

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

**DECIDED ON: 23.07.2012**

+ **CEAC 22/2012**

**COMMISSIONER OF CUSTOMS (EXPORT) ..... Petitioner**

Through: Dr.Ashwani Bhardwaj, Advocate

versus

**KULTAR EXPORT**

**..... Respondent**

Through:Mr.Joseph Vellapalli, Sr.Advocate  
with Mr.Piyush Kumar & Ms.Shikha Sapra,  
Advocates

**CORAM:**

**MR. JUSTICE S. RAVINDRA BHAT**

**MR. JUSTICE R.V. EASWAR**

**MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)**

**%**

**CAV.739/2012**

Learned counsel for the caveator has put in appearance.  
Accordingly, Caveat 739/2012 stands discharged.

**CEAC 22/2012 & CM APPL.12285/2012**

1. The Commissioner of Customs (Export) in this appeal under Section 35 G of the Central Excise Act, 1944 claims to be aggrieved by an order of the Customs Excise & Service Tax Appellate Tribunal (C.E.S.T.A.T.) dated 14<sup>th</sup> September, 2011 by which the respondent's

appeal was allowed with consequential relief. The question of law urged is that the Tribunal's findings are contrary to the Customs' Circular Nos.54/2001-Cus and 17/1997-Cus dated 19.10.2001 and 04.06.1997 and the duty drawback permitted to the respondent, contrary to the express provisions of the said scheme.

2. Brief facts necessary to decide the case are that the respondent is in the business of readymade garments and textiles. It purchases these export items from various traders and exports them. On the basis of an existing scheme, it claims duty drawback on the inputs required for the manufacture of such items at drawback rates notified by the Central Government (also known as 'All Industry Rates'). These rates have two components i.e. customs duty element and another, excise duty component.

3. For the period 2003-2004 to 2006-2007, the respondent exported garments and textiles against 326 shipping bills with FOB value of Rs.90,32,98,529/-. It claimed Central Excise portion of duty drawback to the extent of Rs.1,43,15,400/- . The appellant alleged that during the course of investigation based upon the vigilance report it became aware that the respondent had fraudulently obtained inadmissible drawback of the Customs duty component of duty and that it had failed to provide copies of shipping bills and related documents. Consequently, the Commissioner of Customs issued a show cause notice on 9<sup>th</sup> September, 2008 demanding a sum of Rs.1,43,15,400/- under Section 75 of the Customs Act, 1962. The show cause notice

alleged that the procedure applicable and spelt out in a Circular No.44/2001 had not been complied with. The respondent replied, *inter-alia*, stating that the demand pertained to a period beyond five years and was time barred. It was also urged that the drawback claimed and admitted was in accordance with the procedure and formalities prescribed under the Customs and Central Excise Drawback Rules, 1995. A declaration in terms of Rule 12 of the Rules was made by the respondent on the shipping bills that no drawback claim for rebate of duty has been sought in respect of the Customs and Central Excise duty paid on materials, containers etc. The respondent also alleged that they had given a declaration that no CENVAT Credit had been allowed on exported goods. The reply to the show cause notice also stated that Circular No.8/2003 (dated 17<sup>th</sup> February, 2003) had been complied with as the same was in force and that being a merchant exporter, a self-declaration that no CENVAT Credit was claimed was sufficient to enable the duty drawback.

4. By the order in original dated 20<sup>th</sup> October, 2009, the Commissioner of Customs rejected the respondent's contentions and demanded a sum of Rs.1,43,15,400/-. The Commissioner, however, said that no penalty or confiscation of the goods was necessary. The respondent appealed to the CESTAT, which by the impugned order allowed it holding that there was no fraud, suppression of facts or misrepresentation practiced by the respondent to render it liable for the demand alleged against it.

5. The Commissioner of Customs (Export) who has appealed against that order, argues that the Tribunal fell into error in

disregarding the Circular No.17/97-Cus, 64/98-Cus dated 01.09.1998 as well as Circular No.44/01-Cus dated 19.10.2001. It is submitted that all categories of readymade woven garments and accessories falling under Chapter 62 of the Customs and Central Excise Tariff Act are subjected to excise duty levy. Special provisions were made by which the merchants who get the garments produced by supplying material to job working units were recognized for the purpose of registration and duty payment. It is urged that under Rule 4 (3) of the Central Excise Rules, a merchant manufacturer, is one who gets goods manufactured from a job worker on his own account and on his behalf. He is responsible for paying excise duty. In such event, he can claim CENVAT credit for inputs procured and used for garment production. A merchant-manufacturer and exporter can claim CENVAT Credit but is under an obligation to furnish certificate-cum-declaration from his supporting job workers clarifying that they were manufacturing and supplying garments to this particular merchant exporter only. In this case, learned counsel urged that the respondent did not furnish any such declaration and was clearly ineligible to duty drawback benefit which it had availed.

6. It is argued on behalf of the Commissioner of Customs (Export) that the excise portion of duty paid on inputs used in manufacturing the goods is required to be paid through CENVAT Credit Scheme which grants them benefit. They cannot be refunded that through the draw-back scheme, which would amount to a double benefit. It is urged that the respondent did not ever produce such certificate.

7. The Tribunal after considering the Circulars relied upon by the

Commissioner of Customs (Export), in this case, (i.e. 54/2001, 8/2003, 19/2005 & 16/2009), noticed that the dispute pertained to interpretation of Rule 3 under executive instructions. The Tribunal noticed that the Commissioner of Customs (Export) relied on Circulars Nos.17/97 and 64/98. However, it was noticed at the same time that none of these was relied on in the Show cause Notice. In fact, Circular No.19/09-Cus could not have been relied upon because it was issued much after the Show cause notice was issued.

8. The Tribunal proceeded to over-rule the Commissioner's argument and held as follows:-

*“12. On a careful reading of paras 1 and 6 as also from item 4 of Annexure-I and items 4 and 5 of Annexure-II of Circular 54/2001-Cus it is clear that this circular and certificates as per this Circular are not applicable for merchant exporters who buy goods from open market and we have no difficulty in concluding that this circular is not applicable to merchant exporters who procure goods from the open market and the Appellant was not required to give such certificates. So the very basis of on which SCN is issued is not sound.*

*13. The only issue to be examined is whether the demand is to be sustained in view of para(iv) of Circular 17/97-Cus and para (vi) of Circular 64/98 though these are not relied upon in SCN. As per these circulars the Appellant should not have been given the impugned drawback. There was no question of taking any declarations. The only relevant information was that the Appellant was a merchant exporter, which was always known to the department. As may be seen from para 1(iv) of Circular 17/97-Cus and para1(vi) of Circular 64/98-Cus there was no question of taking any declaration from merchant exporters who buy goods from the open market as in the case of this Appellant but the drawback was supposed to be restricted to the customs portion only. However Revenue chose to grant drawback for excise portion also and after lapse of five years to*

*one year, the drawback amounts granted on various shipping bills have been demanded to be paid back. There is also an argument that this Appellant is being singled out for such treatment. This argument is relevant not in the sense whether a wrong can be corrected in the hands of one when others go scot free but in the context that there was a bonafide relief because of the circulars from 2001 onwards that they were eligible for the impugned drawback.*

*14. We are not inclined to confirm such huge liability for past periods based on Circulars which were in the knowledge of the department and which were not implemented. We would like to rely more on the legal provisions. The only legal provision relied upon is Rule 3 of the drawback Rules. We agree with the interpretation to this Rule given by the Board in Circular 16/2009-Cus. The argument that this interpretation is applicable from date of issue of circular 16/2009-Cus is repugnant to logic because the Rule has remained the same except for amendment on 13-07-2006, to take care of incidence and rebate of Service Tax. So we are not inclined to rely on the word “henceforth” used in para 7 of this circular and uphold this demand.”*

9. The above discussion would show that the respondent is a merchant exporter. An important factual aspect highlighted and also noticed by the Tribunal is that the respondent does not engage in job work or getting garments stitched by others. It merely procures readymade garments and textiles and exports them. Rule 3 of the 1995 Customs and Excise Drawback Rules states that drawback are allowed on the export of goods as prescribed amount. A proviso to Section 3 (1) states that if the goods are produced or manufactured from imported materials or excisable materials on some of which only the duly chargeable has been paid and not on the rest, or only a part of the duty chargeable had been paid or duty waived or there has been rebate

or refund and is given as credit under any rules, the drawback admissible shall be reduced by taking into account the lesser duty or tax paid or refunded or credit obtained. Circular No.17/97 prescribed the various conditions and visualized different situations in which duty drawback could be given. It recognized that exporters who manufactured goods or get them manufactured were to follow a certain procedure. In the case of merchant exporters, the same circular provided as follows:

*“(iv) 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.**”*

10. Circular No.64/98, dated 1.09.1998 superseded Circular No.17/97 and provided more elaborately the conditions to be followed by manufacturers, who exported goods, and paid or claimed credit in terms of the prescribed rules or statutory schemes. It provided a procedure in respect of manufacturers, and merchant exporters who got garments stitched through job workers and merchant exporters who procure goods from the open market. In respect of the latter category the Circular stated as follows:-

*“(vi) 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 are not entitled to the Central Excise allocation of the All Industry Rate of Drawback.”*

11. The Commissioner of Customs (Export) in this case relied on Circular No.54/01 dated 19.10.2001. Facially that document pertains to merchant exporters who are also manufacturers. The first paragraph of the Circular reads as follows:

*“All categories of Ready-made woven garments (other than raincoats, undergarments and clothing accessories) falling under Chapter 62 of Customs & Central Excise Tariff Act are now subject to central excise levy as a result of the changes announced in the Union Budget, 2001-2002(Finance Bill stage and those made thereafter till the Finance Bill was enacted.) Though normally it is the actual manufacturer who is to pay duty of excise leviable on any commodity, considering the peculiar and very decentralised nature of garment producing sector certain special provisions have been made, wherein the merchants who get their garments produced by supplying materials to producing job working units have been recognised for registration/ duty payment etc. purposes. Vide Rule 4(3) of Central Excise (No.2) Rules, 2001, a merchant manufacturer, i.e., a merchant, who gets the goods manufactured from a job worker on his own account, is required to pay duty on the garments manufactured on his behalf on job work basis, either himself or authorise such job worker(s) to pay duty on his behalf. When merchant manufacturer pays duty, he is also entitled to avail of CENVAT for inputs procured and used for garment production by job workers”*

12. Para 6 goes on to describe the procedure:-

*“These exporters shall also be required to furnish a certificate-cum- declaration as given in Annexure-II, from their supporting manufacturers/ job workers interalia clarifying that they are manufacturing and supplying garments to this particular merchant exporter only and that they are not registered nor availing of any Cenvat facility for any garments manufactured by them.”*

13. It can be discerned from the above discussion, that merchant exporters who did not get the garments manufactured or stitched through a job workers, but who procured goods from the open market were treated differently and an entirely different set of procedures always existed by virtue of Circulars of 1997 and 1998. The *rationale* for this was that goods were sourced from diverse suppliers and the authorities were alive to difficulty in securing certificates about duty credit. All these changed in 2003 with the issuance of Circular No.8/2003.

14. Circular No.8/03 dated 17<sup>th</sup> February, 2003 noticed that a large number of trade representations had been made that exporters found difficulty to furnish certificates from Central Excise Authorities for every export consignment. The circular also noticed that a committee was set up for making certain recommendations. The Circular then provided as follows:-

*“3. After accepting the recommendations of the Committee, the Board has decided that henceforth the manufacturer-exporters who are not registered with Central Excise or such merchant exporters whose supporting manufacturer are not registered with the Central Excise, shall not be required to furnish any certificate as to the non-availment of Cenvat facility from the jurisdictional Central Excise authorities.*

*4. It has been decided that instead these manufacturer exporters and merchant exporters with a supporting manufacturer shall be required to give a self-declaration that such manufacturer-exporters or the supporting manufacturers are not registered with Central Excise and that they do not avail / have not availed Cenvat facility. The form of self-declaration is enclosed.*

*5. It is also clarified here that as regards such manufacturer-exporters and supporting manufacturers who are registered with Central Excise, the fact of non-availment of Cenvat facility can be*

*confirmed from ARE-I which these exporters shall be furnishing. Therefore, in case of registered manufacturer-exporters and merchant exporters with registered supporting manufacturers the earlier practice of acceptance of ARE-I shall continue.”*

14. As noticed earlier in this case, the respondent is not a manufacturer but only procures or sources goods from the Indian market and exports them. Therefore, it availed the benefit of All India rates of duty drawback, a notional concept applicable to such class of exporters. None of the circulars cited by the petitioner required the respondent to follow the procedure which is now mandated, in 2009. The previous circulars of 1997 and 1998 as well as the circular of 2003 clearly visualized that duty drawback was restricted, excluding duty credit availed, in the case of manufacturers who also got their job work done. Exporters of goods purchased from the market were to be treated as having availed Modvat facility. In view of this, and considering the facts that the exports had been finalized and duty drawback paid as long back as in 2006-2007, the attempt to reopening the entire issue by the petitioner was clearly unwarranted.

15. In view of the foregoing discussion, this Court finds no infirmity in the order of the Tribunal; no substantial question of law arises for consideration. The appeal, is therefore, dismissed.

**S. RAVINDRA BHAT, J.**

**R.V.EASWAR, J.**

**JULY 23, 2012**

**vk**