

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7210 OF 2017

Sarla Performance Fibers	}	
Limited	}	
a company registered under	}	
the Companies Act, 1956,	}	
having its office at 304,	}	
Arcadia, 195, Nariman Point,	}	
Mumbai - 400 021	}	Petitioner
versus		
1. The Union of India	}	
through the Secretary,	}	
Ministry of Commerce and	}	
Industry, Department of	}	
Commerce, Udyog Bhavan,	}	
New Delhi 110 107	}	
	}	
2. The Joint Director	}	
General of Foreign Trade,	}	
Ministry of Commerce and	}	
Industry, Department of	}	
Commerce, having his office	}	
at Directorate General of	}	
Foreign Trade, Udyog Bawan,	}	
New Delhi 110 011	}	
	}	
3. The Development	}	
Commissioner,	}	
SEEPZ-SEZ, Ministry of	}	
Commerce and Industry,	}	
having his office at Andheri	}	
(East), Mumbai - 400 096	}	Respondents

Mr. Prakash Shah i/b. M/s. PDS Legal for
the petitioner.

Mr. Anil C. Singh-Additional Solicitor
General with Mr. Pradeep S. Jetly and
Mr. M. S. Bharadwaj for respondent nos. 1
to 3.

**CORAM :- S. C. DHARMADHIKARI &
PRAKASH. D. NAIK, JJ.**

DATED :- APRIL 27, 2018

ORAL JUDGMENT :- (Per S. C. Dharmadhikari, J.)

1. Rule. Respondents waive service. By consent, Rule is made returnable forthwith.
2. The petitioner, by this petition, claims the following two reliefs:-

“(a) this Hon'ble Court be pleased to issue a Writ of Certiorari or a writ in the nature of Certiorari or any other writ, order or direction under Article 226 of the Constitution of India calling for the records pertaining to the Petitioners case and after going into the validity and legality thereof to quash and set aside (i) Policy Circular No. 9(RE-2013)/2009-14 dated 30.10.2013 issued by the Respondent No. 2; and (ii) Order No. SEEPZ-SEZ/I-A-II/DBK/978/WP/SPFL/2014-15/03290 dated 15.02.2017 passed by Respondent No. 3;

(b) this Hon'ble Court be pleased to issue writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India, ordering and directing the Respondents, their subordinate servants and agents -

(i) to forthwith sanction and grant to the Petitioner the deemed export drawback at the rate mentioned in column “B” of the Schedule of the All Industry Rate of Duty Drawback published vide Notification No. 68/2011-Customs (N. T.) dated 22.09.2011;

(ii) to forthwith sanction and grant the drawback of Rs.7,87,837/- and Rs.50,54,299/- in respect of POY supplied by the DTA units to the Petitioners at the rate of 4 per cent specified in column “B” of Serial No. 540203 of the Schedule of All Industry Rate of Duty Drawback as claimed in Applications for duty drawback dated 09.11.2013 and 10.03.2014 of the Petitioners (Exhibits “H” & “Q” hereto)”

3. It is the case of the petitioner that in terms of a letter/permission dated 29th July, 1994 and as amended from time to time, the petitioner has established, inter alia, an Export

Oriented Unit (EOU) for the manufacture of synthetic yarn at its factories, details of which are set out in para 6 of the petition. The petitioner is engaged in the manufacture and export of all types of synthetic yarns and of the nature described in para 7 of the petition. It is claimed that Unit-I of the petitioner has been licenced under section 58 of the Customs Act, 1962 as Private Bonded Warehouse vide licence dated 18th October, 1994. This licence is renewed from time to time. The Unit-II has been licenced under section 58 of the Act as Private Bonded Warehouse vide a licence dated 14th November, 2003. The validity of this licence is extended from time to time. Both these units are also registered under section 6 of the Central Excise Act, 1944. The petitioner purchased polyester yarn from the units located in domestic tariff area (for short "DTA"). The purchase orders are relied upon by the petitioner in this behalf.

4. It is stated that the Foreign Trade Policy (FTP) 2009-2014 under Chapter 6 provides for an Export Oriented Unit Scheme (hereinafter referred to as "the EOU Scheme"). Chapter 6 of the Hand Book of Procedures (HBP) Volume-I deals with the procedure, inter alia, of EOUs. The claim of the petitioner is that the supply of goods at the said units located in DTA is a deemed export in terms of Para 8.5 of FTP 2009-2014. In terms of Para

8.3(b) of the FTP, the supplier of the goods to EOU is entitled to duty drawback at the rates specified in the Schedule of the All Industry Rate of Duty Drawback issued by the Department of Revenue. The extracts from these paragraphs are set out in the petition. It is then stated that section 74 of the Act provides for grant of the drawback on both, Customs Duties as well as Central Excise Duties paid on goods (raw materials or inputs) used in the manufacture of export goods. Under section 75 of the Act, the exporter is entitled to drawback based on All Industry Drawback Rates, Brand Rate Drawback and Special Brand Rate Drawback. Then, it is stated that by section 75 of the Customs Act, 1962, section 37 of the Central Excise Act, 1944 and section 93A read with section 94 of the Finance Act, 1994, the first respondent to this petition, namely, the Union of India made the Customs, Central Excise and Service Tax Drawback Rules, 1995 (hereinafter referred to as "the Drawback Rules").

5. Rule 3 and Rule 7 of the Drawback Rules are relied upon together with a notification dated 22nd September, 2011, copy of which is at Exhibit 'E', to urge that the petitioner is entitled to such drawback. However, a policy circular has been issued by the authorities under the Foreign Trade (Development and Regulation) Act, 1992, which says that the deemed export

drawback in terms of Para 8.3(b) of the FTP, including as per Column 'B' of All Industry Rate of Duty Drawback under the Duty Drawback Schedule of the Department of Revenue is not admissible if the facility of CENVAT Credit/rebate is availed. However, if the basic customs duty has been paid, then, that is refundable in terms of para 8.5 of the FTP. However, Para 8.5 prescribes that such supplies shall be eligible for deemed export drawback on customs duty paid on inputs/components. Thus, there is a clarification that basic customs duty paid can be taken back as brand rate of duty drawback, based on actual duty paid documents as per the procedure prescribed in Chapter 8 of the FTP and Chapter 8 of the HBP Volumn-I. It is in these circumstances that the petitioner stated that in the past, drawback at the rate mentioned in this Schedule (Column 'B') of the Schedule of the All Industry Rate of Duty Drawback was granted.

6. For the period October, 2012 to March, 2013, the petitioner claimed drawback of 7,87,837/- in respect of polyester yarn supplied by the DTA units to the petitioner at the rate of 4% under serial number 540203 of the Schedule to All Industry Rate of Duty Drawback Schedule specified in Box 'B' as the suppliers were availing CENVAT facility. A copy of this application is marked as Exhibit 'H'.

7. On 27th November, 2013, the office of the third respondent pointed out certain discrepancies and those were intimated by this letter, copy of which is at Annexure 'I'. The petitioner furnished relevant documents on 15th January, 2014. However, by Exhibit 'K', which is a copy of the letter dated 27th March, 2014, the office of the third respondent rejected the justification provided by the petitioner. Once again, the petitioner corresponded by letter dated 18th April, 2014, to which, a similar reply was given on 9th May, 2014. Thus, Exhibits 'L' and 'M' are relied upon to urge that the petitioner was once again requested to depute their person to collect the original documents for claiming fixation of brand rate, if required, in terms of the Policy Circular No. 9 (RE-2013)/2009-2014 dated 30th October, 2013, received from the Directorate General of Foreign Trade, Ministry of Commerce, New Delhi (Exhibit 'N').

8. The petitioner continued the correspondence and finally, on 21st July, 2014 (Exhibit 'P'), the application of the petitioner was returned by the office of the third respondent. For a period from April, 2013 to September, 2013, similar application for duty drawback in the sum of Rs.50,54,299/- dated 10th March, 2014 was forwarded, to which as well, there was a similar response and identical correspondence.

9. A writ petition was filed in this court being Writ Petition No. 1480 of 2015 challenging the impugned circulars and the purported denial of the deemed export drawback, but when this petition was placed before this court, the respondents gave an undertaking through their counsel that the third respondent will grant a personal hearing to the petitioner and pass a reasoned order.

10. It is in terms of this direction that a personal hearing was held, at which, detailed submissions were canvassed, but on 15th February, 2017 (impugned order), the petitioner's claim for deemed export drawback as per Column 'B' of All Industry Rate of Duty Drawback Schedule was rejected.

11. The findings to the extent relevant and to be found in the impugned order read thus:-

“8. I have carefully gone through the available material on record and the written submissions made by the Applicants during the Course of personal hearings.

.....

10. It is not a dispute that the applicants are entitled to claim the refund of duty drawback as per para 8.5 of FTP for custom duty paid on inputs/components. The only issue is the route through which they are entitled to claim the refund. The applicants are insisting that they are entitled to claim the duty drawback as per column 'B' of AIR schedule notified by D/O Revenue, whereas the department's view is that the applicants can get the refund only after submission of documentary evidence in respect of custom duty paid and getting the same fixed through route of brand rate fixation.

11. On perusal of the provisions it is noted that for refund of drawback Para 8.5 of the FTP categorically provides that, “supplies will be eligible for deemed export drawback in terms of Para 8.3(b) of FTP on Central Excise paid on inputs/components, Provided CENVAT credit facility/rebate has not been availed by applicant”. It further provides that “.....Such supplies will however be eligible for deemed export drawback on customs duty paid on inputs/components”.

12. In this case the Applicants claim are based only on the premise that the applicants have options to seek the refund of duty drawback through fixation of brand rate and are entitled to get the refund of Drawback as per All Industry Rate Column 'B' of Duty Drawback Schedule, even if the CENVAT credit has been availed.

13. In this context, it need to be noted that D/O Revenue has notified All Industry Rate of Duty Drawback Schedule for physical export. DGFT has adopted these rates, to the extent applicable, for deemed exports, so that wherever it is admissible under FTP, for deemed exports, DGFT does not have to re-fix these rates. If, the supplier does not claim CENVAT credit then it has the clear option to claim the duty drawback as per Column 'A' of All Industry Rate of Duty Drawback Schedule and these rates are applied for deemed exports mutatis-mutandis. It is a simple straight option available to the domestic supplier. However, in case a supplier opts to avail CENVAT credit then also option has been provided that basic Custom Duty paid can be taken back as Brand Rate of duty drawback, based upon documents evidencing payment of actual duty.

14. After careful reading of para 8.5 of FTP, it is noted that para 8.5 of FTP categorically provides that supplies will be eligible for deemed exports drawback provided CENVAT credit/rebate has not been availed of. Para 8.3.3 of Handbook of Procedure further provides that in case the applicants are not satisfied with the All Industry Rate, then it has facility to apply for fixation of brand rate. On the other hand para 8.5 of FTP does not provide for any scenario where the CENVAT credit has been availed. As this scenario visualized fixation of brand rate, therefore, para 8.3.3 of HBP does not provide any flexibility for such cases where CENVAT credit has been availed. From close reading of para 8.5 of FTP and para 8.3.3 of HBP, it is clear that provisions of FTP do not visualize the application of column 'B' of All Industry Rate Schedule where the

CENVAT Credit has already been availed. This position was specifically clarified by DGFT through its Policy Circular No. 9 dated 30.10.2013.

.....

17. It has been further contended that no such prohibition or bar was in FTP 2009-2014, and the prohibition/bar has come for the first time in the FTP 2015-2020. In this connection, it is noteworthy that the Policy Circular No. 9(RE-2013)/2009-14 dated 30.10.2013 was issued to clarify the aforesaid position. The FTP 2015-20 only takes into account the clarified position of FTP 2009-14 and in no way can be considered as the amendment of policy provision. Therefore, the contention of the applicants is not tenable.”

12. When this petition was filed and a copy served on the respondents, the Joint Development Commissioner in the office of the Development Commissioner, SEEPZ, Special Economic Zone (SEZ), Andheri (East), Mumbai - 400 096 has filed an affidavit in reply. In that affidavit in reply, the stand is that deemed export scheme has been devised to neutralise the duty components, namely, terminal excise duty on the finished products and the excise duty/customs duty on the inputs (raw materials/components). The excise duty on finished products is either *ab-initio* exempted or the same is reimbursable. On the inputs, there may be two components, namely, excise duty on the domestic inputs and customs duty on the imported inputs. In case of deemed exports, domestic supplier has the option of claiming all duties on inputs back through All Industry Rate of Duty Drawback, Column 'A' of Drawback Schedule of the Department of Revenue, if it has not claimed CENVAT Credit. However, in case it

opts to take excise duty back through CENVAT Credit, the customs duty on the imported inputs is reimbursable by way of a brand rate based upon the documentary evidence of having actually paid the customs duty. It is claimed that the Directorate General of Foreign Trade (DGFT) is vested with the power under Para 2.3(a) of FTP 2009-2014 to interpret the policy to clarify such kind of misunderstanding as forwarded by the applicants. The DGFT vide Policy Circular No. 9(RE-2013)/2009-2014 dated 30th October, 2013 clarified that whenever CENVAT Credit has been claimed, the only route available for claiming drawback is by way of fixation of brand rate. If the petitioner is aggrieved by this order, then, it can approach the next higher authority, namely, the Additional Secretary in the Ministry of Commerce and Industry, Government of India, which remedy has not been exhausted by the petitioner. Thus, the impugned order has been justified on these lines.

13. Mr. Prakash Shah learned counsel appearing for the petitioner would submit that the impugned order is contrary to law. The requirement that the respondents insist upon is not to be found in the relevant documents and particularly the provisions enabling duty drawback. In that regard, Mr. Shah relied upon the annexures to this petition and particularly para 4

of the circular dated 30th October, 2013. He would submit that para 4 of this circular, far from assisting the respondents, would denote as to how the petitioner is entitled to the drawback. Mr. Shah would submit, therefore, that the impugned order is contrary to law. It is clearly beyond the powers of the authorities. Mr. Shah would submit that it is not in dispute that the petitioner is otherwise entitled to drawback in view of the suppliers having taken CENVAT Credit. The drawback under Column 'B' was denied mainly relying upon the policy circular referred above and Para 8.5 of the FTP 2009-2014. However, para 8.3.3 of the HBP provides that when All Industry Rate of Duty Drawback is not available or same is less than 4/5th of duties actually paid on materials or components used in production or manufacture of the said goods, an application in ANF 8 along with prescribed documents may be made to the Regional Authorities or Development Commissioner for fixation of brand rate. It was not required to file an application to ANF 8 for fixation of brand rate. Mr. Shah was at pains to point out that Para 8.5 of the FTP 2009-2014 read with Para 8.3.3 of HBP Volume-I makes it clear that while claiming deemed export drawback in terms of Para 8.3(b) of FTP 2009-2014 that the applicant has an option to claim drawback at the rate specified in the Schedule of All Industry Rates of Duty Drawback published by respondent no. 1. The

applicant has further option to seek fixation of brand rate in case the condition mentioned in Para 8.3.3 of the HBP Volume-I is satisfied. Once a notification has been issued being Notification No. 68/2011-Customs (NT) dated 22nd September, 2011 and respondent no. 1 has published the revised Schedule of All Industry Rates of Duty Drawback for 2011-12, then, that has two columns, namely, Column 'A' and Column 'B'. The Column 'A' is applicable when credit is not taken and Column 'B' is applicable when credit is taken. Thus, respondent no. 1 has consciously specified two separate rates of drawback in the schedule of the All Industry Rate of Duty Drawback. In Column 'A' the rates of drawback are specified considering the CENVAT Credit is not availed. In Column 'B', the rates of drawback are specified considering the CENVAT Credit is availed. The recipient EOU is allowed to claim drawback under Column 'B' on production of a suitable disclaimer from supplier along with a self-declaration in Appendix 22C of HBP Volume-I regarding non-availment of CENVAT Credit in addition to prescribed documents. Hence, respondent no. 3 was not empowered to reject refund/drawback specified in Column 'B' of All Industry Rates of Duty Drawback under the drawback Schedule of the Department of Revenue, once the facility of CENVAT Credit has been availed. In these circumstances, he would submit that a combined reading of FTP

and HBP would denote that application of Column 'B' would be ruled out. The provisions of FTP 2009-2014 do not visualise the application of Column 'B' of the All Industry Rate Schedule where the CENVAT Credit has already been availed. It is in these circumstances, the findings in the impugned order are perverse.

14. Mr. Shah placed strong reliance upon the Drawback Rules, Chapter 5402-03 of Schedule to the All Industry Rates of Duty Drawback and a Division Bench Judgment of this court in the case of *Alfa Laval (India) Ltd. vs. Union of India*¹.

15. On the other hand, Mr. Jetly learned counsel appearing for the respondents would submit that the impugned order does not call for any interference in this courts writ jurisdiction. He would submit that the impugned order correctly summarises the issue and the controversy. Mr. Jetly would submit that it is not in dispute that the petitioner/applicant is entitled to claim the refund of duty drawback as per Para 8.5 of the FTP for customs duty paid on inputs. The only issue is the route through which they are entitled to claim the refund. The petitioner is insisting that it is entitled to claim the duty drawback as per Column 'B' of the All Industry Rate of Duty Drawback Schedule notified by the Department of Revenue, whereas, the respondents are of the view

¹ 2014 (309) ELT 17

that the petitioners can obtain refund only after submission of documentary evidence in respect of the customs duty paid and getting the same fixed through the route of brand rate fixation. It is in these circumstances that the interpretation placed on these policies is neither perverse nor vitiated by an error of law apparent on the face of the record warranting interference of this court in writ jurisdiction. Mr. Jetly would submit that this is not a court of appeal, but in writ jurisdiction this court is concerned with only one aspect, namely, whether the application of the petitioner was duly considered and consistent with the policy, a decision has been taken or not. If the view taken by the respondents is in consonance with the terms, then, the interpretation of the policy by the respondents does not call for any interference in writ jurisdiction merely because another view is possible. Hence, the writ petition is devoid of merits and it be dismissed.

16. With the assistance of the learned counsel appearing for both sides, we have perused the petition and all annexures. We have also perused the affidavit in reply and the materials in the compilation tendered by Mr. Shah. In the case of *Alfa Laval (India) Ltd.* (supra), this court was concerned with a contention of the petitioner that it is entitled to brand rate of drawback in

terms of Rule 7 if the All Industry Rate of Drawback notified in Rule 3 is less than $4/5^{\text{th}}$ of the actual duties suffered on the inputs. Once the brand rate of drawback is not determined in terms of Rule 7, the amount of drawback is disbursed after adjusting the amount of drawback already granted/disbursed to the petitioner under Rule 3. Thus, the petitioner does not get drawback under Rule 3 as well as Rule 7. The petitioner in that case could get difference between the All Industry Rate (under Rule 3) and the brand rate (under Rule 7), provided that the All Industry Rate notified under Rule 3 is less than $4/5^{\text{th}}$ (80%) of the actual duties suffered on the inputs. This method was being followed by the petitioner for a long period of time and the Revenue was accepting the petitioner's applications under Rule 7 even after they had claimed drawback at the All Industry Rate under Rule 3. After verification and scrutiny of the said applications, the Respondents have in the past sanctioned the brand rate of drawback under Rule 7 after deducting the drawback already granted/disbursed under Rule 3. This was not disputed.

17. However, deviating from this practice, when applications were filed by the petitioner under Rule 7 seeking determination of brand rate of drawback, those applications were rejected on the ground that it had already claimed drawback under Rule 3 and

therefore, these applications invoking Rule 7 and seeking to determine the brand rate of drawback for the very same export were not maintainable. It was this view of the Revenue/ Respondents, which was challenged in the writ petition.

18. After hearing both sides, this court referred to the provisions of the Customs Act, 1962, the Drawback Rules and the notifications issued. After reproducing Rule 3, this court held as under:-

“19. The drawback claimed under Rule 3 is known as the “All Industry Rate of Duty Drawback”. For a large number of export products, the All India Rate of duty drawback are notified every year by the Central Government after an assessment of average incidence of customs and central excise duties suffered on inputs/input services utilized in the manufacture of the said exported products. This facility is generally availed of by the exporters as no proof of actual duties suffered on the inputs/input services used, is required to be produced. After the announcement of the Budget, various Export Promotion Councils/ Associations are consulted and their suggestions as well as their requests and justifications for suitable enhancement of rates and also any changes sought in the scheme of the Drawback Table or the entries therein, are taken note of whilst finalizing and announcing the new All Industry Rates and which generally are fixed as a percentage of the FOB price of the exported goods. Thereafter, the new All Industry Rate of drawbacks are notified every year after factoring in the changes in duty rates effected by the Budget. This is generally the procedure followed whilst arriving at the All Industry Rate and at which rate the exporter can claim drawback under Rule 3. It is for this reason that Rule 3 provides that subject to the provisions of (a) the Customs Act, 1962 and the Rules made thereunder; (b) the Central Excise and Salt Act, 1944 and the Rules made thereunder; (c) the Finance Act, 1994 and the Rules made

thereunder; and (d) the Drawback Rules, a drawback may be allowed on the export of goods at such amount, or at such rates, as may be determined by the Central Government. This is obviously, subject to the other provisions set out in Rule 3.

20. Rule 4 deals with the revision of rates and empowers the Central Government to revise the amounts or rates determined under Rule 3. Rule 5 deals with the determination of the date from which the amount or rate of drawback is to come into force and the effective date for application of the amount or rate of drawback. Rule 6 deals with goods where the amount or rate of drawback has not been determined. In effect, Rule 6 comes into play where no All Industry Rate is determined under Rule 3 in respect of any goods. Thereafter comes Rule 7 and with which we are really concerned. Rule 7 deals with goods where the amount or rate of drawback determined is low, and reads as under :-

“RULE 7. Cases where amount or rate of drawback determined is low. -

(1) Where, in respect of any goods, the manufacturer or exporter finds that the amount or rate of drawback determined under rule 3 or, as the case may be, revised under rule 4, for the class of goods is less than four-fifth of the duties or taxes paid on the materials or components or input services used in the production or manufacture of the said goods, he may within sixty days from the date relevant for the applicability of the amount or rate of drawback in terms of sub-rule (3) of rule 5, make an application in writing to the Commissioner of Central Excise or the Commissioner of Customs and Central Excise having jurisdiction over the manufacturing unit, of the (manufacturer) or, of the supporting manufacturer, as the case may be, for determination of the amount or rate of drawback thereof stating all relevant facts including the proportion in which the materials or components or input services are used in the production or manufacture of goods and the duties or taxes paid on such materials or components or input services;

Provided that the Commissioner of Central Excise or the Commissioner of Customs and

Central Excise may, if he is satisfied that the manufacturer or exporter was prevented by sufficient cause from making the application within the aforesaid time, allow such manufacturer or exporter to make such application within a further period of thirty days;

(2) On receipt of the application referred to in sub-rule (1), the Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, may, after making or causing to be made such inquiry as it deems fit, allow payment of drawback to such exporter at such amount or at such rate as may be determined to be appropriate, if the amount or rate of drawback determined under rule 3 or, as the case may be revised under rule 4, is in fact less than four-fifth of such amount or rate determined under this sub-rule.

(3) Where an manufacturer or exporter desires that he may be granted drawback provisionally, he may, while making an application under sub-rule (1), apply to the Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, in writing in this behalf in the manner as has been provided in clause (a) of sub-rule (2) of rule 6 for the applications made under that rule and the grant of provisional drawback shall be considered in the manner and subject to the conditions specified in clauses (b) and (c) of sub-rule (2) and sub-rule (3) of rule 6, subject to the condition that bond required to be executed by the claimant shall only be for the difference between amount or rate of drawback determined under rule 3 or, as the case may be, revised under rule 4 by the Central Government and the provisional drawback authorised by the Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, under this Rule;

(4)

(5)” (emphasis supplied)

21. In a nutshell, what Rule 7(1) stipulates is that where in respect of any goods, the manufacturer

or exporter finds that the amount or rate of drawback determined under Rule 3 or as the case may be, revised under Rule 4, is less than 4/5th (80 %) of the duties or taxes paid on the inputs/input services used in the production or manufacture of the said goods, he may within sixty days, subject to the other conditions laid down therein, make an application in writing to the Commissioner of Central Excise or the Commissioner of Customs and Central Excise, for determination of the amount or rate of drawback thereof stating all the relevant facts as required under Rule 7. Rule 7(2) provides that on receipt of an application under Rule 7(1), the concerned authority, after making such enquiries as it deems fit, allow the payment of drawback to such exporter at such rate as may be determined to be appropriate if the amount or rate of drawback determined under Rule 3 or as the case may be, revised under Rule 4, is in fact less than 4/5th of such amount or rate determined under Rule 7(2).

.....

26. On reading the Circular, and particularly paragraph (d) thereof, it is clear that the Circular seeks to interpret the Rules to mean that an exporter once having availed the All Industry Rate of drawback at the time of export, cannot file an application for determination of the Brand Rate of drawback under Rule 7. As discussed earlier, on a plain reading of the Drawback Rules, we do not find any such prohibition as is sought to be culled out by the CBEC in its Circular dated 30th December, 2011. The CBEC whilst clarifying the said Drawback Rules, has imposed limitations/restrictions which are clearly not provided for in the Rules and has the effect of whittling down the Drawback Rules. Under the garb of clarifying the Rules, the CBEC cannot incorporate a restriction / limitation, which does not find place in the Drawback Rules. In clause (d) of the Circular cannot be reconciled with clauses (b) and (c) thereof. Hence, read together and harmoniously it will have to be held that the Circular cannot override the Rules and particularly Rules 3 and 7 of the Drawback Rules and the sub-rules thereunder. This being the case, clause (d) of the said Circular is clearly unsustainable and has to be struck down. On the same parity of reasoning, and more so because the orders/letters impugned herein, rely upon the said Circular to reject the applications of the Petitioner seeking determination of the Brand Rate of drawback under

Rule 7, even the said impugned orders/letters will have to be set aside.”

19. In the instant case, the petitioner's applications at pages 68 and 91 to 95 of the papers book in clearest terms stated that they have purchased partially polyester yarn during the period 1st October, 2012 to 31st March, 2013 by making payment of excise duty and education cess from M/s. Beekaylon Synthetics Private Limited and B. F. Industries Limited, which is treated as deemed export and entitled for benefit of duty drawback at All Industry Rate. The drawback of 4% is specified in Box 'A' (when no CENVAT Credit is availed) and also 4% in Box 'B' (when CENVAT Credit is availed). When same rate is presented in Box 'A' and 'B', the exporter is entitled for drawback and issue of input credit availed or not is not relevant. Accordingly, the petitioner stated that they are claiming drawback in respect of polyester filament yarn supplied to their EOU and they enclosed the documents, which are to be found at pages 68 and 91 of the paper book. The petitioner was aggrieved and dissatisfied with the fact that its application was rejected without application of mind earlier. Later on, they approached this court and this court directed a fresh consideration of its applications. Respondent no. 3 agreed to such a course and pursuant to the directions in the earlier writ petition, a speaking order has been passed. The speaking order

though refers to the two applications made by the petitioner, proceeds on the footing that the FTP and HBP and the clarification issued by the DGFT would have to be taken into consideration. Then, it is stated that the petitioner is entitled to claim the refund of duty drawback as per para 8.5 of the FTP on customs duty paid on inputs. That is not disputed at all. The only issue is the route through which the petitioner is entitled to claim the refund. The reliance was placed on para 8.5 of the FTP and particularly the words *“supplies will be eligible for deemed export drawback in terms of Para 8.3(b) of FTP on Central Excise paid on inputs/components, provided CENVAT Credit facility/rebate has not been availed by the applicant”*. It further provides that *“....such supplies will, however, be eligible for deemed export drawback on customs duty paid on inputs/components”*. In this case, the applicant's claim is based only on the premise that they have option to seek the refund on duty drawback even if the CENVAT Credit has been availed. It is observed in the impugned order that if the supplier does not claim CENVAT Credit, then, it has the clear option to claim the duty drawback as per Column 'A' of All Industry Rate of Duty Drawback Schedule and these rates are applied for deemed exports mutatis-mutandis. It is simple straight option available to the domestic supplier. However, in case a supplier opts to avail CENVAT Credit, then also option has

been provided that basic customs duty paid can be taken back as brand rate of duty drawback, based upon documents evidencing payment of actual duty. It is in these circumstances that the order proceeds on the footing that there is a bar now in the FTP of 2015-2020. However, there is a policy circular dated 30th October, 2013 issued to clarify the aforesaid position. Thus, the FTP 2015-2020 only takes into account the clarified position of FTP 2009-2014 and in no way can be considered as the amendment of policy provision. Therefore, the contention of the applicant is not tenable.

20. In the applications made by the petitioner, it has very clearly stated that it has purchased partial polyester yarn during the period for which the application for duty drawback is made by making payment of excise duty and education cess from the two suppliers. That is treated as deemed export and entitled for benefit of duty drawback at All Industry Rate. The drawback is 4% as specified in Box 'A' when no CENVAT Credit is availed and 4% in Box 'B' when CENVAT Credit is availed. When the same rate is presented in Box 'A' and 'B', the exporter is entitled for drawback and the issue of input credit availed or not is not relevant.

21. It was this simple aspect of the matter, which should have been taken into consideration. However, what we find is that

there is a reference to the whole policy and every time, the petitioner was informed that the route chosen is the real issue. We are not concerned with the route chosen for in respect of both, the percentage is the same. That was not an aspect, therefore, really necessary to be gone into. Apart therefrom, what we find from a reading of Rule 3 of the Drawback Rules is that subject to the provisions of the Customs Act, 1962 and the Rules made thereunder, the Central Excise and Salt Act, 1944 and the Rules made thereunder, the Finance Act, 1994 and the Rules made thereunder and the Drawback Rules, a drawback may be allowed on the export of goods at such amount or at such rates, as may be determined by the Central Government. Then, there are provisos and by sub-rule (2) of Rule 3, in determining the amount or rate of drawback under this Rule, the Central Government shall have regard to the matters set out in sub-rule (2) of Rule 3. Then, Rules 4, 5 and 6 speak of revision of rates, determinate of date from which the amount or rate of drawback is to come into force and effective date for application of amount or rate of drawback and cases where amount or rate of drawback has not been determined. Rule 7 follows, where the aspect of those cases where amount or rate of drawback determined is low. It is that aspect which is dealt with and Rule 7 reads as under:-

“RULE 7. Cases where amount or rate of drawback determined is low. -

(1) Where, in respect of any goods, the manufacturer or exporter finds that the amount or rate of drawback determined under rule 3 or, as the case may be, revised under rule 4, for the class of goods is less than four-fifth of the duties or taxes paid on the materials or components or input services used in the production or manufacture of the said goods, he may within sixty days from the date relevant for the applicability of the amount or rate of drawback in terms of sub-rule (3) of rule 5, make an application in writing to the Commissioner of Central Excise or the Commissioner of Customs and Central Excise having jurisdiction over the manufacturing unit, of the (manufacturer) or, of the supporting manufacturer, as the case may be, for determination of the amount or rate of drawback thereof stating all relevant facts including the proportion in which the materials or components or input services are used in the production or manufacture of goods and the duties or taxes paid on such materials or components or input services;

Provided that the Commissioner of Central Excise or the Commissioner of Customs and Central Excise may, if he is satisfied that the manufacturer or exporter was prevented by sufficient cause from making the application within the aforesaid time, allow such manufacturer or exporter to make such application within a further period of thirty days;

(2) On receipt of the application referred to in sub-rule (1), the Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, may, after making or causing to be made such inquiry as it deems fit, allow payment of drawback to such exporter at such amount or at such rate as may be determined to be appropriate, if the amount or rate of drawback determined under rule 3 or, as the case may be revised under rule 4, is in fact less than four-fifth of such amount or rate determined under this sub-rule.

(3) Where an manufacturer or exporter desires that he may be granted drawback provisionally, he may, while making an application under sub-rule (1), apply to the Commissioner of Central Excise or the

Commissioner of Customs and Central Excise, as the case may be, in writing in this behalf in the manner as has been provided in clause (a) of sub-rule (2) of rule 6 for the applications made under that rule and the grant of provisional drawback shall be considered in the manner and subject to the conditions specified in clauses (b) and (c) of sub-rule (2) and sub-rule (3) of rule 6, subject to the condition that bond required to be executed by the claimant shall only be for the difference between amount or rate of drawback determined under rule 3 or, as the case may be, revised under rule 4 by the Central Government and the provisional drawback authorised by the Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, under this Rule;

(4) Where the Central Government considers it necessary so to do, it may -

(a) revoke the rate of drawback or amount of drawback determined under sub-rule (2) by the commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, or

(b) direct the Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, to withdraw the rate of drawback or amount of drawback determined.

(5) No amount or rate of drawback shall be determined in respect of any of the goods (falling within heading 1006 or 2523) of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975)."

22. The petitioner's applications very clearly stated that there are schemes, one is the Export Promotion Scheme and which is very clearly referable to Chapter 22, whereunder relief of customs and excise duty suffered on the inputs used is allowed to the exporters. In that, there is a scheme for All Industry Rate of Duty Drawback. The fixation of such rates is as a percentage of

FOB price of export product Very often, the export prices are obtained for a product or class of products which have no correlation with the actual duties suffered on inputs used, which is sought to be refunded to exporters as drawback. In order to safeguard Government revenue but also to be fair to exporters, reasonable duty drawback caps have been imposed in respect of many export products having rates on FOB basis. These caps essentially reflect the average duty incidence suffered on the inputs used in the manufacture of the particular goods exported by several exporters with different prices and they are fixed on the basis of data supplied by the Export Promotion Councils and collected by Directorate from other sources. What we found from the compilation tendered is that there are duty drawback rates effective from 1st October, 2011. In that, there is a Schedule and that Schedule under heading Chapter 3 includes Polyester Filament Yarn. The tariff item is 540203. Box 'A', drawback is when CENVAT facility has not been availed and Box 'B', drawback is when CENVAT facility has been availed. There is drawback rate and drawback cap per unit. What we have been shown is the judgment of this court and which clearly holds that the scheme is not to deny the benefit by placing obstacles and hurdles. In the instant case, Chapter 8 of the HBP is titled as "Deemed Exports". In that, there is a procedure for claiming deemed export

drawback and terminal excise duty refund/exemption. That is in Para 8.3.1. In that, it is stated in Para 8.3.3 that where All Industry Rate of Drawback is not available or same is less than $4/5^{\text{th}}$ of duties actually paid on materials or components used in production or manufacture of the said goods, an application in ANF 8 along with prescribed documents may be made to RA or DC for fixation of brand rate. The recipient may claim benefits on production of a suitable disclaimer from the supplier along with a self declaration in the format given in Annexure II of ANF 8, regarding non-availment of CENVAT credit in addition to prescribed documents. Then, it is stated in Para 8.3.6 that subject to procedure laid down in HBP, Customs and Central Excise Duty Drawback Rules, 1995 shall apply mutatis mutandis to deemed exports. It is on this basis, and to our mind, the petitioner rightly claimed that they are entitled to claim this drawback. That is not disputed either. It is in these circumstances that we are of the opinion that the issue was unnecessarily confused and compounded further by the respondents. Once there was no dispute about the entitlement of the petitioner, then, we do not see why the petitioners were denied the benefit. The petitioner has also pointed out, and to our mind, rightly, in the application as also the grounds of this petition that they are otherwise entitled to drawback at the rate

mentioned in Column 'B'. That could not have been denied by relying upon the policy circular dated 30th October, 2013 and relying upon Para 805 of FTP 2009-2014. In that regard, the petitioner also rightly placed reliance on Para 8.3.3 of the HBP. Thus, Para 8.5 of the FTP read with Para 8.3.3 of HBP makes it clear that while claiming deemed export drawback in terms of 8.3, there is an option to claim drawback at the rate specified in the Schedule of All Industry Rate of Duty Drawback or the fixation of brand rate. Once the respondent no. 1 has published revised Schedule of All Industry Rates of Duty Drawback for 2011-2012 and that Schedule of All Industry Rates published by respondent no. 1 has two columns, namely, Column 'A' and Column 'B', then, this conscious specification of two separate rates would enable the recipient EOU to claim drawback under Column 'B' on production of suitable disclaimer. That condition has been prescribed. It is in these circumstances that we are of the opinion that the petitioner's claim could not have been rejected. In any event, the rejection is not in tune with the policy and the HBP. An unnecessary and uncalled for controversy was generated only because of the route chosen by the petitioner. We do not see how merely for this alleged fault or deficiency could the whole claim have been denied. It is in these circumstances that the conclusion of the respondents that the refund of duty drawback for customs

duty on inputs can be made only by way of brand rate of fixation and hence, the claim for refund as per Column 'B' of the All Industry Rates of Duty Drawback Schedule is rejected cannot be sustained.

23. As a result of the above discussion, the writ petition succeeds. We proceed to quash and set aside the impugned order. Rule is made absolute in terms of prayer clauses (a) and (b). There would be no order as to costs.

(PRAKASH.D.NAIK, J.)

(S.C.DHARMADHIKARI, J.)