

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.11.2017

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P. Nos.11645 to 11648 of 2003

M/s.K.G.Denim Limited,
(rep. by V. Arulanandham
Dy. General Manager),
Jadayampalayam,
Mettupalayam Taluk,
Mettupalayam 641 302.

... Petitioner in
all W.P.s

Versus

1. The Central Board of Excise & Customs,
Represented by its Chairman,
Ministry of Finance,
Government of India,
South Block,
New Delhi - 110 001.
2. Director General of Central Excise
Intelligence, Coimbatore,
Regional Unit,
386-a, Pankaja Mill Road,
Ramanathapuram,
Coimbatore 641 045.
3. Director General of Foreign Trade,
Udyog Bhavan,
New Delhi - 110 011.
4. Joint Director General of Foreign Trade,
Indian Life Building (Annex),
1544, Trichy Road,
Coimbatore - 641 018.

Respondents
all W.P.s

...

in

PRAYER in W.P. No.11645 of 2003: Writ Petition filed under Article 226 of the Constitution of India to issue any Writ, Order or Direction more particularly in the nature of a Writ of declaration declaring the impugned M.F. (D.R.) Public Notice No.2/2000-DBK, dated 25.05.2000 issued by first respondent as ultra vires paras 2.1, 2.2, 7.4, 7,17 and 9.17 of the Export Import Policy 1992-1997 and Articles 14 and 265 of the Constitution of India and contrary to CBEC Circular No.67/98-

Cus, dated 14.09.1998 and CBEC Circular No.31/2000-Cus, dated 20.04.2000 in so far as the petitioner is concerned.

Prayer in W.P. No.11646 of 2003 : Writ Petition filed under Article 226 of the Constitution of India to issue Writ, Order or Direction more particularly in the nature of Writ of Certiorarified Mandamus to call for the records of the third respondent's letter bearing Ref. F.No.01/84/162/70/AM02/DES.V/3511, dated 28.02.2003 and quash the same and direct the fourth respondent to sanction DEPB licence for same and direct the fourth respondent to sanction DEPB licence for Rs.1,34,45,257/- on 58 shipping bills on the exports made under Chapter VII of the Export - Import Policy 1997-2002.

Prayer in W.P. No.11647 of 2003 : Writ Petition filed under Article 226 of the Constitution of India to issue Writ, Order or Direction more particularly in the nature of Writ of Certiorarified Mandamus to call for the records of the fourth respondent's letter dated 04.03.2003 and quash the same and to direct the fourth respondent to issue DEPB licence for Rs.50,38,634.72/- on the direct exports made from DTA unit under Chapter VII of the Export-Import Policy 1997-2002 covered by 34 shipping bills.

Prayer in W.P. No.11648 of 2003 : Writ Petition filed under Article 226 of the Constitution of India to issue Writ, Order or Direction more particularly in the nature of Writ of Certiorarified Mandamus to call for the records of the fourth respondent's letter bearing Ref. F.No.32/95/181/0020/AM02/13607, dated 20.03.2003 and quash the same and to forbear the fourth respondent from proceeding further with recovery proceedings under the aforesaid letter.

For Petitioner : Mr.C. Saravanan
For Respondents : Mr.A.P. Srinivas,
Senior Panel counsel for R1
Mr.V.Sundareswaran,
Senior Panel Counsel
for R2
Mr.Su.Srinivasan, ASGI for R3 &R4

COMMON ORDER

The petitioner in all these writ petitions is a Company registered under the Indian Companies Act, 1956 and a manufacturer and exporter of Denim Fabric. The prayer sought for in all these four writ petitions is as follows :-

(i) In W.P. No.11645 of 2003, the petitioner challenges a public Notice, dated 25.05.2000. Public Notice, dated 25.05.2000, by which there is an amendment to Circular No.31 of 2000, dated 20.04.2000 and another Circular No.2 of 2000, dated 25.05.2000. By the said Circular, the words "of exports under DEPB" was deleted in Circular No.31 of 2000, dated 20.04.2000. The Circular pertains to the eligibility of DTA units for grant of duty drawback against duties suffered on their inputs which are processed by EOU/EPZ units. The petitioner seeks for declaring the said public Notice as ultravires paras 2.1, 2.2, 7.4, 7.17 and 9.17 of the Export Import Policy 1992-97 (EXIM Policy) being violative of Articles 14 and 265 of the Constitution of India apart from being contrary to CBEC Circular No.67/1998-Cus dated 14.09.1998. In fact the amendment which is challenged in the said Writ Petition is a sequel to the earliest policy Circular dated 03.09.1998 in Circular No.35/98-99 and policy Circular No.6 dated 20.05.1998. Though the prayer sought for is to declare the public Notice dated 25.05.2000 as being ultravires what is required to be decided is whether the policy Circular No.6, dated 20.05.1998 would apply to the case of the petitioner.

(ii) In W.P. No.11646 of 2003, the petitioner has challenged the order passed by the 3rd respondent, dated 28.02.2003 by which the petitioner was informed that in terms of policy Circular Nos.6 and 35, they are not eligible for DEPB benefit for the exports effected through EOU.

(iii) In W.P. Nos.11647 of 2003 and 11648 of 2003, the petitioner has challenged the consequential orders pursuant to the order dated 28.02.2003.

2. In the above four writ petitions, initially the Court is required to answer two issues, viz.,

- (1) Applicability of Policy Circular No.6, dated 20.05.1998 and Policy Circular No.35, dated 03.09.1998 to the petitioner's case and what is the legal effect of such policy Circulars.
- (2) Whether the denial of DEPB benefit to the petitioner by virtue of the decision taken by the 4th respondent based on the impugned policy Circulars is valid and proper.

3. The petitioner is a Domestic Tariff Unit (DTA) carrying on business of manufacturing Denim Fabrics. The petitioner has exported the fabrics by utilising the manufacturing facility of 100% EOU at Hosur, who is termed as Job Worker who carries out weaving operations before the manufacture of Denim Fabrics at the factory of the petitioner. The Petitioners' case is that the Fabrics were exported in terms of Chapter VII of EXIM Policy 1997-2002 under the DEPB scheme following the requirements of para 3.54 of the said policy. It is further submitted that in terms of para 7.14 of EXIM Policy 1997-2002, an exporter not

desirous of going through licensing route, is given an optional facility under DEPB Scheme and he is entitled to apply for credit at a specified percentage of FOB value of exports made in freely convertible currency. The credit were made available against such export products and at such rates specified by the Director General of Foreign Trade (DGFT) by way of public notice issued in this behalf for import of raw materials, intermediate component, parts, packing materials, etc. In terms of para 7.17 of the earlier policy and 4.3.5. of the new Export Import Policy 2002-2007, exports made under DEPB scheme are not eligible for drawback. Only additional duty of customs paid in cash on inputs under DEPB were made eligible to be adjusted as CENVAT or duty drawback as per the rules framed by the Department of Revenue. Thus, the petitioner would state, only Additional Duty of Customs is eligible for CENVAT/Drawback.

4. According to the petitioner, the impugned policy circulars are violative of Article 14 of the Constitution of India in as much as the benefits of DEPB Scheme has been denied merely because the Idle capacity of 100% EOU has been used for the export of finished goods by the petitioner and other DTA units while it does not provide for such restriction of DTA units subcontracting work from another DTA unit for export. It is further submitted that the impugned policy Circulars cannot deny the benefit which is conferred on the petitioner under the policy and at best the policy Circular can be clarificatory in nature but it cannot take away the right conferred on the exporter under the EXIM Policy.

5. The case of the respondent is that the petitioner is a manufacturer and an exporter of Denim Fabrics and they are registered with the Central Excise Department and DGFT and they are a Domestic Tariff Unit (DTA Unit). As the exporters of cotton Denim Fabrics and garments, the petitioner is availing credit under DEPB Scheme and they are availing the benefit extended in Customs Circular No.31/2000-Cus dated 20.04.2000 after taking credit of duty paid on the inputs. The grey yarn is being processed in the 100% EOU at Hosur and it comes back to the petitioner for undergoing further process in their factory and the petitioner send back the Denim Fabric to the 100% EOU in Hosur for further process like mending, final inspection, checking and sea worthy packing and the finished Denim fabrics are exported from the 100% EOU and the petitioner claim DEPB benefits for the export made through 100% EOU. The petitioner is not entitled to this benefit in the light of the policy Circular No.6 and Policy Circular No.35.

6. The above stand has been reiterated in the counter affidavit filed on behalf of the 3rd respondent. Thus, the first question as framed by this Court is to consider as to what would be the validity of a policy circular. We need not labour much

to consider this issue as identical issue has been considered by the Hon'ble Division Bench of the High Court of Karnataka in the case of Karle International Vs. Commissioner of Customs, Bangalore reported in 2012(281) E.L.T. 486 (Kar.). The said appeal was preferred against the order passed by the revisional authority who has held that the appellants therein are not entitled to the benefit of duty drawback in respect of the goods which are manufactured in a 100% Export Oriented Unit (EOU).

7. The case of the appellant therein was that it is a manufacturer/exporter of readymade garments and entitled to duty Drawback at All India Industry Rate prescribed by the Central Government in exercise of its powers under Section 75 of the Customs Act, 1962 and also in accordance with the Customs and Central Excise Duties and Service Tax Drawback Rules, 1995. The appellant further stated that by Circular No.67/98, dated 14.09.1998 to utilise the Idle capacity of EOU/EPZ units in textile, readymade garments, etc. were permitted to undertake job work from DTA Units with a condition that the finished products produced by such EOU/EPZ were exported directly from the EOU/EPZ units and the goods are not sent back to the DTA units. The appellant approached the 100% EOU unit which was also the second appellant in the said appeal for manufacturing of readymade garments. The first appellant supplied raw materials and all other inputs to the second appellant for such manufacture. The second appellant manufactured the said goods on job work basis from and out of the inputs including the fabrics supplied by the first appellant. At the time of clearance, shipping bills were prepared in the name of the first appellant as Exporter and presented along with the other export documents including the invoice, packing list to the jurisdictional officer in-charge, the second appellant, who in turn forward a sealed cover containing invoice, shipping bills, packing list and letter for removal to the jurisdictional officer at the Port of export. After such export, the first appellant applied for duty Drawback and to a certain extent, it was allowed. However, the further claim was not considered after which the appellants were issued show cause calling upon them to explain as to why the drawback ought not to be denied to them on the goods that have been manufactured by the second appellant which being a 100% EOU. The appellants filed their objections. However, the adjudicating authority denied the duty drawback and imposed penalty. The appeal filed before the Commissioner (Appeals) was disposed of stating that only revision would lie as against such order in terms of Section 129DD before the Joint Secretary, Government of India, Ministry of Finance, Department of Revenue, New Delhi. The revisional authority set aside the order passed by the Commissioner (Appeals) and restored the order-in-original. Aggrieved by the same, the appellants preferred a writ petition before the High Court of Karnataka. The writ petitions were rejected on the

ground that under Notification No.67/1998 dated 01.09.1998, the first appellant did not fall within the category of exporter who can claim the benefit under the notification. Aggrieved by the same, an appeal before the Hon'ble Division Bench.

8.The appellants referred to a decision of this Court in CMA No.2622 of 2005 reported in 2007 (207) E.L.T., 358 (Mad.), which was an appeal filed by the Revenue challenging an order passed by the Tribunal which set aside the order passed by the adjudicating authority denying the claim for duty drawback. Therefore, the appellant contended that the issue is squarely covered in their favour in the light of the said decision. The Union of India on the other hand contended that in the Circulars issued by the Department from time to time, it has been made clear that the benefit of duty drawback is not available to a manufacture who manufacture the goods in a EOU. In the background of these facts, the Court considered the issue, took note of Section 75 of the Customs Act, which deals with drawback on imported materials used in the manufacture of goods which are exported and held as follows :-

11. A reading of the aforesaid provisions makes it very clear that goods of any class or description manufactured, processed or on which any operation has been carried out in India. If exported, 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. Sub section (2) of Section 75 vests with the Central Government, the power to make Rules for the purpose of carrying out the provisions of sub-section (1). It is in pursuance of such power conferred, the Customs and Central Excise Duties Drawback Rules, 1995 has been framed.

9.After referring to the Circular No.74/99 dated 05.11.1999 dealing with manufacture of goods in EOU as job work and Drawback and further Circular No.31/2000 dated 20.04.2000 again dealing with the same subject, it was stated that the duty drawback was denied to the first appellant by referring to the two Circulars. The Division Bench proceeded to examine the next questions as to what is the effect of such circulars especially in cases if it is contrary to the statutory provisions. The said question was answered in the following terms in paragraph 14 of the judgment.

14. Relying on these two Circulars, the Duty drawback is denied to the first appellant. It is settled law that a right vested under a statutory provisions cannot be taken away by virtue of Circulars issued from time to time, if they are contrary to statutory provisions. Under Section

75, to be eligible for Duty drawback, all that the exporter has to satisfy is that the goods are manufactured, processed or on which any operation has been carried out in India. It is immaterial where the said manufacturing or processing has taken place. It may be in his Unit or it may be in EOU unit. Guiding principle is, it should have been manufactured or processed in India and exported. The Circular 67/98 was issued only to enable EOU Units to overcome the problems which they were facing, so that, instead of keeping their machinery idle, they were permitted to accept job work so that the capacity is utilized and they are able to overcome the recession in the world market. It is by virtue of the said Circular, the EOU undertook the job work. The Circular makes it very clear that if the idle capacity of EOU/EPZ Units is utilized and the textile, ready-made garments, agro-processing and granite sectors undertakes job work from the DTA Units, then the finished products produced by such EOU/EPZ Units will have to be exported directly from EOU/EPZ Unit itself and these goods will not be sent back to the DTA. The reason is obvious. The appellant's product does not belong to EOU. It belongs to DTA AND IN FACT EXPORT IS DONE IN THE NAME OF dta. Once DTA exports the manufactured goods and if they have paid duty on raw materials then, under Section 75, they are eligible for these statutory provisions. Similarly the Circular 31/2000 where it is stated that under no circumstances the exporter will be allowed to claim All Industry rate, also runs counter to the Act and Rules. However, that Circular makes it very clear that DTA units are eligible for duty drawback. If we look into the scheme of the Rules, it becomes clear that if the Government by notification decides what is public policy known in trade terms as All Industry rate, irrespective of the duty paid on raw materials, the exporter of the finished products, would be entitled to Duty Drawback at such rates. Under the Rules, if he has paid more duty and the All Industry Rate is low, he has to approach the authorities under the Rules for enhancement of the Duty Drawback to which he is legally entitled to. If on such application, on being satisfied from the material produced by such exporter, the authority can fix a higher rate than the All Industry rate, which is known as Brand Rate Drawback rate. Therefore, the Circular making it

obligatory for DTA to get the goods manufactured in a EOU to necessarily approach the authorities for fixation of Brand Rate Drawback rate. Therefore declaring that he is not entitled to All Industry rate, is arbitrary, absurd and does not stand to reason. As always brand Rate Drawback rate is higher than the All Industry rate, the choice is that of the exporter. If he is satisfied with the All Industry rate, if he is not interested in approaching the authorities, he cannot be denied the all Industry rate, fixed by the Government.

10. In terms of the above findings rendered by the Hon'ble Division Bench that Circular No.67 of 1998 was issued only to enable the EOU units to overcome the problems which they were facing and instead of keeping their machinery idle, they were permitted to accept job work so that their capacity is utilized and they are able to overcome the recession in the open market and by virtue of such Circular, the EOU underook the job. Further it was pointed out that the appellants product do not belong to the EOU but it belongs to DTA and in fact export is done in the name of DTA and once the DTA exports the manufactured goods and if they have paid duty on raw materials, then under Section 17, they are eligible for duty drawback. Therefore, it was held that the right conferred in the statute cannot be taken away by issuing circulars which run contrary to the statutory provisions. Similarly it was held that Circular No.31/2000, where it is stated that under no circumstances, the exporter will be allowed to claim All India Industry Rate also runs counter to the Act and Rules. Thus, when the Government by notification decides what is the public policy known in terms of industry rate, irrespective of duty paid on raw materials, the exporter of finished goods is entitled to duty drawback at such rates. The above decision of the Division Bench was affirmed by the Hon'ble Supreme Court after noting that the decision of the Madras High Court on the same issue has not been challenged by the revenue and they decline to entertain the Special Leave Petition and accordingly, the same was dismissed (2015 (323) ELT A74(SC)). The review petitions filed by the revenue before the Hon'ble Supreme court was dismissed (2017 (348) ELT A27 (SC)).

11. In my considered view, the ratio of decision of the High Court of Karnataka would very well apply to the facts of the case. The Export Import policy for the relevant year was formulated in exercise of the powers conferred under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992. The policy thus has a force of law and it is a statutory policy. In terms of the said policy, more particularly, para 7.17, the petitioner is entitled to drawback. The said para 7.17 reads as

follows :-

Applicability of Drawback

7.17 The exports made under the DEPB Scheme shall not be entitled for drawback. However, the additional customs duty paid in cash on inputs under DEPB shall be adjusted as CENVAT Credit or Duty Drawback as per rules framed by the Deptt. of Revenue". In cases, where the Additional Customs Duty is adjusted from DEPB, no benefit of CENVAT/Drawback shall be admissible.

12.This benefit which flows from the statutory policy is sought to be denied based upon the policy Circular Nos.6 and 35 as held in the case of Karle International Vs. Commissioner of Customs, Bangalore reported in 2012 (281) E.L.T. 486 (Kar.), the right conferred in the statute which in the instant case is in the nature of Export Import Policy cannot be taken away by issuing Circulars. Thus, the benefit which has accrued to the petitioner by virtue of Export Import Policy cannot be denied by relying upon the impugned policy circulars. Though the petitioner has challenged the amendment to Circular No.31/2000, eventually in the impugned order reference has been made to policy Circular Nos.6 and 31. In the light of the finding that the policy circulars cannot override the statutory benefit, the rejection of the petitioner's request for being eligible for DEPB Scheme vide order dated 28.02.2003 and the consequential communications of the 4th respondent dated 20.03.2003 and 04.03.2003 are held to be unsustainable in law.

13.For the above reasons, it may not be necessary for this Court to declare the policy circular as either null and void or ultravires and it would suffice to hold that the policy Circulars cannot override the statutory policy which is the Export Import Policy of the year 1997 framed under the provisions of Foreign Trade (Development and Regulations) Act, 1992.

14. In the result, Writ Petition Nos.11646 to 11648 of 2003 are allowed and the impugned orders are set aside. Writ Petition No.11645 of 2003 is disposed of for the reasons stated in the preceeding paragraphs. No costs.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

vsi2/cse

To :

1. The Central Board of Excise & Customs,
Represented by its Chairman,
Ministry of Finance,
Government of India,
South Block,
New Delhi - 110 001.

2. Director General of Central Excise
Intelligence, Coimbatore,
Regional Unit,
386-a, Pankaja Mill Road,
Ramanathapuram,
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4. Joint Director General of Foreign Trade,
Indian Life Building (Annex),
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Coimbatore - 641 018.

+4 ccs to M/s.R.Saravanan Advocate sr 80757

+1 cc to M/s.V.Sundareswaran Advocate sr 80760

+1 cc to Ms.A.P.Srinivas Advocate sr 80798

W.P. Nos.11645 to 11648 of 2003

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