

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.06.2019

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE C.V.KARTHIKEYAN

C.M.A.Nos. 1804, 1811, 1813 & 1820 of 2019
And
C.M.P.Nos. 5877 & 5937 of 2019

M/s. Bishan Saroop Kishan Agro Industries (P) Ltd.,
SLV Industrial Estate
Andrahalli Main Road
Bangalore - 560 058.

Appellant / Appellant in C.M.A.No.
1804 of 2019

M/s. Big Bags International Private Limited
62, Ndakerappa Industrial Estate,
7, Andrahalli Main Road,
Vishwaneedam Post,
Bangalore - 560 091.

Appellant/Appellant in C.M.A.Nos.
1811 & 1813 of 2019

Shri Ravish Kamath

Appellant/Appellant in C.M.A.No.
1820 of 2019

Vs.

1. The Customs, Excise and Service Tax
Appellate Tribunal, South Zonal Bench,
26, Sashtri Bhavan Annexe Building,
Haddows Road,
Chennai - 6.

2. The Commissioner of Customs (Sea-Export),
Custom House,
60, Rajaji Salai,
Chennai.-I.

Respondents/Respondents in
all C.M.As.

Civil Miscellaneous Appeals filed under Section 130 of the Customs Act, 1962, to consider the above substantial questions of law and all the appeal by setting aside the impugned final order Nos. 40836, 40834, 40833 & 40835/2018 dated 16.03.2018 passed by the Honourable CESTAT, Chennai.

For Appellants in all
C.M.As. : Mr. V.Srikanth

For RR 1 & 2, 2 in
C.M.A.Nos. 1813 &
1804/2019 : M/s. R.Hemalatha
Senior Standing Counsel

For R2 in
C.M.A.No. 1811/2019 : M/s. S.R.Sundar

J U D G M E N T

(Delivered by DR.VINEET KOTHARI, J)

C.M.A.No. 1804 of 2019 has been filed by the manufacturer M/s. Bishan Saroop Kishan Agro Industries (P) Ltd., and the connected Appeals in C.M.A.Nos. 1811 7 1813 of 2019 have been filed by the exporter M/s. Big Bags International Private Limited and C.M.A.No. 1820 of 2019 has been filed by Shri Ravish Kamath.

2. The appellants are aggrieved by the Order dated 16.03.2018 passed by the learned CESTAT whereby the learned CESTAT held that the exporter M/s. Big Bags International Private Limited was not entitled to custom duty draw back at higher All Industry Rate (AIR rate) for the reason that for the bags purchased by it, which were manufactured by M/s. Bishan Saroop Kishan Agro Industries (P) Ltd., the said manufacturer M/s. Bishan Saroop Kishan Agro Industries (P) Ltd., had availed Cenvat credit under the relevant excise rules and in view of such Cenvat credit having been availed by the manufacturer, the exporter M/s. Big Bags International Private Limited was not entitled to the higher duty draw back in terms of Clause 13 of the Notification No. 103/2008- Cus (NT) dated 29th August 2008.

3. The purpose and reason for not allowing the higher rate duty draw back of custom duty is not to allow the double benefit in the hands of the exporter, since the manufacturer of those goods had already availed the Cenvat credit under the relevant Excise law. The relevant portion of the impugned order passed by the learned Tribunal is quoted below for ready reference:-

"7. The dispute is with reference to the drawback which is allowable under the Air for FIBCS exported by the appellants. As per the facts of the case, the appellant has procured the export goods from other manufacturers, on payment of duty. The manufacturers in turn have availed Cenvat credit and using the same have paid the duty on the goods sold to the appellants. Such goods in turn were exported by the appellant under claim for drawback under AIR. The dispute is whether the appellants will be entitled to AIR only for the customs component (in case Cenvat credit was used) or for the higher rate including the excise as well as customs components, as has been claimed and paid by the appellants.

8. The appellant has specifically relied on the CBEC Circular No. 16/2009-Cus. dated 25.05.2009, which has clarified the rate of duty drawback payable to the merchant exporters. The relevant para of the circular relied by the appellant is reproduced as below:-

"7. In view of the above, the Board has decided to accept the recommendation of the Drawback Committee in this regard. Thus merchant exporters who purchase goods from the local market for export shall henceforth be entitled to full rate of duty drawback (including the excise portion). However, such merchant exporters shall have to declare at the time of export, the name and address of the trader from whom they have purchased the goods. They shall also have to declare that no rebate (input rebate and also the final product rebate) shall be taken against the Shipping Bills under which they are exporting the goods. The merchant exporters who purchase goods from traders may therefore furnish the declaration, at the time of export, in the format annexed with this circular. This is issued in supersession of para (vi) of Circular No. 64/98-Cus. Dated 01.09.1998."

After perusing the Circular and paragraph-7 of the above circular, it is easily seen that the circular has clarified

the payment of drawback in respect of the goods which are purchased by merchant exporters from traders in the local market. There is a presumption that the goods available in the market are deemed to be duty paid. But in the facts of the present case, it is evident that the appellant has not procured the export goods from any trader in the market but directly from the manufacturer who has paid the central excise duty on such goods by availing Cenvat credit.

9. We have perused the Notification No. 103/2008-Cus (NT) dated 28.08.2008 in which the Air for drawback for the period 2008-09 was notified. The relevant condition of the Notification is reproduced as under:-

"No.13. The expressions "when Cenvat facility has not been availed", used in the said schedule, shall mean that the exporter shall satisfy the following conditions, namely:-

(i) The exporter shall declare, and if necessary, establish to the satisfaction of the Assistant Commissioner of Customs or Assistant Commissioner of Central Excise or Deputy Commissioner of Customs or Deputy Commissioner of Central Excise, as the case may be, that no Cenvat facility has been availed for any of the inputs or input services used in the manufacture of the export products."

The term "Cenvat credit has not been availed" has been explained to mean that no Cenvat facility has been availed for any of the inputs or input services used in the manufacture of the export products. This is evidently in relation to the manufacture of the goods which in the present case is manufactured by M/s. Bishen Saroop Ram Kishen Agro Pvt. Limited. Since the manufacturer has availed the benefit of Cenvat credit and the same is not in dispute, we are of the view that the appellant will not be entitled to the excise portion of AIR. In view of the above, we find no reason to interfere with the

impugned order and the same is sustained. All the appeals are rejected."

4. The learned counsel for the appellant Mr.V.Srikanth urged before us that the exporter M/s. Big Bags International Private Limited had not claimed any Cenvat credit in his own hands and therefore, the benefit of duty draw back at higher AIR rate which was earlier given to the Assessee/Appellant could not have been withdrawn by the respondent Department authorities. He further drew our attention to another Circular No. 16/2009-Cus dated 25th May 2009 applicable to the merchant exporter purchasing the goods from open market, which were deemed to be duty paid and higher duty draw back was allowed for such cases vide paragraph 6 of the said Circular. He therefore submitted that on a parity of reasoning, the respondent authorities were bound to allow higher duty draw back to the appellants well. He further submitted that the learned Tribunal had erred in not deciding the exact duty draw back allowable in the hands of the Assessee/appellant, M/s. Big Bags International Private Limited as also the issue of penalty imposed against the appellants herein including the Manufacturer and the CEO of the merchant exporter. It was urged that therefore, the Tribunal should be directed to decide the issues so far not decided by it.

5. The learned counsel for the respondent Department supported the impugned order.

6. We have heard the learned counsels.

7. In our considered opinion, there is no error in the order impugned passed by the learned Tribunal. The purpose of allowing the reduced duty draw back in the hands of the merchant exporter unless he fails to satisfy the authorities of the department that no CENVAT facility has been availed by the manufacturer in respect of the goods exported by the merchant exporter, is to avoid a double benefit in the hands of the exporter/manufacturer of those goods. The duty draw back is allowed for giving incentive to the export to the extent of Excise component only to the extent of Excise duty actually suffered by the goods in question. If the Cenvat credit is availed by the manufacturer of such goods, in respect of Excise duty paid on the raw materials or inputs for manufacture of those goods, then the duty draw back is liable to be reduced under the Notification in question, namely, Notification No.103 of 2008 dated 29th August 2008 which is applicable to the facts of the present case.

8. Since admittedly the appellant M/s. Big Bags International Private Limited in the present case has not purchased the bags in question from the open market but has purchased the same from the manufacturer M/s. Bishan Saroop Kishan Agro Industries (P) Ltd., directly, who has been granted

Cenvat credit in respect of the bags in question, the duty draw back available to the exporter was liable to be reduced to that extent. Clause 13 of the said Notification is relevant, which has been quoted by the learned Tribunal also and has been quoted by us above. Clause (I) of the said Clause 13 quoted above clearly requires even the Exporter to satisfy the authority concerned that none of the credit facility has been availed for any of the inputs or services used in the manufacture of the bags in question. In the absence of any proof of such non availment of Cenvat credit by the manufacturer, obviously the appellant/merchant exporter was therefore entitled only to get the reduced duty draw back after deducting the amount of Cenvat Credit availed by the manufacturer. We hold that this finding of the learned Tribunal, is perfectly in consonance with the terms of the notification in question. There is no error in the same.

9. The parity of reasoning sought and drawn by the learned counsel for the appellants with the subsequent notification where the goods have purchased from the open market is not applicable to the facts of the present case. The Appeal, therefore in our opinion, has no merit and deserves to be dismissed. However to the extent of the issues raised before the Tribunal but not decided, we leave it open to the appellants/Assesseees to approach the Tribunal once again by way of suitable application or review petition which we expect the learned Tribunal to decide on merits and in accordance with law.

10. With these observations and liberty, these Civil Miscellaneous Appeals are dismissed. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar (CS)

//True copy//

Sub Assistant Registrar

vsg

To

1. The Customs, Excise and Service Tax
Appellate Tribunal, South Zonal Bench,
26, Sashtri Bhavan Annexe Building,
Haddows Road,
Chennai - 6.

2. The Commissioner of Customs (Sea-Export),
Custom House,
60, Rajaji Salai,
Chennai.-I.

+3cc to Mr.R.Hemalatha, Advocate SR.No.45545, 45546, 45547

+1cc to Mr.S.R.Sundar, Advocate SR.No.45319

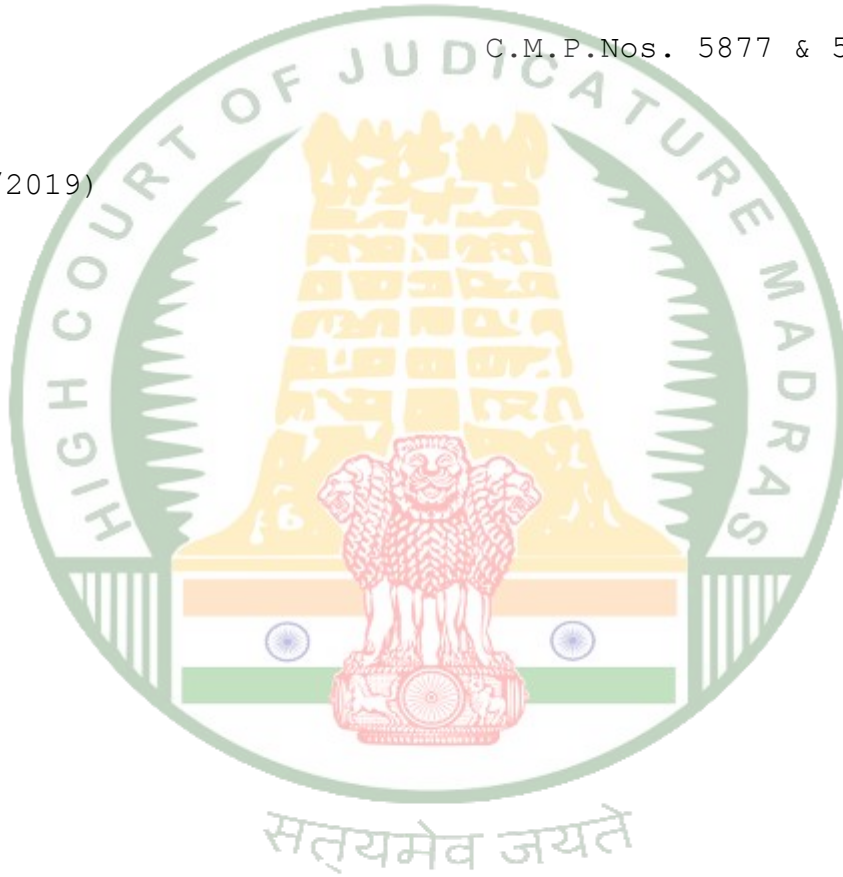
+1cc to Mr.V.Srikanth, Advocate SR.No.45501

C.M.A.Nos. 1804, 1811, 1813 & 1820 of 2019

And

C.M.P.Nos. 5877 & 5937 of 2019

MG (CO)
GMY (16/08/2019)



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