the petitioner had been rightly granted the drawback for its 22 export consignments during the period from June 02, 2000 to August 26, 2000. Further the Commissioner (Appeals)

also relied upon the Chartered Accountant's certificate issued in favour of the petitioner on February 14, 2017 which certifies that the petitioner had procured the said bulk tea of 22 consignments where excise duty was duly paid. In this regard, sample invoice raised on the petitioner showing purchase affected by paying duty has been annexed at page no. 116 of the Writ Petition. The Commissioner (Appeals) set aside the original order dated September 06, 2004 and allowed the petitioner's appeal.

Petitioner submits that the being aggrieved, the Department filed a revision application before the Central Government under Section 129DD of the Act against the said order of the Commissioner (Appeals). The main ground in the said revision application before the Central Government taken by the department is that the petitioner being EOU is not entitled for drawback at All Industry Rates or AIR, which ground is outside the scope of the show cause notice dated August 24, 2004.

Petitioner submits that the revisional Authority, however, vide its impugned order dated December 20, 2019 rejected petitioner's submissions and allowed the departmental revision application by setting aside the Commissioner's (Appeals) order dated February 16, 2017.

Petitioner submits that the impugned order dated December 20, 2019 passed by the Respondent No. 2 is outside the scope of the show cause notice dated August 20, 2004 and original order dated September 09, 2004. It is trite law that in Customs, Excise & Service Tax matters, the appellate or revisionary authority cannot go beyond the scope of show cause notice. The appellate authority in its order dated February 16, 2017 acknowledged the fact that the original case made out against the petitioner was confined to the allegations that "with effect from 01.06.2000 there was no duty drawback serial no. 40 under drawback serial no. 9.021 but the same was paid erroneously……".

Petitioner submits that the impugned order dated December 20, 2019 passed by the respondent no. 2 is wholly without jurisdiction and illegal since

the said order is outside the scope of the show cause notice and original order. The impugned order of the revisional authority makes out a new case against the petitioner beyond the scope of show cause notice for the first time which is impermissible in law.

Petitioner relies on the judgment of the Hon'ble Supreme Court in the case of Toyo Engineering India Ltd. reported in 2006 (201) ELT 513 (SC) and Board Circular No. 1053/2/2017-CX., dated 10.03.2017 wherein at paragraph 14.7 it is specifically stated that *"At any cost, the findings and discussions should not go beyond the scope and grounds of the show cause notice."*

Respondents submit that as per Section 75 of the Customs Act, 1962 Drawback of All Industry Rates or AIR is sanctioned by the Ministry of Finance. These drawback rates are periodically notified from time to time by the Ministry through issue of Notifications. As per General Note No. 2 (c) of the Drawback Schedule notified by CBEC Notification No. 31/1999-Cus (N.T.) dated 20.05.1999 – "The rates of drawback shall not be applicable to export of any of the commodities/products if such commodity/product is manufactured and/or exported by a unit licensed as 100% EOU undertaking in terms of the relevant provisions of the Import and Export Police in force." Therefore, it is very clear that any item manufactured or exported by a Unit licensed as a hundred percent Export Oriented Unit is not eligible for duty drawback. The Customs Act debars the petitioner from getting the benefits. The policy decision taken by the Ministry of Commerce is not applicable in the facts of the case since the Customs Act debars the eligibility of the petitioner.

Respondents further submit that the DGFT vide Notification No. 39 (RE-1)/1997-2002 dated 22.11.2001 prescribes that this rate shall be applicable only in cases where excise duty has been paid on procurement of bulk tea by 100% export oriented units and units in export processing zones, considered as deemed exports in terms of Chapter 10 of the Import and Export Policy 1997-2002.

Respondents submit that as per the provision of Import-Export Policy, the goods supplied by a DTA unit to 100% export oriented unit are termed as “deemed export”. Paragraph 9.13 of EXIM Policy 1997-2002 clearly states that supplies from the DTA to EOU units will be regarded as “deemed exports”.

Respondents submit that in the instant case excise duty has been paid by bulk tea manufactured and supplied to 100% EOU (the writ petitioner herein) treating the same as ‘deemed export’. Therefore, the petitioner by no stretch of imagination being a 100% EOU can claim drawback on export goods since drawback is not admissible to a 100% EOU unit in terms of General Notes 2 (c) of CBEC Notification No. 31/1999-Cus (N.T) dated 20.05.1999. Thus, the drawback in the instant case should have been claimed by the bulk tea manufacturer who has paid the excise duty and supplied the impugned goods to the petitioner who is a 100% EOU unit in terms of DGFT Notification No. 39 (RE-1)/1997-2002 dated 22.11.2001.

Respondents submit that during the course of hearing before the Adjudicating Authority the authorised representative of the petitioner agreed to return back the drawback amount within one month. Thus, the petitioner cannot contend that there has been non-consideration of any legal issue.

Respondents submit that the benefit of duty drawback as enabled under Section 75 of the Customs Act, 1962, is expressly and specifically made subject to the Rules framed thereunder and the further notification issued in the context of the implementation or operation of the provision. Therefore, when the notifications read with the Rules and the Section expressly deny the benefit of duty drawback in certain situations and in respect of certain goods, there is no question of the benefit being claimed or extended in contravention with the statutory provisions and the statutory notification, more so when the language of the notifications, rules and the section is clear, emphatic and unambiguous.

Respondents submit that the judgments cited by the petitioner are not applicable to this case since the said judgment are related to the denial of benefits to the manufacturer.

Respondents submit that the Import Export policy is published by the Department of Commerce, Govt. of India while the Customs notification and entitlement is published by the Ministry of Finance. Hence, in absence of amendment of the provisions of the Customs Act, the petitioner cannot be entitled to such claim.

Respondents submit that no document has been annexed by the petitioner showing that the petitioner is the manufacturer of the product and has paid excise duty. The chartered accountant certificate is not correct and is misleading. The other challans are not matching with the procurement made by the petitioner. On this score also the petitioner failed to make out a case that the petitioner is otherwise eligible to get duty draw back. Hence there is no ground to interfere with the order of the revisional authority and the writ petition should be dismissed.

In rebuttal to the arguments advanced by the respondents during the course of hearing, petitioner submits as hereunder.

An altogether new case was sought to be set up by the respondents during the course of hearing before this writ Court when it was argued that the purported demands should be sustained since the writ petitioner's representative had originally conceded before the adjudicating authority and agreed to return the disputed amount. Firstly, no such objection had been taken in the affidavit-in-opposition. Secondly, the writ petitioner had throughout challenging the original order dated September 06, 2004 clearly supported its stand on its claim. Fourthly, concession cannot operate against the statute or deprive an assessee of its rights otherwise granted by the law, as held by this Court in the decision of Ena Chaudhuri –Vs- Assistant Commissioner of Income Tax, [2003] 148 taxmann.com 100 (Calcutta).

Reliance is also placed by the writ petitioner on the decision of Union of India – Vs- Mohanlal Punjabi, 2004 (166) ELT 296 (SC). Lastly, this was never the department's case even before the Revisional Authority.

Contrary to what has been averred in the Affidavit-in-Opposition, there is no restriction in law that only the manufacturer is entitled to drawback and not a purchaser-EOU who procures on payment of applicable duties. On a plain reading of the concerned notifications, such position does not emerge. It is also submitted that no Wing of the Government should go against the Policy provisions, as held in State of Bihar –Vs- Suprabhat Steel, (1999) 1 SCC 31 (para 7).

Reliance was placed upon the judgment of this Calcutta High Court in the case of Ruia Cotex [374 ELT 39 (cal)] by the respondents, is highly misplaced. In the said case the issue was totally different. The Customs notification was issued subsequent to DGFT notification. In the instant case Customs notification existed when DGFT notification was issued and DGFT Notification was specifically given retrospective effect.

Petitioner submits that a careful reading of the DGFT Notification dated November 22, 2001 would show that EOUs have been specifically made eligible for receiving drawback in respect of bulk tea item.

Petitioner submits that the impugned order is erroneous in ignoring the Notification dated December 01, 1999 wherein sub-paragraph (c) was added after paragraph 9.13(b) of the Exim Policy 1997-2002. The said sub-paragraph (c) clearly stated that Central Excise duty paid on bulk tea procured from licensed auction centre by EOU/EPZ units would be reimbursed by the Development Commissioner of concerned zone at all industry rate so long as levy on bulk tea in this regard is enforced.

Petitioner submits that a careful reading of both the notifications dated December 01, 1999 and November 22, 2001 issued by DGFT, which were specific to the issue, would clearly show that the 100% EOU is eligible for duty

drawback in respect of bulk tea. There was no restriction against an EOU claiming drawback or additional condition which the writ petitioner was required to fulfil and the respondents had erred in acting contrary to the aforesaid notifications.

Petitioner submits that no reliance can be placed upon the general note 2(c) to Customs Notification No. 31/1999-Cus (NT) dated May 20, 1999. The said general note 2(c) is not applicable in the facts and circumstances of the present case when the DGFT has specifically issued two notifications with respect to grant of duty drawback of central excise on export of bulk tea. The said notifications relating to bulk tea are more specific notifications and would prevail over customs general notifications. The Customs Notification dated May 20, 1999 was issued earlier in tie and was issued under the Drawback Rules and not under the Customs Act. The said Customs notification has to be read along with the DGFT notifications and not in derogation of the same.

Petitioner further submits that the General Note 2(c) of the aforesaid Customs Notification dated May 20, 1999 refers to "relevant provisions of the Import and Export Policy in force", meaning thereby, the provisions of the Foreign Trade Policy/Import Export Policy had to be read together with the said Customs notification. As an implementing agency, the Customs Department was required to give effect to the provisions of the Foreign Trade Policy/Import Export Policy and there was no basis for initiating demand proceedings for recovery of the refunded amount.

Petitioner submits that even otherwise the said general note 2(c) to the Customs Notification dated May 20, 1999 is contrary to law and is illegal. Reliance is placed upon the judgment of the Hon'ble Karnataka High Court in the case of Karle International reported in 2012 (281) ELT 486 (Kar). The departmental SLP was dismissed by the Hon'ble Supreme Court against the said judgment (Commissioner –Vs- Karle International – 2015 (323) ELT 174 (SC)). Petitioner relies on a decision in the case of Union of India –Vs- Cosmo

Films Ltd., 2023 SCC OnLine SC 518, wherein at paragraph no. 55, the Hon'ble Supreme Court has held that provisions of the Foreign Trade Policy are statutory in nature which are framed by the Union of India in exercise of statutory powers.

Petitioner submits that the impugned order dated December 20, 2019 denying the duty drawback claims of your petitioner in respect of the 22 shipping bills for the period June 02, 2000 to August 26, 2000 is contrary to the intention of the legislature. It has been the legislative intent to unburden export goods on tax.

Petitioner submits that the impugned order erred in ignoring the certificate furnished by a Chartered Accountant in support of the petitioner certifying that the petitioner has procured excise duty paid tea in respect of the subject shipping bills. The sample invoices and shipping bills clearly show duty was paid on procurement by the petitioner. Under such circumstances, there could be no reason to deny drawback to the petitioner which is an EOU.

Considering the facts and circumstances of the case as appears from record including the contents therein and annexure to the writ petition, affidavits by the parties and their submission I am of the considered view that impugned order of the revisional authority dated 20th December, 2019 is not sustainable both in law and in fact and is liable to be set aside for the following reasons:

(i) Admittedly petitioner is an 100% Export Oriented Unit (EOU).

(ii) Admittedly petitioner has procured bulk tea from the manufacturer which has paid Excise on such goods and has not claimed Drawback.

(iii) Admittedly deemed Export took place between the period 01.06.2000 to 31.03.2001.

(iv) Revisional authority while passing the impugned order on the revisional application of the respondents customs authority setting aside the order of the Appellate authority which had allowed drawback in favour of the

petitioner, has taken into consideration the ground which was no part of show cause notice or adjudication order or order of the Appellate authority.

(v) Issue of concession by the petitioner's representative before the adjudicating authority, raised by the respondents customs authority for the first time in course of hearing of this writ petition which was neither before the Appellate authority nor before the revisional authority nor in the affidavit-in-opposition to the writ petition with regard to petitioner's statutory and legal right of availing the benefit of Drawback in question on the basis of aforesaid notification dated 22nd November, 2001, issued by the DGFT authority, is not sustainable since there can be concession on fact and not on law and further petitioner has not accepted the same and has challenged the order-in-original before the Appellate authority.

(vi) Petitioner is entitled to avail the benefit of Drawback under the Notification No. 39(RE-01)/1997-2002, New Delhi dated 22nd November, 2001 issued by the DGFT (Government of India, Ministry of Finance) issued in exercise of powers conferred under paragraph 4.11 of the Export and Import Policy 1997-2002, relating to Duty Drawback for the period from 01.06.2000 to 31.03.2001, since it has fulfilled all the criteria of the aforesaid notification which has statutory force.

Accordingly this writ petition being WPA No. 2600 of 2020 is disposed of by upholding the order of the Appellate authority and setting aside the impugned order of the revisional authority. No order as to costs.

Urgent certified photocopy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

MOHAMMAD NIZAMUDDIN
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(MD. NIZAMUDDIN, J.)