

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 227 OF 2009

Anandeya Zinc Oxides Pvt. Ltd.,
a Company incorporated under the
Companies Act, 1956, having office at
Plot no. 23, GDDIDC, Phase III-A,
Sancolate Industrial Estate, Zuarinagar,
Goa 403 726.

... Petitioners

V e r s u s

1. The Union of India through
The Secretary, Ministry of Finance,
North Block,
New Delhi 110 001.
2. The Joint Secretary,
Government of India
Ministry of Finance
Department of Revenue,
14, Hudco Vishala Bldg., B Wing,
6th Floor, Bhikaji Cama Place,
New Delhi – 110 066
3. The Commissioner (Appeals)
Central Excise and of Customs
ICE House, EDC Complex, Patto
Plaza, Panaji, Goa.
4. The Commissioner of Central Excise
and Customs, ICE House, EDC,
Complex, Panaji (Goa)
5. The Deputy Commissioner of
Customs (Appraising), Customs
House, Marmagoa, Goa, 403 803.

... Respondents

Mr. S. M. Singbal, Advocate for the Petitioner.

Mr. C. A. Ferreira, Advocate for the Respondents.

Coram :-

F. M. REIS,
K. L. WADANE, JJ.

Date :

2nd February, 2016

JUDGMENT (Per F. M. Reis, J.)

Heard Shri S. M. Singbal, learned Counsel appearing for the Petitioner and Shri Ferreira, learned Counsel appearing for the Respondents.

2. The above Petition, inter alia, prays for a writ to quash and set aside the Order dated 29.01.2009, passe by the Joint Secretary to the Government of India, the Respondent no. 2 herein.

3. Briefly, the facts of the case as contended by the Petitioner are that the Petitioners are 100% EOU and are engaged, inter alia, in the manufacturer of zinc oxide which is mainly used in the tyre and paint industry and for that purpose, they have a factory at Plot no. 23, GDDIDC, Phase-III-A, Sancoale Industrial Estate, Zuarinagar, Goa. It is further their case that zinc oxide is covered under serial no. 28.06 of the draw back schedule notified under Section 75 of the Customs Act, 1962 read with Customs and Central Excise Duties Drawback Rules, 1995. The rate of drawback is notified under Notification no. 26/2003-Cus (NT) dated 01.04.2005 under All Industry Rate. As per the said Notification, All Industry Rate of Drawback admissible against export of various products indicate that the type of allocation of duty namely Customs Duty alone or both the duties are qualified for such Drawback. The Notification also specified separate rates when Cenvat is availed and when Cenvat is not availed. It is further their contention that when Cenvat is availed, only Customs Portion of drawback rate is admissible. The Petitioner, accordingly filed three Shipping Bills dated 14.08.2004, 21.08.2004 and

03.09.2004 for export of zinc oxide under claim for drawback under Sr. no. 28.06 of the Drawback Schedule. The goods were duly examined and passed for export by the Customs and were exported and the sale proceeds in Foreign Exchange was received through the negotiating Banks. The goods exported were manufactured by using the inputs received indigenously as per rule 19(2) of the Central Excise Rules 2002 and no rebate was claimed against any inputs or the final products exported as the export was under Bond. It is further their case that availing of Cenvat also would not have any adverse effect on drawback rate since the drawback entitlement against export of zinc oxide is "All Customs". But, however, no Cenvat or rebate against Rule 18 of CER 2002 was claimed and the Petitioners claimed the drawback as permitted by Notification dated 01.04.2003. The Customs Authorities, according to the Petitioners, raised objections with regard to the admissibility of the drawback on export of zinc oxide made by the Petitioners and therefore the Petitioners had submitted a detailed reply with regard to the objections and also explained in detail during the personal hearing about the eligibility of the Petitioner for such drawback. In response to follow up for the sanction of the Petitioner drawback claim, the office of the Deputy Commissioner of Customs wrote a letter dated 25.11.2004 informing the Petitioner that the Petitioners' drawback claim cannot be considered because of General Note 2(f) of the Notification no. 26/2003-Cus(N.T.). The Petitioners by letter dated 10.12.2004, had thereafter contended that Rule 19(2) has been issued under Central Excise Rules of 2002 and explained about movement of goods without payment of Central Excise Duty but, what the Petitioners are claiming as drawbacks of the Customs component. It was further contended that the restrictions imposed, if any, in Notification dated 01.04.2003 is about the applicability of the specific rate in goods

of specified rate comprising of Customs as well as Central Excise Duties. The Petitioner contended that they were constantly reminding the Customs Authority with regard to their claim under the said drawback scheme. By letter dated 10.11.2005, the office of the Commissioner of Customs, returned to the Petitioner their drawback claims requiring the Petitioners to submit documents as mentioned therein. The Petitioners by their letter dated 08.12.2005, submitted a detailed reply to the said letter, inter alia, contending that their claim for drawback is not under the Brand Rate but under the All India Rate of drawback. The Petitioners by letter dated 08.12.2005 and 22.12.2005, again reminded the Respondent no. 5 to sanction the said drawback. But, however, by letter dated 16.02.2006, the Respondent no. 5 informed the Petitioners that since goods were exported without payment of duty, draw back cannot be sanctioned in view of Para 2(f) of the proviso to Notification no. 26/2003-Cus (NT) dated 01.04.2003. The Petitioner thereafter contended by another letter addressed to Respondent no. 5 that it is duty bound to follow the Board's instructions contained in the Circular dated 20.04.2001 and 21.03.2005 and requested Respondent no. 5 to sanction and disburse the long outstanding legitimate claim. But, however, without issuing a show cause notice, the Petitioners were granted a personal hearing on 08.03.2006 which was attended by the representative of the Petitioner. The Deputy Commissioner of Customs by his Order in original dated 02.05.2006, rejected the Petitioners' claim for draw back of Rs.14,07,860/- in respect of the aforesaid three shipping bills holding that the Petitioners' claim for all Industry rate of Drawback is inadmissible in view of the specific inadmissibility proviso 2(f) to the Notification dated 01.04.2003. The Respondent no. 5 did not make any reference to the Board's two circulars dated 21.03.2005. The Respondent no. 5 took the same view as taken in

his letter dated 16.02.2006 and rejected the draw back claim filed by the Petitioners. It was further held by the Respondent no. 5 that as per the Notification dated 01.04.2003 vide proviso 2(f), the All Industry Rate of drawback is not applicable to export of a commodity or product if such commodity or product is manufactured or exported in terms of Rule 19(2) of Central Excise Rules 2002. It was further held that All Industry Rate under the Drawback Schedule Serial no. 28.06 for said products in terms of Rule 19(2) of Central Excise Rules 2002, was not available though all Customs is not availed in view of the specific proviso of non-applicability of AIR of Drawback. It was further held that the question of going into the individual allocation i.e. whether Customs or Central Excise component does not arise at all. It was also held that there was no mention in any of the Circular/Notifications cited by the Petitioners that under the given circumstances, Customs allocation of All Industry Rate of drawback can be paid. It was further held that the reference to the Circular dated 06.10.2003 which refers to proviso 2(e) is about rebate under Rule 18 of the Central Excise Rules and is not applicable in the goods where the input for manufacturer of export products are procured duty free and where Rule 19(2) of the Central Excise Rules which is specifically an exclusive proviso to nonavailability of All Industry Rates. It was further held that the reference to Notification dated 16.10.2000 which refers to Rule 57(f)(14) is completely out of context and is not applicable as the said Rules are not in vogue and the proviso 2(b) shall prevail. Being aggrieved by the said Order, the Petitioners preferred an Appeal under Section 128 of the Act before the Commissioner of Customs (Appeals). The Commissioner (Appeals) Central Excise & Customs by Order dated 15.09.2006, rejected the Appeal filed by the Petitioner by upholding the Order in Original dated 02.05.2006 passed by the Respondent no.

5. By the said Order, the Respondent no. 3, inter alia, held that since the Petitioners have availed the benefit of Rule 19 of the Central Excise Rule 2002, they are not entitled for drawback rates as specified in the Table. The Petitioners thereafter filed a Revision Petition against the said Order under Section 129DD of the Act before the Joint Secretary to Government of India. The Respondent no. 2, by its Order dated 29.01.2009, rejected the Application filed by the Petitioners, inter alia, on the ground that the plea of the Petitioners that actual duty suffered and actual consumption pattern are not to be looked into and it was also held that the Petitioners are not entitled for Customs allocation in drawback schedule by way of deemed provisions or otherwise, by circumventing the fact of back door entry into drawback schedule which is not available in the case. It was further held that the explanation and consequences in the Order in original and the order in appeal are precisely legal and proper when seen through the principles of "Interpretations of statutes" as laid down by the Apex Court in a number of Judgments. It was further held that the claim of Petitioners of Customs portion of All Industry Rate of drawback is not legal and proper. It was further held that the proviso 2(f) of the Notification implies that any drawback is not available to the Petitioners, who have availed of Rule 19(2) of the Central Excise Rules, 2002.

4. The Respondents have re-iterated the findings of the authorities and pointed out that there is no infirmity committed by the authority whilst passing the impugned Order as such Orders were based upon due instructions of the relevant provisions of law. It was further contended that on perusal of the notification dated 01.04.2003, it clearly reveals that duty drawback cannot be availed, inter alia, if such commodity or product is manufactured or exported in terms of Sub-Rule (2)

9of Rule 19 of the Central Excise Rules of 2002. It was further pointed out that the Petitioners did not dispute that the goods exported were manufactured by using the input received indigenously as per Rule 19(2) of the Central Excise Rules 2002 as can be seen from para 11 of the Petition. It was further pointed out that the Petitioners cannot seek recourse to the Circulars dated 20.04.2011 since the same did not deal with the case under Rule 19(2) of th Central Excise 2002 in rspect of which specific provisions have been made in the Notification dated 01.04.2003. It was further pointed out that the Notification specifically provides for the exclusion of goods manufactures and exported in terms of sub Rule (2) of rule 19 of the Central Excise Rules, 2002. It was further pointed out that the Petition be rejected.

5. An affidavit in rejoinder was also filed by the Petitioners, inter alia, disputing the contentions of the Petitioners.

6. We have heard the learned Counsel appearing for the Petitioners as well as the learned Counsel appearing for the Respondents.

7. The main contention of the Petitioner is that the Petitioner is entitled for Customs drawback as, according to them, merely because they are not entitled to claim drawback on account of excise, it would not by itself disentitle the Petitioners from claiming drawback towards Customs duty. Shri Singbal, learned Counsel appearing for the Petitioners, has strenuously taken us through all the relevant provisions of the Rules and pointed out that the authorities below have misconstrued the Rues and have erroneously come to the conclusion that the rejection of the claim of the Petitioner for such drawback is justified. Learned

Counsel further pointed out that the intention for introducing the drawback provisions is to achieve the object of the Government that no exported goods should suffer tax and it had always been the intention of the Government not to levy any tax or duty on the goods exported out of India. It was further pointed out that the contention of the Respondents that the Petitioners' claim deserves to be rejected on the ground that the proviso 2(f) of the Notification implies that drawback is not available to the Petitioners which has availed all benefit of Rule 19(2) of the Central Excise Rules of 2002 is totally misconceived. It is further pointed out that the statutory basis of fixing all Industry rates of drawback as contained in Section 75 of the Customs Act of 1962 of Sub-Section (1)A of the said Section provides that where it appears to the Central Government that the quantity of particular material imported into India is more than the total quantity of like material that has been used in the goods manufactured or processed or on which an operation has been carried out in India and exported outside India, the Central Government may declare that so much of material as is contained in the goods exported shall be deemed to be imported material for the purpose of granting drawbacks. It is further submitted by Mr. Singbal learned Counsel appearing for the Petitioner, that in Section 75 of the Customs, Central Excise Duties and Service Tax Drawback Rules of 1995, are to be neutralized in respect of goods manufactured for export and exported out of India. It is further submitted that the said goods provide for fixation of Brand Rate and also determination of All Industry Rate of Drawback on the specified products and, as such, according to him, Joint Circular dated 06.10.2003 clearly provides that in order to dispel such doubts it is clarified that duty drawback scheme is aimed at neutralizing the input stage duties of Customs and Central Excise. Learned Counsel further submitted that if the drawback rate is comprised

of both Customs and Excise Duties and the portion of excise duty is obtained as rebate, refund or as Cenvat credit, in such cases, the Exporters are eligible only for customs duty component of drawback and not entitled for Central Excise portion of the drawback rate. Learned Counsel has thereafter taken us through the Circulars and the impugned Orders to point out that the impugned Orders deserves to be quashed and set aside and the claim of the said drawback has to be included.

8. On the other hand, Shri C. A. Ferreira, learned Counsel appearing for the Respondents, has supported the impugned Order. Learned Counsel has taken us through the relevant provisions and Rules that it is well settled that fiscal and taxation laws has to be strictly construed. It is further submitted that on perusal of the Petition, it is clearly admitted that the Petitioners have availed of the rebate towards the Central Excise and this itself disentitles the Petitioners from claiming any alleged drawback for Customs Duty. Learned Counsel further pointed out that the question of invoking the provisions of Section 75 of the said Act would not be applicable in the present case. Learned Counsel also submitted that the Petitioners have not paid any amount towards Customs Duty. Learned Counsel as such submits that there is no infirmity in the impugned Order and, consequently, the Petition deserves to be rejected.

9. We have considered the submissions of the learned Counsel and we have also gone through the records. The facts of the case suggests that the subject matter of the present case is with regard to three shipping bills dated 14.08.2004, 21.08.2004 and 03.09.2004 for export of zinc oxide. The Petitioners had manufactured such goods by availing the benefit of Rule 19(2) of the Central

Excise Rules of 2002. The Petitioners have claimed such drawback towards the Customs allocation contained in the Notification dated 01.04.2003. On perusal of the Order passed by the Deputy Commissioner of Customs dated 02.05.2006, we find that it was held therein that the Petitioner was not entitled to the drawback sought in respect of the three shipping bills in terms of the Notification dated 01.04.2003 and the proviso to Rule 2(f). All Industry Rates of drawback is not applicable to exporters of the Commodity or products manufactured in terms of sub-Rule (2) of Rule 19 of the Central Excise Rules 2002. It was further held that the Circular dated 06.10.2003 was not applicable to the facts of the present case. The Order was thereafter challenged by the Petitioners before the Appellate Authority. The said Appellate Authority noted that the records revealed upon scrutiny that in respect of all the claims put forward by the Petitioners, the finished goods products were removed by the producer of the Company i.e. the same were removed under bond without payment of duties and, consequently, the Department was of the opinion that in view of the removal of the goods under bond without payment of duties, the goods were covered under the provisions of Rule 2(f) of the Notification dated 01.04.2003 and, therefore, All Industry Rates under Drawback Scheme is not admissible. The learned Appellate Authority further noted that in terms of the proviso to the Notification dated 01.04.2003, it clearly points out that such drawback is not admissible in cases in which the Commodity is manufactured or exported in terms of sub Rule (2) of Rule 19 of the Central Excise Rules of 2002. It was further noted that in terms of the said Notification dated 01.04.2003, as per proviso 2(f) All Industry Rates of drawbacks are not applicable to exports if such commodity is manufactured or exported in terms of Sub Rule (2) of Rule 19 of the Central Excise Rules 2002. It was further held that the claim of neutralization of the

Customs allocation is not backed by any of the Notification or Rules and, as such, the same is not tenable. Accordingly, the Appeal came to be rejected. On perusal of the Order passed by the Revision Authority, we find that the view taken by the authorities below, came to be upheld as noted at paras 6, 8 and 11 thus :

“6. Govt. notes that in this case the applicant have availed facility under Rule 19(2) of the Central Excise Rules, 2002 and thereafter the All Industry Rate Drawback under S S No. 28.06 is claimed and admissibility of which is to be decided in the light of prohibition under Clause 2(f) of the Notification No. 26/2003-Cus(NT) dated 01.04.2003. The applicant vide their submissions as interpretation of various Notifications/Circulars (Supra) which are both erstwhile and prospective in age (dates) has concluded the same in their favor whereas the adjudicating authority and the Commissioner (Appeals) have gone into direct application of simple and plain meaning of the wordings of statute of All Industry Rate Drawback schedule along with clause 2(f) of the Notification no. 26/2033-Cus(NT) dated 01.04.2003.

7. ...

8. Govt. notes in this case that the respondent are claiming two different Schemes i.e. procedure under Rule 19(2) of the Central Excise Rules, 2002 for (procurement/utilization of inputs) in manufacturing of the product/commodity and All Industry Rate DBK Scheme for claiming Export benefits of Customs portion of that very product/commodity. Such specific provisions are nowhere provided in any of the statutes under

reference. The plea of the respondents that actual duty suffered and actual consumption patterns are not to be looked into and they are entitled for Customs allocation in DBK schedule by way of deemed provisions or otherwise is circumventing the fact for back door entry into DBK Scheme which is (straightway) not available in this case.

9. ...

10. ...

11. The Govt. is therefore of the considered opinion in this case that simple and plain reading and application of proviso 2(f) of the Notification No. 26/2003, implies that any Drawback is not available to the applicant, who has availed Rule 19(2) of the Central Excise Rules, 2002. Thus the Govt. do not find any reasons to interfere with the Order in original of lower authority and Order in Appeal under reference.”

10. Rule 19(2) of the Central Excise Rules 2002 reads thus :

“Rule 19. Export without payment of duty. - (1) Any excisable goods may be exported without payment of duty from a factory of the producer or the manufacturer or the warehouse or any other premises, as may be approved by the Commissioner.

(2) Any material may be removed without payment of duty from a factory of the producer or the manufacturer or the warehouse or any other premises, for use in the manufacture or processing of goods which are exported, as may be approved by the Commissioner.”

11. The basic contention of the Petitioner is that the Petitioner ought to have been granted the Duty Drawback in respect of Customs allocation of duty

though no such claim is made against excise. In support of such contention, the Petitioners have also taken us through the Board Circulars to point out that it clearly reveals that drawbacks claimed by the Petitioners towards Customs Duty cannot be refused. Para 11 of the Petition reads thus :

“11. The goods exported were manufactured by using the inputs received indigenously as per Rule 19(2) of Central Excise Rules 2002 and no rebate was claimed against any inputs or the final products exported as the export was under Bond. Availing of Cenvat also would not have any adverse effect on drawback rate since the drawback entitlement against export of zinc oxide is “All Customs”. However, no CENVAT or rebate against Rule 18 of CER 2002 was claimed and the Appellants claimed the drawback as permitted by Notification No. 26/2003 Cus(NT) dated 01.02.2003.”

12. On going through the Notification no. 26/2003, relied upon by the Petitioner, it clearly shows that such Notification has been issued in exercise of powers conferred by Rule 3 read with Rule 4 of the Customs and Central Excise Duties Drawback Rules 1995. In General Notes 2, it is specifically provides thus :

“2. The rates of drawback specified in the said Table shall not be applicable to export of a commodity or product if such commodity or product is-

(a) manufactured partly or wholly in a warehouse under section 65 of the Customs Act, 1962 (52 of 1962),

(b) manufactured or exported in discharge

of export obligation against an Advance Licence issued under the Duty Exemption Scheme of the relevant Export and Import Policy :

Provided that where exports are made against Advance Licences issued on or after 1st April, 1997, in discharge of export obligations in terms of notification no. 31/97-Customs, dated the 1st April, 1997, or against Duty Free Replenishment Certificate Licence issued in terms of notification no. 48/2000-Customs, dated the 25th April 2000, or against Duty Free Replenishment Certificate Licence issued in terms of notification no. 46/2002-Customs, dated the 22nd April, 2002, drawback at the rate equivalent to Central Excise allocation of rate of drawback specified in the said Table shall be admissible subject to the conditions specified therein:

(c) manufactured or exported by a unit licensed as hundred per cent. Export oriented unit in terms of the provisions of the relevant Import and Export Policy.

(d) manufactured or exported by any of the units situated in free trade zones or export processing zones or special economic zone;

(e) manufactured or exported by availing the rebate of duty paid on materials used in the manufacture or processing of such commodity or product in terms of Rule 18 of the Central Excise Rules, 2002;

(f) manufactured or exported in terms of sub-rule (2) of Rule 19 of the Central Excise Rules, 2002;

(g) manufactured or exported availing of the facility under the Duty Entitlement Pass Book Scheme as contained in paragraph 7.14, read with paragraph 7.17 of the Export and Import Policy 1997-2002 and manufactured or exported availing of

the facility under the Duty Entitlement Pass Book Scheme as contained in paragraph 4.3 of the Export and Import Policy 2002-2007, notified under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992), read with paragraph 4.37 of the Hand Book of Procedures (Volume 1) issued in pursuance of the provisions of paragraph 2.4 of the said policy and that shall remain in force until 31st March, 2007.”

13. On going through the said relevant clauses, we find that the view taken by the authorities below that the Petitioners cannot avail of the Customs drawback, cannot be faulted. There is no scope of bifurcating drawback towards customs and excise allocation. On the basis of the admitted facts by the Petitioners themselves that they had manufactured their goods and exported them in terms of sub-Rule (2) of Rule 19 of the Central and Excise Rules 2002, the question of admitting the claim of the Petitioners towards customs allocation drawback is not at all justified. The said Notification clearly provides an exclusion of the applicability of the entire Notification in specific situations which have been specified therein. As such, nothing further can be read into such Notification as contended by Mr. Singbal, learned Counsel appearing for the Petitioners. It is well settled that the taxation and fiscal statutes have to be strictly construed. The Courts cannot read words into such proviso. The exercise submitted by Mr. Singbal, learned Counsel appearing for the Petitioners, to bifurcate the non-applicability of the said Notification into the claims towards customs allocation, cannot be accepted. This exercise would be totally in contravention of the very Notification no. 26/2003. Para 3 of the Circular dated 06.10.2003 relied upon by Mr. Singbal, learned Counsel appearing for the Petitioners, cannot be read in isolation

when Para 4 of the Circular clearly provides that while allowing drawbacks, it should be ensured that the exporters do not avail all the facility under Rule 19(2) of the Central Excise Rules of 2002. Once it is not disputed that the Petitioners have availed of the benefits under Rule 19(2) of the said Central and Excise Rules of 2002, the question of availing any drawbacks in terms of the subject Notification would not arise at all. The reliance of Mr. Singbal, learned Counsel appearing for the Petitioners in the Judgment of the Apex Court reported in **1988 LawSuit (SC) 666** in the case of **Collector of Central Excise, Bombay-L vs. Parle Exports (P) Ltd.** Would not at all be applicable in the present case as the Petitioners come within the exception as noted herein above. The Judgment of the Tribunal at Delhi reported in **2006 (109) ECC 202 Tri Delhi** in the case of **Cce vs. Meghdoot Pistons (P) Ltd.**, would also not be applicable to the facts of the present case.

14. The Petitioners admittedly availed of the said benefits and removed exported excisable goods without payment of duty from the factory and, as such, the question of availing of any drawback in terms of the said Scheme is not at all justified. On perusal of the Orders impugned of the authorities below, we find no infirmity therein. There is no merit in the above Petition, which stands accordingly rejected.

K. L. WADANE, J.

F. M. REIS, J.

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