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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 13335/2005

SKB OVERSEAS CORPORATION Petitioner
Through: Mr.Pradeep Jain, Advocate

versus

JOINT SECRETARY (DRAWBACK) M/O Respondent
Through: None.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V.EASWAR

ORDER

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14.12.2011

There is no appearance on behalf of the respondent, accordingly,
we have heard learned counsel for the petitioner.

2. The petitioner is a firm and had imported photographic colour films by paying customs duty of Rs.19,12,281/- vide TR-6 challan dated 24.4.2003 under cover of bill of entry No. 836127 dated 16.4.2003.

3. The petitioner re-exported the said goods within about four months of import, to another overseas buyer M/s Jamaica Trading EST. The said export was made vide shipping bill No. 2095 dated 12.8.2003.

4. As the petitioner had re-exported the same goods which were

imported on payment of customs duty of Rs.19,12,281/-, they filed an application for refund of the customs duty under Section 74 of the Customs Act, 1962(Act, for short).

5. The Petitioner received duty drawback or refund of Rs.18,74,035/- on 8.4.2004.

6. Subsequently, the respondent issued a show cause notice dated 8.9.2004 on the ground that the payment of Rs.18,74,035/- was erroneous as drawback or refund of duty was filed after six months 22 days, which was beyond period of three months and the extendable period of another three months, allowed under Rules 5 of the Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995, (the Rules, for short).

6. The petitioner protested and filed objections.

7. By order dated 1.11.2004 the Assistant Commissioner, Customs held that the claim for refund was beyond six months and the authorities concerned did not have the power to condone the delay of 22 days. Accordingly, he confirmed the demand of Rs.18,74,035/-, as the drawback amount had been erroneously paid. The said demand was recoverable under Rule 7 of the Rules read with Section 28 of the Act. In this order, the Assistant Commissioner of Customs also referred to Rule 7A which empowers the Central Government to

condone the delay beyond six months. The relevant portion of the said order reads as under:

“ The party claimed in the defence that benefit of Rule 7A of the Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995 may be granted to them. However, I do not accept this plea for the reason that the competent authority for consideration this application under Rule 7A of the Re-export of Imported goods (Drawback of Customs Duties) Rules, 1995 is Central Government and that as per Rule 5 of drawback rules the Asstt. Commissioner is competent to only condone delay upto 3 months only.”

8. The petitioner filed an appeal against the said order before the Commissioner of Customs (Appeals) but the same had been dismissed vide order dated 29th December, 2006. Before the Commissioner of Customs (Appeals), the petitioner had contended that they had prayed for condonation of delay in their initial application dated 11th March, 2004 and in case only the Central Government had the power to condon the delay in terms of Rule 7A, their application should have been forwarded to the Central Government. The Commissioner of Customs (Appeals) rejected the said ground, inter alia, observing:

“The appellant has contended that the adjudicating authority should have forwarded their application for relaxation of the provisions of the Rules to the Central government in terms of Rule 7A of the said Rules. It is observed that the adjudicating authority has clearly observed in his adjudication order that there was no request from the appellant for

condonation of delay in their refund claim dated 11.3.04. Even if it is accepted that they had filed such a letter, the Rules do not place any obligation on the adjudicating authority to forward their application to the central Government. In fact, the appellant should have realized that their claim for refund was barred by limitation and they should have themselves applied to the Central Government under Rule 7A for relaxation of 22 days delay in filing the refund claim under Section 74 of the Customs Act read with Rule 5 of Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995. They have not done so, and instead, have unjustifiably accused the Customs authorities not to have forwarded their application to the Central Government for requisite relaxation under Rule 7A of the said Rules. They have submitted their request to the Joint Secretary (Drawback) for relaxation of Rule 5 of the said rules only on 21.12.04. But this is no ground for me to await the decision of the Central government in this regard, especially because I find no legal or procedural infirmity in the impugned order in original.”

9. The petitioner, on 21.12.2004, filed an application with the Central Government for condonation of delay. The said application has been placed on record as Annexure 9.

10. The application records the entire history of the case and states that there was a lapse on their part as the application for refund or duty drawback was made after a period of six months. The fact that the petitioner had sought condonation of delay in the original application dated 11.03.2004 was also stated. In addition to the aforesaid facts, the petitioner had pleaded that they had faced both

administrative and family problems due to long illness and then unfortunate death of their father on 29.1.2004. Death certificate was enclosed. Accordingly, the following prayer was made in the application.

“4.5. We submit that the reasons for delay as tendered in our application dated 15.03.200 and 27.03.2004 and as amplified in response to the show cause notice and narrated in sub-paras 4.1 and 4.2 supra may also be considered for delay of 22 days beyond the extended period of three months provided under proviso to Rule 5 *ibid*.

5. In view of the facts and circumstances explained in the above paragraphs, unless the provision regarding time period for filling the claim under rule 5 *ibid* is relaxed by 22 days by the Central government in terms of Rule 7A *ibid*, we would be faced with a grave situation of recovery of the drawback amount with interest which is genuinely due to us on merit. We, therefore, request your honour to kindly consider our representation sympathetically and judiciously and allow relaxation of 22 days under Rule 7A *ibid* beyond the extended period of three months which is allowed under Rule 5 *ibid*. We shall remain ever grateful and obliged for this act of kindness.”

11. The aforesaid application remained pending with the Central Government and there was no response or reply to the said application. In these circumstances, the present writ petition was filed on 16.8.2005.

12. On the very first date of hearing, on 23.8.2005 while issuing notice on the writ petition, the Court had passed the following order:-

“Issue notice to the respondents to show cause why the writ petition not admitted.

Mr. J.P.Sengh accepts notice on behalf of the respondent. He submits that although the Government have received a representation dated 21st December, 2004, no decision on the same has been taken so far. He states that given six weeks time, the Government should be in a position to examine the prayer made in the representation and pass an appropriate order in case the same has not already been passed.

In the circumstances, therefore, this writ petition shall stand adjourned to be posted again on 12th December, 2005. The Government shall dispose of the representation made to it within six weeks. A copy of the order passed in the same shall be placed before the court by the next date of hearing.

We further direct that no coercive step for the recovery of the drawback amount shall be initiated against the petitioner.

Dasti.”

13. Thereafter, the Assistant Commissioner of Customs issued a letter dated 3rd October, 2005, which for the sake of convenience is reproduced below:-

“Please refer to order in Original No.17/04 dated 01.11.04 issued by Asstt. Commissioner of Customs, ICD, PPG, Delhi vide which a demand of Rs.18,74,035/- representing drawback amount erroneously paid along with interest recoverable under Rule 7 of the Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995 read with Section 28 of the Customs Act 1962, was confirmed and this office letter of C No. VIII/6/ICD/PPG/SCN/947/04 dated 22.03.2005.

2. You are directed to make the payment of drawback amount erroneously paid along with

interest applicable in compliance to said order within 7 days of the receipt of this letter, failing which action as deemed fit under the law would be taken to recover the outstanding dues. In this regard this is also to inform you that as intimated to this office by Dy. Secretary (Drawback), CBEC, Department of Revenue, Ministry of finance, Government of India, your request for condonation of delay under rule 7A of the Re-export of imported Goods (Drawback of Customs Duties) Rules, 1995 has not been considered by the Central Government.”

(emphasis supplied)

14. The aforesaid letter merely records that the request made by the petitioner for condonation of delay under Rule 7A of the Rules has not been considered by the Central Government. It does not even state that the request has been rejected. Reasons for rejection of request have not been adverted to and stated.

15. In these circumstances, the petitioner was permitted to place on record and challenge the order dated 3rd October, 2005. This was allowed by order dated 2nd January, 2006 and the amended writ petition has been taken on record.

16. Section 74 of the Act reads as under:-

“SECTION 74. Drawback allowable on re-export of duty-paid goods. – (1) When any goods capable of being easily identified which have been imported into India and upon which any duty has been paid on importation, -
(i) are entered for export and the proper officer makes an order permitting clearance and loading of the goods for exportation under section 51; or

(ii) are to be exported as baggage and the owner of such baggage, for the purpose of clearing it, makes a declaration of its contents to the proper officer under section 77 (which declaration shall be deemed to be an entry for export for the purposes of this section) and such officer makes an order permitting clearance of the goods for exportation; or

(iii) are entered for export by post under section 82 and the proper officer makes an order permitting clearance of the goods for exportation, ninety-eight per cent of such duty shall, except as otherwise hereinafter provided, be re-paid as drawback, if -

(a) the goods are identified to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs as the goods which were imported; and

(b) the goods are entered for export within two years from the date of payment of duty on the importation thereof :

Provided that in any particular case the aforesaid period of two years may, on sufficient cause being shown, be extended by the Board by such further period as it may deem fit.

(2) Notwithstanding anything contained in sub-section (1), the rate of drawback in the case of goods which have been used after the importation thereof shall be such as the Central Government, having regard to the duration of use, depreciation in value and other relevant circumstances, may, by notification in the Official Gazette, fix.

(3) The Central Government may make rules for the purpose of carrying out the provisions of this section and, in particular, such rules may —

(a) provide for the manner in which the identity of goods imported in different consignments which are ordinarily stored together in bulk, may be established;

(b) specify the goods which shall be deemed to be not capable of being easily identified; and

(c) provide for the manner and the time within which a claim for payment of drawback is to be filed.

(4) For the purposes of this section -

- (a) goods shall be deemed to have been entered for export on the date with reference to which the rate of duty is calculated under section 16;
- (b) in the case of goods assessed to duty provisionally under section 18, the date of payment of the provisional duty shall be deemed to be the date of payment of duty.”

17. There is no dispute or doubt that the said Section is applicable and the petitioner satisfies the conditions/stipulations mentioned in the said provision. The said Section permits that on re-export of imported goods, the exporter, who had paid the duty on the imported goods, is entitled to refund of 98% of the duty paid at the time of import. It is not alleged that there is dispute about the identity of the goods, which were imported and which were subsequently exported. The only claim and the defence raised by the respondent is that the application for refund was not made within the period specified in Rule 5 of the Rules.

18. The aforesaid Rule 5 and 7A read as under:-

“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 within three months from the date on which an order permitting clearance and loading of goods for exportation under section 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.

(2) The claim shall be filed alongwith the following documents, namely :-

(a) Triplicate copy of the Shipping Bill bearing examination report recorded by the proper officer of the customs at the time of export.

(b) Copy of Bill of Entry or any other prescribed document against which goods were cleared on importation.

(c) Import invoice.

(d) Evidence of payment of duty paid at the time of importation of the goods.

(e) Permission from Reserve Bank of India for re-export of goods, wherever necessary.

(f) Export invoice and packing list.

(g) Copy of Bill of lading or Airway bill.

(h) Any other documents as may be specified in the deficiency memo.

(3) The date of filing of the claim for the purpose of section 75A shall be the date of affixing the Dated Receipt Stamp on the claims which are complete in all respects, and for which an acknowledgement shall be issued in such form as may be prescribed by the Commissioner of Customs.

(4) (a) Any claim which is incomplete in any material particulars or is without the documents specified in sub-rule (2) shall not be accepted for the purpose of section 75A and such claim shall be returned to the claimant with the deficiency memo in the form prescribed by the Commissioner of Customs within fifteen days of submission and shall be deemed not to have been filed;

(b) Where exporter complies with requirements specified in deficiency memo within thirty days from the date of receipt of deficiency memo, the same will be treated as a claim filed under sub-rule (1).

(5) Where any order for payment of drawback is made by the Commissioner (Appeals), Central Government or any Court against an order of the proper officer of customs, the manufacturer exporter may file a claim in the manner prescribed in this rule within three months from the date of receipt of the

order so passed by the Commissioner (Appeals) Central Government or the Court, as the case may be.

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.”

19. Rule 5 stipulates that a claim for drawback be filed within three months from the date on which an order permitting clearance and loading of goods for exportation under Section 51 is made. Assistant Commissioner of Customs or Deputy Commissioner of Customs is entitled to extend the time for a further period of three months on sufficient cause being shown by the exporter. No further extension of time can be given by the Assistant Commissioner of Customs or Deputy Commissioner of Customs. Rule 7A of the Rules, however, permits the Central Government to extend the time beyond the time stipulated in Rule 5 i.e. six months, if the exporter or his authorized agent for the reasons beyond his control, has failed to comply with any of the provisions of the Rules. It is accepted and admitted that in the present case when the petitioner moved an application for

repayment/refund of the drawback on 11th March, 2004, they had asked for condonation of delay. No doubt that the said application was moved before the Assistant Commissioner of Customs, but in case the said Commissioner was not competent to condone the delay, he should have informed the petitioner. Rather, in the present case, the application was allowed and refund was made. Later on a show cause notice was issued and an order of repayment of Rs.18,74,035/- was issued. The petitioner unsuccessfully challenged the said order in appeal. The petitioner, in the meanwhile, filed an application under Section 7A dated 21st December, 2004, which remained pending for a long time and an unreasoned communication was made on 3rd October, 2005 that the Central Government has not considered the said application for condonation of delay under Rule 7A. This is a highly unsatisfactory manner to deal with the application. The order dated 3rd October, 2005 does not state or give any reason and is cryptic. Reasons are heart and soul of an order. When power has been conferred under Rule 7A, the said power has to be exercised appropriately and fairly, after considering the grounds and reasons given by the applicant. The rejection of the application for condonation of delay of 22 days in the present case, therefore, cannot be sustained.

20. One option available to us is to remand the matter and ask the

Central Government to pass a fresh order, but in the present case the delay is of only 22 days and it is almost six years since the application for condonation of delay was made. In the application for condonation of delay, the petitioner had mentioned that there was long illness and death in the family i.e. death of the father of one of the partners. We are satisfied that there were reasons beyond the control of the petitioner. It is a case where delay should be condoned. Accordingly, we issue a writ of certiorari and quash the letter dated 3rd October, 2005 and mandamus is issued to the respondent to make payment of Rs.18,74,035/-. In case the aforesaid amount has been recovered by adjustment, the said adjustment will be treated as null and void. If any refund payment is to be made, the same will be made within a period of four weeks from the date copy of this order is received. In case payment is not made within four weeks, the respondent will be liable to pay interest @ 12% per annum from the date of this order and till payment is made. No costs.

SANJIV KHANNA, J.

R.V.EASWAR, J.

**DECEMBER 14, 2011
SV/NA**