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

Decided on : 21.02.2014

+ **W.P.(C) 1198/2014, C.M. APPL. 2499/2014**

GROZ-BECKERT ASIA PVT. LTD. Petitioner
Through: Sh. Virag Tiwari and Sh. K.J.
Bhat, Advocates.

versus

UNION OF INDIA Respondent
Through: Sh. B.V. Niren, Advocate, for
UOI.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

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1. The petitioner is aggrieved by an order of the Central Government dated 23.09.2013, setting aside the Commissioner (Appeal)'s determination in its favour. The petitioner had imported 58,00,000 pieces of sewing needles for the purpose of re-export between May and August 2011. It cleared the goods against payment of duty to the tune of ₹30.96 lakhs after declaring that the goods were brought in for re-export. It asserted that after importation, the needles were removed from grey dispensers, each containing 10 needles and changed to orange dispensers manually. The import

samples at the stage of entry in the territory of India were drawn for the purpose of identification as was the case at the time of re-export. It is not in dispute that the description and quantity of the re-export tallied with what was claimed originally. In these circumstances, when the claim for duty drawback was made, initially the claim was granted to the extent of 3 applications. However, drawback on grey dispensers was not allowed. At that stage, the Deputy Commissioner recorded his satisfaction that the goods imported were exported. On 11.07.2012, the three orders granting drawback by the Deputy Commissioner were reviewed by the Commissioner, who directed the original authority to apply for setting-aside of the drawback order granting drawback claims. The Commissioner (Appeals) then on 10.10.2012 set-aside the three orders-in-original and directed verification at the field level. He was of the opinion that the terms of Section 75 apply since the goods had undergone an operation. In these circumstances, on 10.10.2012, the Deputy Commissioner (Drawbacks) issued three Show Cause Notices eliciting response why drawback sanctioned in respect of the sum of ₹26 lakhs ought not to be recovered with interest and penalty under the Customs Act. After considering the responses, the Deputy Commissioner, by separate orders-in-original dated 19.12.2012, directed recoveries of these amounts with penalty and interest. The petitioner successfully appealed to the Commissioner (Appeals). In the order of the Commissioner (Appeals), after discussing the basic facts, and the

nature of the process undergone by the goods, i.e. the sewing needles, he held as follows:

“8. After analyzing the said provisions of Section 74 of Act ibid, I am unable to endorse the opinion framed and held by the present Learned Adjudicating Authority in as much as there is no indication in the said Section that the goods needs to be re-exported in the same state as imported. The issue is only regarding the identity of the said goods, which have been imported into India and were subjected to the payment of customs duty and such identification is ought to be to the satisfaction of the Assistant Commissioner of the Customs or the Deputy Commissioner of the Customs. It is materially evident that all these factors are categorically established by the report provided on the shipping bill by the Competent Authority as discussed above.

9. If, this is an admitted position, I do not see any reason to interfere with the satisfaction derived by the competent authority regarding subject goods, i.e. needles. Hence, different containers did not alter the physical identity of the said goods in any manner. Even otherwise, it is observed that the issue of re-packing has not brought changes in the needles that such goods are not identifiable at the time of re-export. Even for academic interest, it is also observed that the subject needles were packed in orange dispensers, brand Beka (full size), which incidentally were imported Bills of Entry. Hence, I set-aside all the three impugned Order-in-Originals for the reasons aforesaid.

The appeal is disposed of with consequential relief as stated above.

Sd/-

(R.K. Routray)

Commissioner of Customs (Appeals)

Regd. AD/Speed Post”

2. The Deputy Commissioner thereupon preferred a revision to the Central Government which, by the impugned order of 23.09.2013 reversed the order of the Commissioner (Appeals) and directed recovery of the duty drawback as penalty and interest. The essential finding of the Central Government in this regard – in the impugned order is as follows:

4.3 A harmonious reading of the Sections 74 & 75 of Customs Act 1963 makes it clear that the Act envisage two categories of goods for drawback purposes: a) goods that have been manufactured, processed or on which any operation has been carried out in India using any imported materials in the manufacture or processing of such goods or carrying out any operation on such goods; b) imported goods which have been exported as such or in other words, without having been subjected to any operation in India such as manufacture, processing or any other operation. The goods under (a) category i.e., when any goods have been manufactured, processed or on which any operation has been carried out in India, fall under

*the purview of Section 75 for drawback purposes and drawback is allowed of duties of customs chargeable under Customs Act on any imported materials of a class or description used in the manufacture or processing of such goods or carrying out any operation on such goods. The goods under (b) category fall under the purview of claim for drawback Section 74. In the instant case, the needles were removed from the original dispenser & repacked in Orange colour dispenser, hence, covered under text of "carrying out any operation" of Section 75(1) of Act *ibid*."*

3. The petitioner contends that the phraseology of Section 74 admits of only one interpretation and addresses it with the language adopted in Section 75. It is argued that Section 75 allows drawback in respect of goods so long as they are identifiable in all material particulars with the imported goods. However, if the concerned officers are of the opinion that the re-exported goods involve a process or operation carried-out in India, the drawback to the extent it is granted would be subject to conditions. It was argued that the issue has been considered by a Division Bench of this Court in *ABC India Ltd. v. UOI* 1992 (61) ELT 205 (Del) which was specifically affirmed by the Supreme Court which refused to entertain the Special Leave Petition (SLP) by the Revenue. Likewise, learned counsel relied upon the decision of the Division Bench of the Bombay High Court in *Commissioner of Customs Drawback Recovery Cell v.*

Phoenix Cement Limited 2010 (259) ELT 372 (Bom). He also relied upon the reported order of the Central Government itself in similar circumstances being *In Re: Torrent Pharmaceuticals* 2001 (138) ELT 949. It was submitted by learned counsel for the respondent that the packaging itself amounted to a process that indicated change in the identity or identifiability of the goods and consequently the drawback could be permitted only in terms of Section 75. It was argued that in these circumstances, the Deputy Commissioner had made an enquiry pursuant to one round of litigation and that having regard to the facts found, the Central Government's determination ought not to be disturbed.

4. Sections 74 and 75 read as follows:

“Drawback

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.*

SECTION 75. Drawback on imported materials used in the manufacture of goods which are exported. - (1) *Where it appears to the Central Government that in respect of goods of any class or description manufactured, processed or on which any operation has been carried out in India , being goods which have been entered for export and in respect of which an order permitting the clearance and loading thereof for exportation has*

been made under section 51 by the proper officer, or being goods entered for export by post under section 82 and in respect of which an order permitting clearance for exportation has been made by the proper officer, a drawback should be allowed of duties of customs chargeable under this Act on any imported materials of a class or description used in the manufacture or processing of such goods or carrying out any operation on such goods, the Central Government may, by notification in the Official Gazette, direct that drawback shall be allowed in respect of such goods in accordance with, and subject to, the rules made under sub-section (2).

Provided that no drawback shall be allowed under this sub-section in respect of any of the aforesaid goods which the Central Government may, by rules made under sub-section (2), specify, if the export value of such goods or class of goods is less than the value of the imported materials used in the manufacture or processing of such goods or carrying out any operation on such goods or class of goods, or is not more than such percentage of the value of the imported materials used in the manufacture or processing of such goods or carrying out any operation on such goods or class of goods as the Central Government may, by notification in the Official Gazette, specify in this behalf :

Provided further that where any drawback has been allowed on any goods under this sub-section and the sale proceeds in respect of such

goods are not received by or on behalf of the exporter in India within the time allowed under the Foreign Exchange Management Act, 1999 (42 of 1999), such drawback shall except under such circumstances or such conditions as the Central Government may, by rule, specify be deemed never to have been allowed and the Central Government may, by rules made under sub-section (2), specify the procedure for the recovery or adjustment of the amount of such drawback.

(1A) Where it appears to the Central Government that the quantity of a particular material imported into India is more than the total quantity of like material that has been used in the goods manufactured, processed or on which any operation has been carried out in India and exported outside India, then, the Central Government may, by notification in the Official Gazette, declare that so much of the material as is contained in the goods exported shall, for the purpose of sub-section (1), be deemed to be imported material.

(2) The Central Government may make rules for the purpose of carrying out the provisions of sub-section (1) and, in particular, such rules may provide –

(a) for the payment of drawback equal to the amount of duty actually paid on the imported materials used in the manufacture or processing of the goods or carrying out any operation on the goods or as is specified in the rules as the average amount of duty paid on the materials of that class

or description used in the manufacture or processing of export goods or carrying out any operation on export goods of that class or description either by manufacturers generally or by persons processing or carrying on any operation generally or by any particular manufacturer or particular person carrying on any process or other operation, and interest if any payable thereon;

(aa) for specifying the goods in respect of which no drawback shall be allowed;

(ab) for specifying the procedure for recovery or adjustment of the amount of any drawback which had been allowed under sub-section (1) or interest chargeable thereon;

(b) for the production of such certificates, documents and other evidence in support of each claim of drawback as may be necessary;

(c) for requiring the manufacturer or the person carrying out any process or other operation to give access to every part of his manufactory to any officer of customs specially authorised in this behalf by the Assistant Commissioner of Customs or Deputy Commissioner of Customs to enable such authorised officer to inspect the processes of manufacture, process or any other operation carried out and to verify by actual check or otherwise the statements made in support of the claim for drawback.

(d) for the manner and the time within which the claim for payment of drawback may be filed;

(3) The power to make rules conferred by sub-section (2) shall include the power to give drawback with retrospective effect from a date not earlier than the date of changes in the rates of duty on inputs used in the export goods.”

5. In *ABC (supra)*, this Court noticed the difference in language between the two and observed as follows:

“13. There is a distinction between Section 74 and Section 75 of the Customs Act. Section 74 of the Customs Act comes into operation when articles are imported, and thereafter re-exported, such articles being easily identifiable; and Section 75 comes into operation when “imported materials are used in the manufacture of goods which are exported.”

14. Inasmuch as the Hydra-jack was an article, already manufactured, and was not material which was used in the manufacture of goods, in the instant case, there is no question of application of Section 75 of the Customs Act to the articles imported.

15. What would apply to this case is Section 74 of the Customs Act, which deals with the drawback of duty paid upon easily identifiable article upon re-export of duty paid goods.”

6. Likewise, in *Phoenix (supra)*, the interpretation placed by this Court in *ABC (supra)*, was agreed upon, by the Bombay High Court. In *Phoenix (supra)*, interestingly, the view of the Central Government, (which cannot, of course, be treated as a precedent) itself appears to have been that if the so-called

“process” is a mere change of packaging, and fairly disclosed by the assessee/re-exporter, Section 74 would apply and not Section 75. This interpretation of the Central Government may be seen in *Torrent (supra)*. What the petitioner appears to have done is a matter which cannot be disputed by the respondents since both at the stage of importation and re-export, the goods were verified – i.e. the needles were subject to re-packaging and re-exported. As to the applicability of the *ABC (supra)*, there cannot be any dispute since re-packing cannot, by any stretch of imagination, be called an “operation” or “process” on the goods. The quantity and identity of the goods remained unchanged. In these circumstances, we are of the opinion that the view of the Central Government cannot be sustained and is set-aside. The writ petition is accordingly allowed along with pending application with no order as to costs.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

FEBRUARY 21, 2014