IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 19.03.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MR. JUSTICE R.KARUPPIAH

C.M.A. No.3652 of 2011

The Commissioner of Customs (Export)
Custom House,
No.60, Rajaji Salai,
Chennai - 600 001. ... Appellant

- Vs -

1. M/s.Cargil India Pvt. Ltd.,
   14th Floor, DCF Building No.9,
   Tower A, DLF City Phase - III,
   Gurgaon - 122 002.

2. The Customs, Excise and Service Tax
   Appellate Tribunal,
   South Zone Bench, Shastri Bhavan Annex,
   1st Floor, No.26, Haddows Road,
   Chennai - 600 006. ... Respondents

Appeal filed under Section 35-G of the Central Excise Act, against the order dated 13.01.2011 passed by Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai, made in Final Order No.72 of 2011 agains the order dated 29/9/09 passed by the commissioner of customs, Chennai made in Original Order No.9689/2009.

सत्यमेव जयते

For Appellant : Mr.T.Chandrasekaran
Standing Counsel

For Respondents : Mr.C.Manishankhar - R1

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J U D G M E N T
(DELIVERED BY R.SUDHAKAR, J.)

This Civil Miscellaneous Appeal has been filed by the Revenue as against the specific direction issued by the Tribunal to the Commissioner allowing conversion of free shipping bill into draw back

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shipping bills. This Court, by order dated 08.03.2012 admitted this appeal on the following substantial question of law:

> "Whether in the facts and circumstances of the case, the Tribunal was legally justified to allow the appeal filed by the 1st respondent ignoring the fact that they have failed to comply the provisions of Rule 12(1)(a) of Drawback Rules, 1995?"

2. The brief facts of the case are as follows:

The first respondent/assessee had made 329 export shipments of Maize under Free Shipping Bills as they were unaware of duty drawback entitlement of the subject goods which was available at the All Industry Rate of 1% on FOB Value. Under the impugned order, the request of the assessee for conversion of free shipping bills into duty drawback shipping bills has been rejected by the Adjudicating Commissioner. An appeal to the Tribunal at the instance of the assessee went in favour of the respondent/exporter. The Tribunal by placing reliance on the decision of the Tribunal in the case of Cargill India Pvt. Ltd., Vs. CC, Visakhapatnam, F.No.738 & 739/2010 dated 23.12.2009 in Appeal No.C/81 & 185/2009, wherein similar plea was accepted, passed the following order:

> "3. Taking into consideration the submissions made from both sides and following the afore-cited decision of the Bangalore Bench of the Tribunal in the appellants' own case, we set aside the impugned order and allow the appeal. The matter is remanded to the original authority for allowing conversion of S/Bs."

3. The only difficulty now propounded by the learned Standing Counsel appearing for the Department is that as per Rule 12(1)(a) of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995, there may be a statement or declaration made on the shipping bill or bill of export, with regard to its description, quantity and such other particulars as are necessary for deciding whether the goods are entitled for duty drawback and if so, at what rates and make a declaration on the shipping bill or bill of export in support of their claim for drawback and not otherwise. For better clarity, the said provision reads as follows:

> "Rule 12. Statement/Declaration to be made on exports other than by Post - (1) In the case of exports other than by post, the exporters shall at the time of export of the goods -
>
> (a) state on the shipping bill or bill of export, the description, quantity and such other particulars as are necessary for deciding whether the goods are entitled to drawback, and if so, at what rate or rates and make a declaration on the relevant shipping bill or bill of export that -

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(i) a claim for drawback under these rules is being made;

(ii).......

(b)......"

4. The issue of conversion of Free Shipping Bill into Drawback Shipping Bill was discussed by the Ministry of Finance & Company Affairs, Department of Revenue and consequently a circular was issued in Circular No.4 of 2004 dated 16.1.2004 amending the earlier circular Nos.6/03 - Cus. dated 28.1.2003 & 40/2003-Cus. dated 12.5.2003. The said Circular No.4 of 2004 reads as follows:

F.No.609/176/2002-DBK
Government of India
Ministry of Finance & Company Affairs
Department of Revenue

Sub: Conversion of free shipping bills into Advance License/DEPB/DFTC/Drawback shipping bills and conversion of shipping bills from one export promotion scheme to another - regarding.

Kind attention is invited to DOR Circular Nos.6/2003 - Cus. dated 28.1.2003 and 40/2003-Cus.dated 12.5.2003 in terms of which conversion of free shipping bills from one export promotion scheme to another was permitted subject to specified conditions.

2. The issue of permitting conversion of free shipping bills into Advance Licence/DEPB/DFRC/Drawback shipping bills was discussed in the Conference of Chief Commissioners on Tariff & allied matters held on 25th and 26th September, 2003. The Conference felt that in cases where the exporters had filed free shipping bills on their own, it would not be advisable to permit such conversion.

3. The issue has been re-examined in the Board.

3.1 In so far as the facility of permitting conversion of free shipping bill into drawback shipping bill is concerned, the same is governed by Chapter X of the Customs Act and Customs & Central Excise Duties Drawback Rules, 1995, Rule 12 of the Customs & Central Excise Duties Drawback Rules contain the details of statement/declaration to be made by the exporter at the time of export of goods for the purpose of availing drawback.

Proviso to Rule 12(1)(a) of ibid rules empowers the Commissioner to grant exemption from observance of the provisions of Rule 12(1)(a) for the purpose of availment of drawback. This necessarily implies that whereas the provisions of Rule 12(1)(a) for the purpose of availment of drawback. This necessarily implies that whereas the Commissioner may grant exemption from observing any of the provisions of Rule 12(1)(a) of ibid rules for the purpose of

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allowing drawback, which includes permitting drawback against a free shipping bill, no provision exists for permitting conversion of free shipping bill into drawback shipping bill. In view of above, it is clarified that there is no need for allowing conversion. However, in terms of the proviso to Rule 12(1)(a) of the Customs and Central Excise Duties Drawback Rules 1995, the Commissioner may examine and consider individual requests on merits and facts in terms of the aforesaid provisions. The aforesaid relaxation shall only apply in respect of drawback claims pertaining to All Industry Rates of drawback and it would not apply to brand rate of duty drawback, where rate is claimed in terms of Rule 6 or Rule 7 of the Customs & Central Excise Duties Drawback Rules.

3.2. As regards permitting conversion of free shipping bills into Advance Licence/DEPB/DFRC shipping bills is concerned, it is true over a period of time, with liberalization having been ushered in the Customs administration, clearance of goods is being permitted mostly on the basis of self-declaration made by the exporters on the shipping bills. Such self-assessment scheme necessarily casts the responsibility on the exporter to make up his mind at the time of filing shipping bills as to which export promotion incentive he likes to avail. With the introduction of the system of on-line assessment, such request for conversion at a later date creates difficulties and it is not advisable to encourage such conversion. It is, therefore, clarified that conversion of free shipping bills into Advance Licence/DEPB/DFRC shipping bills should not be allowed. As regards permitting conversion of shipping bills from one export promotion scheme to another is concerned, it is clarified that such conversion should only be allowed where the benefit of an export promotion scheme claimed by the exporter has been denied by DGFT/MOC or Customs due to any dispute. Such conversion may be permitted on merits by the Commissioner on case to case basis subject to the following conditions:

a. The request for conversion is made by the exporter within one month of the denial/rejection of the benefit claimed.

b. On the basis of available export documents etc., the fact of use of inputs is satisfactorily proved in the resultant export product.

c. The examination report and other endorsements made on the shipping bill/export documents prove the fact of export and the export product is clearly covered under relevant SION and DEPB Schedule as the case may be.

d. On the basis of S/Bill/export documents the exporter is

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fulfilling all conditions of the Export Promotion Scheme into which he is seeking conversion.

e. The exporter has not availed benefit of the export promotion Scheme under which the goods were exported and no fraud/misdeclaration/manipulation/ investigation is initiated against him in respect of such exports.

4. This Circular supersedes earlier DOR Circular Nos.6/2003-Cus. dated 28.1.2003 and 40/2003-Cus. dated 12.5.2003 and also all other DOR Circulars issued in the past on this issue.... "

5. In effect, the above-said Circular makes it clear that the conversion of Free Shipping Bill into Drawback Shipping Bill should not be permitted, however, power could be given to the Commissioner to grant permission on merits and on case to case basis subject to certain conditions.

6. In the present case, it appears that the Department's contention is that the specific direction given by the Tribunal for conversion of free shipping bill into Drawback shipping bill is not in consonance with the above-said Circular and Rule 12 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995. To that extent, the plea of the Department appears to be justified.

7. When a specific direction is issued by the Department of Revenue, Drawback Section as to how free shipping bills should be treated for the purpose of drawback, it is incumbent that the said procedure should be followed.

8. In view of the above-said position pointed out by the learned Standing Counsel appearing for the Revenue, the question of law that has been framed by this Court has to be re-framed. Accordingly, the substantial question has been re-framed as follows:

"Whether the Tribunal was justified in directing the Commissioner to allow the conversion of free shipping bills into Drawback shipping bills without taking taking into consideration the provisions of Rule 12(a) of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 and Circular No.4 of 2004 dated 16.1.2004."

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9. In the light of the above discussion, the order of the Tribunal remanding the matter to the Commissioner directing conversion of free shipping bill into drawback shipping bill without giving the Commissioner the power to examine the issue would not be justified. However, since the Tribunal remanded the matter to the Commissioner, on remand, the jurisdictional Commissioner is empowered to consider the claim for drawback in accordance with Circular No.4 of 2004 dated 16.1.2004.

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In the result, this Civil Miscellaneous Appeal stands disposed of. No costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

1. The Customs, Excise & Service Tax Appellate Tribunal
   South Zonal Bench, 1st Floor, Shastri Bhavan Annexe
   26, Haddows Road, Chennai 600 006.

2. The Commissioner of Customs(Export),
   Custom House, No.60, Rajaji Salai,
   Chennai - 1.

+1cc to Mr.C.Mani Shankar, Advocate, S.R.No.15922
+1cc to Mr.J.Chandrasekaran, Advocate, S.R.No.15758

C.M.A. No.3652 of 2011

RJ(CO)
CA(15/04/2015)

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