IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 06.05.2016

\+ **W.P.(C) 5118/2003**

M.F. RINGS & BEARING RACES LTD. ..... Petitioner
Through: Mr. Kamal Mehta and Mr Sudeep Singh, Advocates.

versus

COMMISSIONER OF CUSTOMS & ANR. ..... Respondents
Through: Mr Kamal Nijhawan, Senior Standing Counsel.
Mr Bhagvan Swarup Shukla, CGSC with Mr Rachit Goel, Advocate for UOI.

WITH

\+ **W.P.(C) 5277/2003**

M.F. RINGS & BEARING RACES LTD. ..... Petitioner
Through: Mr. Kamal Mehta and Mr Sudeep Singh, Advocates.

versus

UNION OF INDIA & ORS. ..... Respondents
Through: Mr Kamal Nijhawan, Senior Standing Counsel.
Mr Bhagvan Swarup Shukla, CGSC with Mr Rachit Goel, Advocate for UOI.

WITH

\+ **W.P.(C) 5394/2003**

R.N. GUPTA & CO. LTD. ..... Petitioner
Through: Mr. P. Devnath with Mr Abhishek Anand, Mr. Vivek Sharma and Mr Yogendra Aldak, Advocates.

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Mr. Rahul Kaushik, Senior Standing Counsel for CBEC with Mr Bhavishya Sharma, Advocate.
Mr. Bhagvan Swarup Shukla, CGSC with Mr. Rachit Goel, Advocate for UOI.

WITH

\+ **W.P.(C) 5403/2003**

UMA SHANKAR KHANDELWAL & CO. ..... Petitioner

Through: Mr. P. Devnath with Mr Abhishek Anand, Mr. Vivek Sharma and Mr Yogendra Aldak, Advocates.

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Mr. Satish kumar, senior standing counsel for R-2 & R-3.
Mr. Bhagvan Swarup Shukla, CGSC with Mr. Rachit Goel, Advocate for UOI.

AND

\+ **W.P.(C) 5692/2003**

KUNJ FORGINGS ..... Petitioner

Through: Mr. P. Devnath with Mr Abhishek Anand, Mr. Vivek Sharma and Mr Yogendra Aldak, Advocates.

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Mr. Kamal Nijhawan, Advocate.

Mr. Bhagvan Swarup Shukla, CGSC with Mr. Rachit Goel, Advocate for UOI.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The controversy involved in the present petitions relates to denial of duty drawback on 'Flanges' manufactured by the Petitioners, by the process of forging, and exported from the country. The Petitioners claim that Flanges manufactured by them and exported during the period 10th December, 2002 to 6th April, 2003 are covered under SS No. 73.29 under Chapter 73 of the Table of Drawback Rates 2002-03 (hereafter 'Drawback Schedule 2002-03') notified by Custom Notification No. 33/2002 (NT) as amended by Notification No. 80/2002 (NT) dated 10th December, 2002 and the Flanges exported by them after 6th April, 2003 till 30th June, 2003 are covered under SS 73.28 of the Table of Drawback Rates 2003-04 (hereafter 'Drawback Schedule 2003-04') as notified by Notification No. 26/2003 (NT). The Respondents contest the claim as according to them, Flanges are manufactured by using low grade steel and are, therefore, not covered under SS No. 73.29 or SS No. 73.28 for the purposes of grant of duty drawback. The Respondents state that the duty drawback rates have been computed on the basis of the data

provided by the Forgings Panel of the Engineering Export Promotion Council (EEPC), which did not contain any data regarding Flanges and, therefore, duty drawback at the rates fixed by the Central Government is not available for export of forged Flanges.

2. In respect of certain shipments, claims made by the Petitioners for duty drawbacks were pending while in certain other cases, claims were sanctioned. Subsequently, show cause notices have been issued calling upon the Petitioners to show cause why their claims should not be rejected and why the drawback claims sanctioned earlier be not recovered. The Petitioners, *inter alia*, impugn the said show cause notices in these petitions.

3. Some of the Petitioners have also impugned a letter dated 8th April, 2003 issued by the Joint Secretary (Drawback), Ministry of Finance, Government of India, clarifying that Flanges are not eligible for duty drawback under SS No. 73.29 and 73.30 of the Drawback Schedule 2002-03 and SS No. 73.28, 73.29 and 73.30 of the Drawback Schedule 2003-04. In W.P.(C) 5277/2003, the Petitioner therein has also impugned the Corrigendum issued by way of a public notice dated 13th May, 2003, *inter alia,* seeking to correct and rectify SS No. 73.28, 73.29, 73.30 and 73.31 of the Drawback Schedule 2003-04. The Petitioner contended that the

said public notice, in fact, seeks to substantially amend those entries; which, according to it, is not permissible as the Drawback Rates have been notified in the Official Gazette in exercise of delegated legislative powers and, thus, cannot be amended by a public notice/circular.

4. For the purposes of addressing the controversy involved in these petitions, certain facts regarding M.F. Rings & Bearing Races Ltd. (the Petitioner in W.P.(C) No.5277/2003 and 5118/2003 and hereafter referred to as MFRBRL) are noticed hereunder.

4.1 MFRBRL is, *inter alia,* engaged in the manufacturing of different types of Steel Forgings under the licence issued by the Department of Industrial Development, Ministry of Industry for manufacture of Forged Steel Flanges, Rings, Discs, Forged Fittings and Bearing Races, etc. MFRBRL states that it manufactures Steel Flanges by the process of Forging and the same entails cutting of Steel, Heating, Punching, Ring-Rolling/Pressing, Forging and Testing. MFRBRL is also registered with the EEPC for export of all types of miscellaneous Forgings, Carbon Steel Forgings/Flanges, Stainless Steel Flanges, Rings, etc., as per International Standards. MFRBRL further states that the Flanges manufactured by it conform to the international standards and specifications as per ASTIM A-105.

4.2 MFRBRL exported Forged Flanges under Shipping Bills dated 28th January, 2003 to 31st March, 2003 in respect of which it claims to be entitled to Duty Drawback of Rs.51,54,890/- under Drawback Schedule 2002-03. MFRBRL has made claims for the aforesaid amount but the same has not been accepted. In addition, MFRBRL had exported Flanges under Shipping Bill Nos.1258707 and 1270730 in respect of which a duty drawback amount of Rs.7,88,956/- was sanctioned. MFRBRL has also exported Flanges under Shipping Bills dated 10th April, 2003 to 16th May, 2003 in respect of which MFRBRL has claimed a sum of Rs.39,17,873/- as duty drawback as per Drawback Schedule 2003-04.

4.3 MFRBRL received a Show Cause Notice dated 4th June, 2003, *inter alia,* calling upon MFRBRL to show cause as to why the duty drawback amount of Rs.51,54,890/- (as claimed by it as per Drawback Schedule 2002-03) not be denied. Further, MFRBRL was also called upon to show cause as to why an amount of Rs.7,93,820/- (subsequently corrected to Rs.7,88,956/-), which was sanctioned earlier be not recovered along with interest.

4.4 MFRBRL was issued another Show Cause Notice dated 22nd July, 2003 referring to the Corrigendum dated 13th May, 2003 issued by the Respondents for rectifying, *inter alia*, SS 73.28, 73.29, 73.30 and 73.31

of Drawback Schedule 2003-04 and calling upon MFRBRL to show cause why the benefit of duty drawback in respect of Shipping Bills for the period 10th April, 2003 to 16th May, 2003 be not denied to it.

4.5 MFRBRL has filed the petition being W.P.(C) No.5118/2003, *inter alia,* impugning the Show Cause Notice dated 4th June, 2003 as well as the action of the Respondents in seeking to denying the benefits of duty drawback in respect of forged Flanges. MFRBRL has also filed another petition, W.P.(C) 5277/2003, impugning the Show Cause Notice dated 22nd July, 2003 and the Corrigendum dated 13th May, 2003 issued by the Respondents to the extent it seeks to rectify SS 73.28, 73.29,73.30 and 73.31 of Drawback Schedule 2003-04.

5. Similarly, Uma Shankar Khandelwal & Co. (the Petitioner in W.P.(C) 5403/2003) impugns the denial of duty drawback of Rs. 2,11,49,807/- in respect of exports made under shipping bills for the period 20th January, 2003 to 4th April, 2003. In W.P.(C) 5394/2003, R.N. Gupta and Co. Ltd. (the Petitioner therein) claims a sum of Rs. 30,38,385/- as duty drawback under SS 73.28 of the Drawback Schedule 2003-04 alongwith interest. In W.P.(C) 5692/2003, M/s Kunj Forgings (the Petitioner therein) claims a sum of Rs. 55,91,260/- as duty drawback for export of product covered under SS 73.29 of the Drawback Schedule

2002-03. The Petitioners in W.P.(C) 5692/2003, W.P.(C) 5394/2003 and W.P.(C) 5403/2002 also impugn the letter dated 8th April, 2003 issued by Joint Secretary (Drawback), Ministry of Finance whereby it is clarified that Flanges are not eligible for duty drawback at the rates specified under Drawback Schedules.

6. The learned counsel appearing for Respondents submitted that the Petitioners were not entitled to duty drawback for export of Flanges because Flanges are manufactured by using low grade steel and the relevant data pertaining to the said product was not considered while fixing the All Industry Rates of duty drawbacks under the Drawback Schedules notified by the Central Government. The learned counsel referred to the Customs and Central Excise Duties Drawback Rules, 1995 and drew the attention of this Court to Sub-rule (2) of Rule 3 which, *inter alia,* postulates that the Central Government shall have regard to the average quantities, value and the duties suffered on the material used for manufacture of the product eligible for duty drawback. They emphasised that since duty relating to Flanges had not been considered by the Central Government while fixing All Industry Rates of duty drawback, Flanges would not be covered under the relevant entries (73.28 and/or 73.29) of the Drawback Schedules.

7. Both, Mr Kamal Nijhawan and Mr Satish Kumar, learned Senior Standing counsels strongly relied upon the decision of the Gujarat High Court in ***Micro Forge (India) Ltd. v. Union of India***: **2014 (307) E.L.T. 652 (Guj.)** and contended that the issues agitated by the Petitioners were covered by the said decision.

8. The learned counsel for the Respondents also supported the clarification issued by the Joint Secretary (Drawback), Ministry of Finance, by his letter dated 8th April, 2003 wherein it was clarified that the data relating to Flanges was not provided by the Forgings panel of EEPC and, therefore, it was not possible for Central Government to determine the rate of duty drawback as applicable to Flanges; consequently SS Nos. 73.29 and 73.30 of Drawback Schedule 2002-03 and SS Nos. 73.28, 73.29 and 73.30 of Drawback Schedule 2003-04 were not representative of the product Flanges. And, therefore, no duty drawback was available on export of Flanges.

9. The principal question that arises for consideration in these petitions is whether the export of Flanges manufactured by the process of Forging are eligible for duty drawback at All Industry Rates under SS 73.29 of the Drawback Schedule 2002-03 and/or SS 73.28 of the

Drawback Schedule 2003-04, as notified under the Customs and Central Excise Duties Drawback Rules, 1995.

10. Flanges are defined as “a projecting edge or rib of a metal wheel or beam used for strengthening, guiding, attaching or securing”. The Petitioners state that Flanges are shaped as metal rings, which are used as sleeves to connect different sections of pipes. It is not in dispute that Flanges are manufactured from Carbon Steel by the process of forging.

11. Duty Drawback is an export incentive which entails providing rebate on the exports of specified products. The purpose of Duty Drawback is to neutralise the impact of the duties on imports used for manufacturing export products in order to ensure that products manufactured in India are competitive in the international market.

12. The statutory sanction for granting Duty Drawback is provided under Section 75 of the Customs Act, 1962 (hereafter the ‘Act’). Section 75 of the Act and Section 37 of the Central Excise Act, 1944 provides that where it appears to the Central Government that in respect of any goods or any class or description of goods manufactured in India and which have been entered for export, a drawback should be allowed of duties of customs chargeable on any imported material used in

manufacture or processing of such goods, the Central Government may by notification in the Official Gazette direct that Duty Drawback be allowed subject to the Rules made thereunder. The relevant extract of Section 75 of the Act is reproduced as under:

> **"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 be deemed never to have been allowed and the Central Government may, by rules made under subsection (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;"

13. In exercise of the powers conferred under Section 75(2) of the Act and Section 37 of the Central Excise Act, 1944, the Central Government had framed the Customs and Central Excise Duties Drawback Rules, 1971 which were subsequently replaced by the Customs and Central Excise Duties Drawback Rules, 1995 (hereafter 'the Rules').

14. Rule 3 of the Rules, *inter alia,* provides that the drawback may be allowed on the export of goods on such amount or at such rate as may be determined by the Central Government. Sub- Rule (2) of Rule 3 of the

Rules indicates the relevant data required to be considered by the Central Government in determining the amount or the rates of the duty drawback. Rule 3(2) of the Rules reads as under:

> "(2) In determining the amount or rate of drawback under this rule, the Central Government shall have regard to:-
>
> (a) the average quantity or value of each class or description of the materials from which a particular class of goods is ordinarily produced or manufactured in India;
>
> (b) the average quantity or value of the imported materials or excisable materials used for production or manufacture in India of a particular class of goods.
>
> (c) the average amount of duties paid on imported materials or excisable materials used in the manufacture of semis, components and intermediate products which are used in the manufacture of goods;
>
> (d) the average amount of duties paid on materials wasted in the process of manufacture and catalytic agents;
>
> Provided that if any such waste or catalytic agent is re-used in any process of manufacture or is sold, the average amount of duties on the waste or catalytic agent re-used or sold shall also be deducted;
>
> (e) the average amount of duties paid on imported materials or excisable materials used for containing or packing the export goods;
>
> (f) any other information which the Central Government may consider relevant or useful for the purpose."

15. In exercise of the powers conferred under Rules 3 and 4 of the Rules, the Central Government notified the Drawback Schedule 2002-2003 vide Notification No. 33/2002 (NT). Chapter 73 of the said Schedule concerns articles of iron and steel. SS 73.29 of the Drawback Schedule 2002-03 as effective from 1st June, 2002 is extracted below:

Serial/ Sub-Serial No.	Description of Goods	Rate of Drawback	Allocation	
			Customs	Excise
73.29	Non-alloy/Carbon Steel Forgings (rough) / unmachined/semifinished / machined / identifiable ready to use machined parts / components manufactured through forging process, when CENVAT facility has not been availed, subject to the condition that the exporters shall give self-certification authenticated by the Chartered Engineer that only duty paid imported steel has been used in the manufacture of these goods.	Rs.19.00 (Rupees nineteen only) per kg. of steel content	12.00	7.00

16. The above entry, SS 73.29, was subsequently substituted by Notification No. 80/2002 (N.T.) w.e.f. 10th December, 2002, which reads as under:

Serial/ Sub-Serial No.	Description of Goods	Rate of Drawback	Allocation	
			Customs	Excise
73.29	Non-alloy/Carbon Steel Forgings (rough) / unmachined/semifinished / machined / identifiable ready to use machined parts / components manufactured through forging process, when CENVAT facility has not been availed.	Rs.19.00 (Rupees nineteen only) per kg. of steel content	12.00	7.00

17. The Central Government issued a notification on 1st April, 2003 being Notification No. 26/2003-CUSTOMS (N.T.), specifying All Industry Rates of duty drawback in supersession of the drawback rates specified earlier under Notification No. 33/2002 - CUSTOMS (N.T.). The entries SS Nos. 73.28, 73.29, 73.30 and 73.31 of the Drawback Schedule 2003-04 as notified under the notification dated 1st April, 2003 reads as under:

Serial/	Description of Goods	Rate of	Allocation

Sub-Serial No.		Drawback		
			Customs	Excise
73.28	Non-alloy/ Carbon Steel Forgings (rough)/ unmachined/ semi-finished/machined/ identifiable ready-to-use machined parts/ components, manufactured through forging process, when CENVAT facility has not been availed.	Rs.17.00 (Rs. seventeen only) per kg. of steel content.	10.70	6.30
73.29	Non-alloy/ Carbon Steel Forgings (rough)/ unmachined/ semi-finished/machined/ identifiable ready-to-use machined parts/ components, manufactured through forging process, when CENVAT facility has been availed.	Rs.10.70 (Rs. ten and paise seventy only) per kg. of steel content.	All Customs	
73.30	Alloy Steel Forgings (rough) / unmachined/ semi-finished/ machined/ identifiable ready-to-use machined parts/ components, manufactured through forging process, when CENVAT facility has not been availed.	Rs.26.80 (Rs. twenty-six and paise eighty only) per kg. of steel content.	17.40	9.40
73.31	Alloy Steel Forgings (rough) / unmachined/semi-finished/ machined/ identifiable ready-to-use machined parts/components, manufactured through forging process, when CENVAT facility has been availed.	Rs.17.40 (Rs. seventeen and paise forty only) per kg. of steel content.	All Customs	

18. Therefore, the Respondents then issued a corrigendum by way of a public notice on 13th May, 2003, *inter alia,* rectifying entries SS 73.28, 73.29, 73.30 and 73.31 of the Drawback Schedule 2003-04. The relevant extract of the said public notice reads as under:-

> "10. At page 65, in Chapter 73, in column 3, against Serial/Sub-serial No.73.28, the word, ".... manufactured ...", the words, "...out of duty paid imported steel...", shall be inserted.
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> 11. At page 65, in Chapter 73, in column 3, against Serial/Sub-serial No.73.29, after the word, ".... manufactured ...", the words, "...out of duty paid imported steel...", shall be inserted.
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> 12. At page 65, in Chapter 73, in column 3, against Serial/Sub-serial No.73.30, after the word, ".... manufactured ...", the words, "...out of duty paid imported steel...", shall be inserted.
>
> 13. At page 65, in Chapter 73, in column 3, against Serial/Sub-serial No.73.31, after the word, ".... manufactured ...", the words, "...out of duty paid imported steel...", shall be inserted."

19. The Central Government issued a Notification dated 25th June, 2003 (being Notification No.42/2003(NT), in exercise of its powers conferred by Rule 3 read with Rule 4 of the Rules deleting SS Nos. 73.28, 73.29, 73.30 and 73.31 from the Drawback Schedule 2003-04 w.e.f. 1st July, 2003.

20. As stated earlier, it is not in dispute that the Petitioners have exported Flanges which were manufactured from carbon steel using the process of forging. The Petitioners further claim that they have not availed CENVAT in relation to the inputs used for manufacturing the Flanges and, accordingly, have claimed duty drawback at the rates specified in respect of SS 73.29 of Drawback Schedule 2002-03 for exports under shipping bills for the period prior to 7th April, 2003, the date from which the notification dated 1st April, 2003 came into effect. R.N. Gupta & Co. Ltd. (the Petitioner in W.P.(C) 5394/2003) and MFRBRL have also claimed benefit of duty drawback under entry SS 73.28 of the Drawback Schedule 2003-04 for export of Flanges made after 6th April, 2003.

21. It is clear on a plain reading of SS 73.29 of the Drawback Schedule 2002-03 and SS 73.28 of the Drawback Schedule 2003-04 that Flanges manufactured and exported by the Petitioners are covered under those entries.

22. Insofar as exports made under shipping bills prior to the notification dated 1st April, 2003 are concerned, the Respondents are seeking to deny the benefits solely on the basis that the data related to the said products was not considered while fixing the All Industry Rates of

duty drawback. Although, it was also mentioned that the Petitioners have not provided proof of payment of duties, the said line of argument was not pressed. Thus, the only question to be addressed in respect of claims made under the Drawback Schedule 2002-03 is whether the benefit of duty drawback could be denied to the Petitioners on the ground that the data relating to Flanges had not been provided by EEPC and, therefore, was not considered by the Central Government while fixing the All Industry Rates.

23. Insofar as the exports made under shipping bills after the Drawback Schedule 2003-04 was notified are concerned, the Respondents have sought to deny the benefit, additionally on the basis of the Corrigendum dated 13th May, 2003 issued by the Central Government. Thus, it is also necessary to consider whether the Central Government could rectify the notification dated 1st April, 2003 with retrospective effect by a public notice issued on 13th May, 2003.

24. A plain reading of Sub-rule (2) of Rule 3 of the Rules indicates that the rates of drawback are to be fixed by the Central Government on the basis of averages in respect of industry as a whole. Sub-rule (2) of Rule 3 of the Rules expressly provides that the Central Government shall have regard to the average quantity or value of the materials from which the

goods in question are ordinarily produced or manufactured in India; the average quantity of value of imported material or excisable material used for production or manufacture of goods and the average amount of duties suffered on such material; average amount of duties of materials wasted in the process of manufacture; and the average amount of duties paid on materials used for packing export goods. Thus, undisputedly, the duties actually paid on the goods manufactured by a particular exporter are not relevant since the drawback rates are fixed on the basis of the industry mean. The scheme of rate fixation takes into account the duties suffered on the raw materials used by an industry as a whole. Thus, there is little scope for calling upon a particular manufacturer to provide proof of the duties actually paid on the materials used by him for manufacture or production of the eligible product, for the purposes of granting duty drawback.

25. Circular No. 23/2001-CUS dated 18th April, 2001 issued by the Central Board of Excise and Customs, New Delhi also clarifies the above position and puts it beyond any pail of doubt. The relevant extract of the said Circular is reproduced below:-

"Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi

Subject : Declaration under Rule 12(1)a(ii) of Drawback Rule for availing AIR of Drawback.

Certain Export Promotion Councils have brought to the notice of the Board that certain Custom Houses are relying on the first proviso to Rule 3 of Customs & Central Excise Rules, 1995 and Declaration filed by exporters under Rule 12(1)(a)(ii) of the said Rules to seek evidence of payment of duties and evidence of import of inputs against individual consignments exported by individual exporters under claim for Drawback at All Industry Rate and this is creating undue delay in disbursement of drawback and harassment to genuine exporters.

2. The issue has been examined in the Board. All Industry Rate is based on the concept of averages, wherein the drawback rate itself, as well as its customs and excise portions, are based on weighted averages of consumption of imported / indigenous inputs of a cross section of exporters and the average incidence for duties suffered on such inputs. These rates have no relation to the actual input consumption pattern and actual incidence suffered on inputs of a particular exporter or individual consignments exported by any particular exporter under AIR/DBK Claim.

3. Therefore, it is clarified that, as a matter of rule, no evidence of actual duties suffered or imported or indigenous nature of inputs, even if the All Industry Rate has customs portion, should be insisted upon by the field formations along with declaration filed by exporters under Rule 12(l)(a)(ii) of the Customs & Central Excise Duties Drawback Rules, 1995."

26. In view of the above, an exporter is only required to satisfy that the exported product falls within the description of the goods as notified by the Central Government in order to claim duty drawbacks at the specified

All Industry Rates. It cannot be disputed that the Flanges exported by the Petitioners conformed to the description as specified in SS 73.29 of Drawback Schedule 2002-03 and SS 73.28 of Drawback Schedule 2003-04 inasmuch as, (i) the Flanges were manufactured from carbon steel; (ii) they were manufactured by the process of forging; and (iii) CENVAT credit on the inputs had not been claimed. Thus, the Petitioners would clearly be entitled to duty drawback at the notified rates in respect of the Flanges exported by them.

27. Now, we turn to the question whether such benefit could be denied to the Petitioners on the basis of the clarification issued by the Joint Secretary by way of a letter dated 8th April, 2003. The said letter dated 8th April, 2003 was addressed to all the Commissioners of Customs and Central Excise for information and necessary action and is reproduced below for ready reference:-

> "Sub: Duty Drawback Rates for Non-Alloy Steel and Alloy Steel Forgings
>
> ....
>
> Please refer to the discussions you had with the undersigned and Shri Avinash Pushkarna, Technical Officer of the Drawback Division, Department of Revenue with regard to the scope of entries at SS Nos. 73.29 and 73.30 of the Drawback Schedule 2002-03 and SS Nos. 73.28, 73.29 and 73.30 of the Drawback Schedule 2003-04. During discussions it was brought to your notice that drawback rates

for these products had been worked out by taking into account non-alloy/carbon steel/alloy steel inputs used in the manufacture of automotive components and machinery parts. You had mentioned that Shri A. K. Raha, Commissioner of Customs, ICD-TKD, Delhi in his letter No VIII/ICD/TKD/20/DBK/22/03 dated 20th March 2003 had provided details of certain shipment bill relating to drawback claims under these sub-serial numbers, which appear to be disproportionately high. According to you, all these shipments were for '**FLANGES**'.

We have gleaned through our data and find that data provided by Forgings Panel of Engineering Export Promotion Council did not contain data regarding "**FLANGES**" exporters of which seem to have been availing the benefit of these entries and getting compensation more than that was intended by the Government. It is, therefore, brought to your notice that no data has been furnished by exporters of '**FLANGES**'. It has also been learnt that 'FLANGES' require low-grade steel as input, value of which is also very low. Hence, the aforesaid entries in the Drawback Schedule are not representative of the product '**FLANGES'**. Therefore, keeping in view the revenue interest and in consonance with the true mandate of Customs & Central Excise Duties Drawback Rules 1995, it is clarified that '**FLANGES**' <u>were not and are not</u> eligible for drawback under these entries.

In order to further gauge the extent of any other misuse of these entries I have already sent a detailed FAX to your Commissioner and other Commissioners soliciting details of such shipments so that further corrective action can be taken by the Ministry by the Ministry (sic) to avoid accrual of any unintended benefits to the exporters.

You may like to take action in the light of above."

28. A plain reading of the aforesaid letter indicates that the only reason provided for denial of benefit is that the data in respect of Flanges was

not considered by the Government while fixing the All Industry Rates. This is also the principal contention advanced by the learned counsel for the Respondents.

29. As observed earlier, All Industry Rates for duty drawback as notified by the Central Government are in pursuance of the powers of delegated legislation conferred under Section 75 of the Act read with the Rules. The All Industry Rates of duty drawbacks as fixed by the Central Government are statutory. Thus, we find it difficult to accept that such statutory notifications could be whittled down or amended by an executive circular.

30. We have no reason to doubt the assertion that the data relating to Flanges had not been forwarded by EEPC and, therefore, was not considered by the Central Government while fixing the drawback rates in exercise of its delegated powers under Section 75 of the Act read with Rule 3 and 4 of the Rules. Perhaps, the Respondents are also correct in submitting that it was not the intention of the Central Government to confer the benefit of duty drawback for export of Flanges at the rate so notified. However, if the language of the statute is clear and unambiguous, there is little scope to entertain such contentions. In our view, the only question to be answered would be whether the product,

Flanges, conforms to the conditions of SS 73.29 of Drawback Schedule 2002-03 and 73.28 of Drawback Schedule 2003-04. It is not open for the Court or the executive to look beyond the plain language of the statute if it is clear and unambiguous.

31. The above principle was pithily put by Lord Cairns in ***Partington v. Attorney General*****: (1869) LR 4 HL 100** in the following words:-

> "As I understand the principle of all fiscal interpretation it is this: if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law, the case might otherwise appear to be."

32. In ***Hemraj Gordhandas v. H.H. Dave, Assistant Collector of C. Ex. & Customs***: **1978 (2) E.L.T. J 350 (S.C.)** a Constitution Bench of the Supreme Court considered the question whether excise duty exemption was available in respect of cotton fabrics which were produced on powerlooms owned by a co-operative society. Such exemption was claimed in respect of two notifications issued by the Central Government. The appellant therein claimed that in terms of the plain language of the notifications, it was entitled to exemption from payment of excise duty on the cotton fabrics. The appellant contended that the exemption applied to

all cotton fabrics which were produced on powerlooms owned by co-operative societies and it was not relevant as to who produced or manufactured such fabrics. The Supreme Court accepted the above contention, as the notification clearly granted exemption to *"cotton fabrics produced by any co-operative society formed of owners of cotton powerlooms which is registered or which may be registered on or before March 31, 1961"*. It was contended on behalf of the Respondents therein that the object of granting exemption was to encourage the formation of co-operative societies which not only produced cotton fabrics but which consisted of members who not only owned but had actually operated not more than four powerlooms during the three years immediately preceding their joining the society. It was emphasized that the intention of the Government always was that exemption be available only in respect of goods produced by the society on its own behalf. The Court did not accept this contention and held that on a true construction of the language of the notifications in question, all that was required for claiming exemption was that the cotton fabrics must be produced on powerlooms owned by the co-operative society. The Court further observed that :

> "It is well established that in a taxing statute there is no room for any intendment but regard must be had to the clear meaning of the words. The entire matter is governed wholly by the language of the notification. If the tax-payer is within

> the plain terms of the exemption it cannot be denied its benefit by calling in aid any supposed intention of the exempting authority."

33. The Supreme Court also referred to the following observations made by Lord Watson in ***Salomon v. Salomon and Co.***: **1897 AC 22**:

> "Intention of the Legislature is a common but very slippery phrase, which, popularly understood may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication."

34. It is trite law that the intention of a statute or a legal provision must be ascertained from the express language of the statute or its necessary implication. In the present case, there is no room in the language of relevant entries to impose additional conditions, other than those expressly stated. Equally, no exclusion can be read in which is not expressly indicated or ascertainable from the plain language of the entries in question.

35. We are, respectively, unable to subscribe to the view accepted by the Gujarat High Court in ***Micro Forge (India) Ltd.*** (*supra*). In our view, it is not open for a Court, while interpreting any statute, to examine the

material which weighed with the authority while framing that law if the provisions of the statute are clear and unequivocal. The scope of the entries in question have to be interpreted on the plain language of the entries, if the same is unambiguous, and it is not open for a Court to interpret the entries in the light of data which may or may not be collected by the Central Government in framing those entries and fixing the All Industry Rates. In the present case, we find that the language of the entries is clear and unequivocal and, thus, there is no room to attempt to discover the intention of the Central Government by taking recourse to any other external aid.

36. In view of the aforesaid, the clarification dated 8th April, 2003 has no statutory force. The express language of the Drawback Schedules as notified by Central Government in exercise of statutory powers cannot be diluted or whittled down by the letter dated 8th April, 2003 and, accordingly, the same is liable to be set aside.

37. We are also inclined to accept the contention that the public notice dated 13th May, 2003 seeks to make substantial amendments to the express language of the Drawback Schedule 2003-04 with retrospective effect and that too is not permissible.

38. It is well established that the devices of public notice or circulars cannot be adopted for modifying the substantive provisions of a statutory notification. In a recent decision, this Court in ***Allen Diesels India Pvt. Ltd. v. Union of India & Ors.:*** **W.P.(C) 4665/2014** decided on 1st February, 2016, following the earlier decisions in ***Sandur Micro Circuits Ltd. v. Commissioner of Central Excise***: **2008 (8) TMI 3-SC**, ***Modi Rubber Ltd. v. Union of India***: **1978 (2) ELT (J127)(Del.)** and ***Pioneer India Electronics (P) Ltd. v. Union of India***: **2014 (301) ELT 59 (Del.)**, it was held that the statutory notifications cannot be amended by the device of circulars. More importantly, a benefit granted by a statutory notification cannot be withdrawn with retrospective effect and that too by a device of a public notice. The Petitioners, in the present case, claim to have made exports and priced their shipments on the basis of the Drawback Schedules notified by the Central Government. Thus, in our view, the benefit of duty drawback cannot be denied to them.

39. A Division Bench of the Bombay High Court ***Mazda International (P) Ltd. v. Union of India***: **1995 (77) E.L.T. 526 (Bom)** considered a case where the Central Government had sought to withdraw drawback benefits in respect of Gripe Water with effect from June 1st, 1983 by way of public notice dated 11th February, 1984. The Respondents had also

issued show cause notices pursuant to the public notice dated 11th February, 1984. The Court accepted the challenge to the show cause notices and held that "*it is not open for the authority issuing public notice to withdraw the benefit with retrospective effect and consequently the issuance of the show cause notice was without jurisdiction*".

40. Before concluding, it is necessary to mention that Mr Satish Kumar, learned counsel for the Respondents submitted that this Court had no jurisdiction to entertain W.P.(C) 5394/2003 inasmuch as the Petitioner therein had impugned two show cause notices of even date i.e. 20th June, 2003, which were issued by the Assistant Commissioner of Customs, Ludhiana. He further pointed out that the Petitioner was also located at Ludhiana and, therefore, no part of cause of action had arisen within the jurisdiction of this Court. He referred to the decision of the Supreme Court in ***Kusum Ingots & Alloys Ltd. v. Union of India and Ors.*: (2004) 6 SCC 254** in support of his contention that the fact that the Drawback Schedules were notified by the Central Government in Delhi would not give rise to any cause of action in Delhi. He contended that since the authority issuing the show cause notices was at Ludhiana, the cause of action for filing the petition lay entirely outside the territories of Delhi.

41. Although, there is merit in Mr Satish Kumar's contention that situs of passing a legislation would not give rise to a cause of action to file a writ petition challenging its validity. However, in the present case, the Petitioner has also impugned the letter dated 8th April, 2003 which is not in the nature of a legislative instrument but is an executive direction. Hence, it is apparent that a part of the cause of action has arisen within the territorial jurisdiction of this Court. Consequently, we are unable to accept that the W.P.(C) 5394/2003 is not maintainable.

42. The petitions are allowed in the aforesaid terms and the Respondents are directed to process the Petitioners' claims for duty drawback in accordance with law.

VIBHU BAKHRU, J

S.MURALIDHAR, J

MAY 06, 2016
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