

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.07.2018

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No.11243 of 2006

Orders reserved on 21.06.2018	Orders pronounced on 04.07.2018
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M/s.Angel Overseas Corporation,
Rep. by its Proprietor,
Mr.D.Sachithanantham,
42, Parasakthi Koil Street,
Kongu Nagar, Thirupur-641 607. .. Petitioner

-vs-

1.Union of India,
Rep. by its Joint Secretary,
Department of Revenue,
Ministry of Finance,
14, Hudco Vishala Bldg., B.Wing,
6th Floor, Bhikaji Cama Place,
New Delhi-110 066.

2.Deputy Commissioner of Customs,
Drawback, Air Cargo Complex,
Meenampakkam, Chennai-27. .. Respondents

Petition filed Under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus to call for the records pertaining to the impugned order No.281-307/2005 dated 21.10.2005 passed by the first respondent and quash the same as arbitrary and illegal and further direct the first respondent to re-examine the case and condone the delay as per the Provisions of Rule 17 of the Drawback Rules and allow drawback.

For Petitioner : Mr.Hari Radhakrishnan

For Respondents: Mr.K.Umesh Rao,
Central Government Standing Counsel

O R D E R

The petitioner has filed this writ petition challenging the order passed by the first respondent dated 21.10.2005, confirming the order passed by the second respondent rejecting the drawback claim and for a direction upon the first respondent to re-examine their case and condone the delay in terms of Rule 17 of the Customs and Central Excise Duties Drawback Rules, 1995 (hereinafter referred to as the "Drawback Rules") and allow the drawback claim.

2. The petitioner filed 27 supplementary claims under Rule 15 of the Drawback Rules. The said claims were rejected by the second respondent by order dated 22.11.2004 on the ground of delay as they were filed after 12 months period including the three months condonable period granted under the Drawback Rules. This order, passed by the second respondent, was put to challenge before the Commissioner of Customs (Appeals), who by order dated 15.02.2005, dismissed the appeal. Challenging the same, the petitioner filed Revision Applications before the first respondent under Section 129DD of the Customs Act, 1962. The revision applications were dismissed by order dated 21.10.2005, which order is impugned in this writ petition.

3. Mr. Hari Radhakrishnan, learned counsel appearing for the petitioner submitted that the impugned order suffers from errors apparent on the face of the record, as the specific prayer made by the petitioner for exercising the power under Rule 17 of the Drawback Rules, which is a power of the Central Government to relax any of the provisions of the Drawback Rules, was not considered and hence, the order passed by the first respondent is liable to be set aside. In this regard, the learned counsel placed reliance on the decision of this Court in the case of Greaves Cotton Ltd. vs. Union of India and Others in W.P.No.10359 of 2007 dated 04.01.2018. It is submitted that the said case arose under the Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995 and the facts are also similar and the writ petition was allowed and the matter was remanded to the first respondent for fresh consideration.

4. The learned counsel for the petitioner has also referred to the following decisions:-

- (i) Commissioner of Customs vs. Terai Overseas Ltd. reported in (2003) 156 ELT 841 (Cal.);
- (ii) Union of India vs. Wipro Ltd. reported in (2010) 255 ELT 226 (Kar.);
- (iii) Acer India Pvt. Ltd. vs. Union of India reported in (2015) 325 ELT 519 (Kar.),

5. Referring to the above decisions, it is pointed out by the learned counsel that the decision in the case of Wipro Ltd. (supra) was confirmed by the Hon'ble Supreme Court, as the appeal filed by the Revenue was dismissed in the decision reported in (2010) 255 ELT A46 (SC) [Union of India vs. Wipro Ltd.].

6. Mr.K.Umesh Rao, learned Central Government Standing Counsel for the Revenue contended that the decision in the case of Greaves Cotton Ltd. (supra) is not applicable to the case of the petitioner, as the same arose under a different Rule and in any event, the argument, which is placed before this Court, on behalf of the respondent, was not placed in the earlier case and therefore, the decision in Greaves Cotton Ltd. (supra), cannot be treated as a precedent.

7. It is submitted that the Drawback Rules, more particularly, Rule 15 of the said Rules is a complete code by itself and the limitation for maintaining an application for supplementary claim has been specified under the Rules and this limitation period cannot be extended by the Government or by the Court.

8. Further, it is submitted that Rule 17 of the Drawback Rules, which deals with power to relax, does not speak about the power to condone the delay in filing a supplementary drawback claim, but it is a power of the Central Government in relation to the export of any goods. If the exporter, for reasons beyond his control, failed to comply with any of the provisions of the rules and has thus been entitled to drawback, the Central Government may after considering the representations, if any, made by such exporter or agent and for reasons to be recorded in writing, exempt such exporter or agent from the provisions of such rule and allow drawback in respect of such goods. Thus, the power under Rule 17, is a power to relax only in relation to export of goods and not for the purpose of filing a supplementary claim under Rule 15 of the Drawback Rules. Thus, it is submitted that the concurrent findings recorded by the authorities may be confirmed and the writ petition may be dismissed.

9. Heard the learned counsels for the parties and carefully perused the materials placed on record.

10. The petitioner had exported 27 consignments to various countries covered under various shipping bills, the details of which have been furnished along with the writ petition. The petitioner claimed drawback in terms of the rates announced by the Central Government under Section 75 of the Customs Act, 1962 read with Drawback Rules, 1995. By Notification No.77/2003-CUS

(NT) dated 18.09.2003, the Central Government retrospectively revised the drawback rates for those goods, which were exported by the petitioner. On account of the revised rate of drawback sanctioned by the Government, the petitioner had to necessarily file a supplementary claim as per Rule 4 of the Drawback Rules and the period for filing such an application is three months from the date of publication of the notification in the Official Gazette. Admittedly, the petitioner did not file claim within the said period. The petitioner would attribute this to improper certain advice rendered by the Customs Department. However, there is nothing to substantiate the said statement.

11. The petitioner would state that one of the consultants advised the petitioner that, for being entitled for the revised rate of drawback, the petitioner has to file a supplementary claim and immediately thereafter, the supplementary claims were filed by the petitioner on 25.09.2004. The second respondent rejected the claim petition as time barred. The petitioner filed appeal to the Commissioner of Customs (Appeals) to condone the delay of 12 months and 7 days in filing such application. The appeals were rejected on the ground that the Commissioner has no powers to condone the delay. Aggrieved by the same, the petitioner preferred revision before the first respondent in which specific plea was raised that the first respondent may invoke its powers to relax the rules as conferred on the Government under Rule 17 of the Rules and allow the drawback claim. The first respondent dismissed the revision applications stating that there is no provision to condone the delay in filing the supplementary claim beyond the stipulated period.

12. In the case of Terai Overseas Ltd., it was a Merchant-Exporter, which entered into a contract with the company in Moscow for supply of dresses and garments. Consequent upon the letters of credit opened, the assessee entered into contract with local suppliers for manufacture and export of the goods on certain terms and conditions. Pursuant to those contracts, the local suppliers exported several consignments under various shipping bills and filed their duty drawback claim with the Customs Authorities. The assessee also approached the Customs Authorities claiming drawback in respect of those consignments. The contention of the assessee was that the actual exports were done on their behalf and therefore, they are entitled for drawback. The drawback claim was rejected holding that the claim was fictitious. The Tribunal allowed the assessee's claim, as against which, the matter was carried by the Revenue to the Division Bench of the High Court of Calcutta. The question was whether the drawback claim could have been rejected for violating Rule 13, which describes the manner and time for claiming drawback on goods exported other than by post. One of the conditions under the Rule was filing of insurance

certificate, which according to the Revenue was mandatory. The Court opined that the Drawback Rules is an incentive oriented scheme for augmenting export and claim for drawback cannot be withheld on the basis of mere technicality and therefore, at the time of granting drawback claim, the authorities have to proceed on reasonable basis and cannot adopt a narrow and pedantic approach. Thus, having found that the main purpose of the Rule is to boost export and the export having taken place and the foreign exchange involved in the process had also been earned, the applications should not have been rejected.

13. In Wipro Ltd., the assessee filed application claiming duty drawback under the Brand Rate System, which was rejected on the ground of delay. One of the contentions raised by the Revenue was that, there is no power to condone the delay under Rule 15 of the Drawback Rules. The assessee referred to the discretionary power vested with the Central Government in para 70 of the Export and Import Policy framed by the Union of India. The Division Bench held that the non-filing of the application for condonation of delay was beyond the control of the party, as he could not have initiated parallel proceedings and accordingly, confirmed the order passed by the Single Bench. The decision was affirmed by the Hon'ble Supreme Court, as the appeal filed by the Revenue was dismissed.

14. In the case of Acer India Private Limited, (supra) the Single Bench of the Karnataka High Court examined the question as to whether it is primordial to condone the delay in filing the application for duty drawback exemption under Section 74 of the Customs Act, as it has been filed beyond the prescribed period. The Court took note of the decisions in the cases of Terai Overseas Ltd. (supra) and Wipro Ltd. (supra) and held that drawback cannot be denied on mere technicalities.

15. In Greaves Cotton Ltd., (supra) this Court considered the question in respect of a drawback claim arising under the Re-export Drawback Rules, where the application was rejected by the first respondent on the ground that it is beyond the prescribed time limit or allowable period of three months. The Court took into consideration the decisions in the cases of Wipro Ltd., (supra) and Acer India Private Limited (supra) and after noting that the alternate prayer sought for by the petitioner therein requesting the first respondent-Union of India to relax the rule, was not considered, held that drawback claim should not be defeated on the ground of technicalities and appropriate relief should be granted. Accordingly, the writ petition was allowed and the matter was remanded to the first respondent for fresh consideration to decide as to whether the petitioner would be entitled to relaxation of the rigor of Rule 5(1) of the Re-export Drawback Rules and consider the case of

the petitioner whether it would fall under Rule 7A of the Rules for the purpose of relaxation of the condition imposed in Rule 5 (1) of the Rules.

16. The learned Central Government Standing Counsel for the Revenue would vehemently contend that the decision in the case of Grieves Cotton Limited, (supra) has no application to the case on hand, as it is a case arising under a different Rule. Further, the arguments advanced by him were not put forth by the counsel, who had appeared in that case and Rule 17, which gives power of relaxation to the Central Government, is not applicable to Rule 15.

17. Rule 15 of the Drawback Rules deals with supplementary claim, which reads as follows:-

"15. Supplementary claim. - (1) Where any exporter finds that the amount of drawback paid to him is less than what he is entitled to on the basis of the amount of rate of drawback determined by the Central Government or Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, he may prefer a supplementary claim in the form at Annexure III :

Provided that the exporter shall prefer such supplementary claim within a period of three months,

(i) Where the rate of drawback is determined or revised under rule 3 or rule 4 from the date of publication of such rate in the official Gazette ;

(ii) Where the rate of drawback is determined or revised upward under rule 6 or rule 7, from the date of communicating the revised said rate to the person concerned;

(iii) in all other cases, from the date of payment or settlement of the original drawback claim by the proper officer.

Provided further that the aforesaid period of three months may be extended by the Assistant Commissioner of Customs or Deputy Commissioner of Customs for a further period of nine months on being satisfied that the exporter was prevented by sufficient cause from filing his supplementary claim within the aforesaid period of three months."

18. This Rule can be invoked when the exporter finds that the amount of drawback paid to him is less than what he is entitled to. In the instant case, the supplementary claim made by the petitioner for the 27 export consignments was as a result of the Central Government issuing Notification No.77/2003-CUS

(NT) dated 18.09.2003, revising the drawback rates with retrospective effect on the goods, which were exported by the petitioner. Thus, the supplementary claim made by the petitioner was not on account of any error or mis-calculation done by the petitioner or for any reason attributable to the petitioner.

19. What occasioned the supplementary claim was the decision of the Government of India to revise the drawback rates with retrospective effect. Thus, it goes without saying that if there is a revised rate of drawback determined that too with retrospective effect, then every exporter, who is entitled for the benefit of the notification, is entitled to maintain a supplementary claim as a matter of right. This was done by the petitioner by submitting supplementary claims on 25.09.2004. The period of limitation for filing the supplementary claim has been provided in the proviso to the said Rule and Clause (i) of the proviso would be attracted, since the rate of drawback was determined or revised under Rule 4 of the Rules and the period of limitation was three months from the date of publication of such rate in the official gazette. The second proviso in Rule 15 empowers the Assistant Commissioner of Customs or Deputy Commissioner of Customs to extend the aforesaid three months period of limitation for a further period of nine months on being satisfied that the exporter was prevented by sufficient cause from filing his supplementary claim within the period of three months. Thus, the period of limitation as per Rule 15(1) (i) read with the second proviso is 3 months + 9 months, i.e., = 12 months.

20. The learned Central Government Standing Counsel for the Revenue is right in a submission that Rule 15 provides for an outer time limit for condonation of delay in filing the supplementary claim petition. It is his submission that if the Rule prescribes the time limit for filing the application, the same cannot be extended by the Court and in this regard, the learned counsel drew parallel to the provisions of the Arbitration and Conciliation Act, 1996. While the Court would accept the submission of the learned Central Government Standing Counsel for the respondent, what is required to be examined in the instant case is whether the Drawback Rules provide for any other remedy or power for the assessee or the Department. If we examine Rule 17, it is seen that the power to relax the Rules has been granted to the Central Government.

21. It is the submission on behalf of the respondents that the power under Rule 17 cannot be used to condone the delay in filing a supplementary claim under Rule 15 of the Rules. Such an interpretation was not given by the first respondent in the impugned order, nor explicitly stated in the counter affidavit

filed on behalf of the respondents. For better appreciation, Rule 17 is quoted below.

"17. Power to relax. - If the Central Government is satisfied that in relation to the export of any goods, the exporter or his authorised agent has, for reasons beyond his control, failed to comply with any of the provisions of these rules, and has thus been entitled to drawback, it may, after considering the representation, if any, made by such exporter or agent, and for reasons to be recorded in writing, exempt such exporter or agent from the provisions of such rule and allow drawback in respect of such goods."

22. To exercise the power under Rule 17, satisfaction of the Central Government is primordial. This satisfaction should be with regard to the fact that the exporter failed to comply with any of the provisions of the Rules for reasons beyond his control and as thus, been entitled to drawback. The Central Government may after considering the representation and for reasons to be recorded in writing, exempt such exporter or agent from the provisions of such Rule and allow drawback in respect of such goods.

23. The language of Rule 17 is so couched to confer power on the Central Government to grant exemption in favour of an exporter from the provisions of any of the Rules and allow drawback. The power of exemption is conferred on the Central Government to exempt an exporter, who has failed to comply with any of the provisions of the Drawback Rules, the object being that the exporter should be entitled to drawback. In fact, the Rules specifically empower the Central Government not only to exempt exporter from the provisions of the Rules for compliance of any of the provisions, but also make an order allowing drawback in respect of such goods. The power conferred on the Assistant Commissioner / Deputy Commissioner of Customs under the second proviso to Rule 15 is no doubt limited. The Central Government, under the Scheme of the Act and Rules, is the Revisional Authority, as legislature thought it fit to confer additional powers on the Central Government. Therefore, it cannot be stated that the power under Rule 17 is in derogation of the other provisions of the Rules. Equally, the argument that Section 15 should be treated as code by itself and Rule 17 would have no application is an argument, which is stated to be rejected more so on account of the language of Rule 17.

24. The learned Central Government Standing Counsel for the Revenue emphasis that such power to relaxation is only in relation to the export of any goods and not in a case like that of the petitioner, where it is a case of supplementary claim.

What has to be noted is that a claim for drawback can arise only in a case where an export occurs. Therefore, to state that Rule 17 would have no application is a very narrow and incorrect way of interpreting Rule 17. Above all, the object of the Drawback Rules is to encourage and boost exports and if the entitlement for drawback is interpreted to be on par with the exemption notification, then what is essential is compliance of the mandatory conditions.

25. So far as the procedural aspect is concerned, always liberal interpretation is given so that the exporter or the importer gets the benefit of the scheme framed by the Government. In the instant case, as noted above, the supplementary claim necessitated on account of a decision taken by the Government of India to revise the drawback rate retrospectively. The petitioner would state that he was not properly advised and much later was informed that he should file a supplementary claim to avail the revised drawback. In this background, the petitioner would state that he was not aware of the procedure. The respondents in the counter affidavit have taken strong exception to such a statement made by the petitioner stating that ignorance of procedure cannot be excused for condonation of delay, which is beyond the permissible period of 12 months. In my understanding what the petitioner has stated is that they were not properly advised that they would have entitled to get the benefit of the revised drawback rate only upon filing a supplementary claim and on enquiry, they were orally informed that the drawback amount would be automatically credited to their account, since it is the decision of the Government of India to revise the rate of drawback retrospectively. Therefore, I am of the view that the petitioner should not be non-suited on the ground stated by the respondents.

26. One more factor, which weighs in the mind of the Court is the period of delay. So far as the first 12 months is concerned, there is sufficient power vested with the second respondent to exercise discretion and condone the delay of 9 months. In the instant case, there is a further delay of 7 days over and above 12 months period, though cumulatively taken delay is 9 months and 7 days. However, the first 9 months period is a condonable period even at the instance of the proper officer, the second respondent. Thus, even if a different interpretation is sought to be given to Rule 17, this is not a case where the petitioner should be denied the benefit of revised rate on such interpretation, as the delay beyond 12 months is only 7 days.

27. Thus, for all the above reasons, this writ petition is allowed, the impugned order is set aside and the second respondent is directed to apply the revised drawback rates as notified by the Central Government in Notification No.77/2003-CUS(NT) dated 18.09.2003 and sanction and effect payments of the amount to the petitioner within a period of three months from the date of receipt of a copy of this order. No costs.

Sd/-
Assistant Registrar(CS-V)

//True Copy//

Sub Assistant Registrar

abr

To

1.The Joint Secretary,
Union of India,
Department of Revenue,
Ministry of Finance,
14, Hudco Vishala Bldg., B.Wing,
6th Floor, Bhikaji Cama Place,
New Delhi-110 066.

2.Deputy Commissioner of Customs,
Drawback, Air Cargo Complex,
Meenampakkam, Chennai-27.

+1cc to Mr.UMESH RAO, Advocate, S.R.No.43071

+1cc to Mr.HARI RADHAKRISHNAN, Advocate, S.R.No.43001

order made in
W.P.No.11243 of 2006

SR(CO)
TR(18/07/2018)

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