

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 30.09.2019

Coram :

The Honourable Dr.JUSTICE ANITA SUMANTH

W.P.No.24766 of 2011

M/s.Jumbo Bags Ltd.,
Rep. by its Director,
108, GNT Road,
Athipedu Village,
Ahlinjivakkam Post,
Chennai - 600 067.

... Petitioner

Vs.

1.The Joint Secretary to the Government of India
Ministry of Finance,
14, Hudco Vishala Building B Wing
6th Floor, Bhikaji Cama Place,
New Delhi - 110 066.

2.The Commissioner of Central Excise,
Chennai II Commissionerate
M.H.U. Complex, 692, Anna Salai,
Nandanam, Chennai - 600 0035.

3.The Assistant Commissioner of Central Excise,
Chennai V Division,
Chennai II Commissionerate,
M.H.U. Complex, 692, Anna Salai,
Nandanam, Chennai - 600 0035.

... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India, for the issuance of Writ of Certiorari, calling for the records of the 1st respondent herein in file F.No.198/20/07-RA and quash the consequent order dated 27.09.2010 passed therein.

For Petitioner : Mr. N.Viswanathan

For Respondents : Mr.A.P.Srinivas
Central Government Standing Counsel

O R D E R

The petitioner is a manufacture of Polypropylene Jumbo bags (in short 'bags') falling under chapter heading No.3923.90 of the Central Excise Tariff Act. It had effected supplies of the Jumbo bags to two customers (in short 'customers') who appear to have utilized the same for packing of Barite Powder (API) Special Product (in short 'goods') for use in the Drilling of Oil Wells. Clearances of the bags containing the goods were effected by the customers in their capacity as merchant exporters in thirteen (13) consignments against ARE 1 forms. The petitioner thereafter claimed rebate of the duty paid in terms of Rule 18 of Central Excise Rules, 2002 (in short Rules) upon a disclaimer being furnished by the exporters confirming that they had not claimed such rebate.

2.The claim for rebate came to be scrutinized by the Assistant Commissioner, Central Excise, who verified the shipping bills, bills of lading, export invoices and ARE 1 forms that contained requisite endorsement made by the Customs Prevention Officer certifying the export. The rebate thereafter was sanctioned on the basis of the aforesaid supporting documentation and five (5) orders covering the thirteen (13) consignments of exports bearing Nos.23/2004 dated 15.07.2004, 30 of 2004 dated 24.08.2004, 32 and 46 of 2004, both dated 03.09.2004, 46 of 2004 and 47 of 2004 dated 03.01.2005 were passed. The rebate sanctioned was duly received by the petitioner.

3.Subsequently, the Commissioner of Central Excise, being of the view that the sanction of rebate was incorrect in law reviewed one of the five sanction orders, the one bearing No.47 of 2004, by his order dated 16.09.2005. The review, under Section 35 E of the Central Excise Act, 1944, (in short Act) was on the ground that the export had not been of the Jumbo bags simpliciter, but that the bags had been used in packing of the goods and as such should be construed as inputs in the manufacture of the goods only. Further, according to him, it was only the merchant- exporter that was entitled to claim export benefit, if any, and not the petitioner.

4.The original sanctioning authority/R3 was directed to file an appeal against the order sanctioning review before the first appellate authority. Consequent upon the review of order dated 03.01.2005, the Assistant Commissioner of Central Excise/R3 issued thirteen (13) show cause notices including in respect of the transaction which was pending in appeal proposing the reversal and recovery of the rebate originally sanctioned. Despite objections raised by the petitioner both on the aspect of jurisdiction as well as on merits, the proposals in the

notices to show cause were confirmed, the original sanction orders reversed and the petitioner called upon to remit the amounts sanctioned as rebate with interest under Section 11A of the Act vide order dated 30.09.2005.

5. Aggrieved by the aforesaid order, a first appeal was filed by the petitioner before the Commissioner of Central Excise (Appeals), who after hearing all the appeals, those filed by the petitioner assessee as well as the appeal filed by the revenue, passed a common order dated 25.10.2006 dismissing the appeal filed by the revenue and allowing the appeals filed by the petitioner. The appellate authority was of the express view that the factum of export not having been disputed by the Department, non-observance of proper procedure could not deny the petitioner of the benefit of rebate sought.

6. The order of the first appellate authority dated 25.10.06 was taken further in revision under section 35 EE of the Act before the Joint Secretary, arrayed as R1 in this writ petition. The sole ground of revision filed by the revenue was that the petitioner was not the entity eligible to have claimed rebate since Notification No.21 of 2004 CE dated 06.09.2004 permitted only merchant exporters to claim a rebate.

7. The petitioner, for its part, and while defending order dated 25.10.06, specifically contended that the revenue had only challenged in revision the rejection of its appeal by the Commissioner of Central Excise (Appeals) in relation to the refund of a sum of Rs.30,949/- and as such the claims in respect of the other twelve (12) transactions, that the Commissioner (Appeals) had allowed, had become final. This submission had not been considered by the authority who allowed the revision petition in full. Pursuant thereto, the authorities called upon the petitioner to pay over the entire amount of duty refunded along with appropriate interest. The petitioner brought to the notice of the authorities that the review application had been filed only in respect of one claim and as such there was no question of the petitioner being liable to pay over the entire amount of rebate sanctioned. The Department however, merely reiterated the demand made and continued the action for recovery in respect of entire refund originally sanctioned along with interest, under threat of recovery.

8. Heard Mr.N.Viswanathan, learned counsel appearing for the petitioner and Mr.A.P.Srinivas, learned Central Government Standing Counsel for the respondents.

9. At the threshold, I am not impressed with the argument of the petitioner that since the subject matter of appeal before the appellate authority was only the one refund/rebate relating to a sum of Rs.30,949/- the remaining twelve rebates sanctioned originally have attained finality and the revisional authority ought not to have reversed the same. True, at column 8(iv) of

the form of revision application, the amount of refund, if any, claimed for the period in revision is quantified at a figure of Rs.30,949/- only. However, at column 10, the relief claimed is 'To set-aside the order of the Commissioner (Appeals) No.25/06 M-II(D) and 78/06 (M-II) dated 25.10.06 and pass such other order as may deem fit'. The statement of facts refers to the orders passed by both the assessee/petitioner as well as the revenue. Thus, it appears clear to me that the order of the Commissioner (Appeals) in full stands challenged by the revenue in revision. The reference to Rs.30,949/- should be construed as mere inadvertence as the form, at column 10 states clearly that the order of the Appellate Commissioner in both the assessee's as well as revenues' appeals should be set aside, duly supported by specific grounds of appeal in respect of both the appeals. This argument is thus rejected.

10. On the question of eligibility to rebate, on merits, Notification No.19 of 2004 dated 06.09.2004 (in short 'Notification'), in my considered view, will support the case of the petitioner. The Notification reads as follows:

Notification No.19/2004-Central Excise (N.T.) dated-06-Sep-2004

Rebate of duty for exports to countries other than Nepal and Bhutan - Procedure - Notification No.40/2001-C.E.(N.T.) partially superseded

In exercise of the powers conferred by rule 18 of the Central Excise Rules, 2002 and in supersession of the Ministry of Finance, Department of Revenue, notification No. 40/2001-Central Excise (NT), dated the 26th June 2001, [G.S.R.469(E), dated the 26th June, 2001] in so far as it relates to export to the countries other than Nepal and Bhutan, the Central Government hereby directs that there shall be granted rebate of the whole of the duty paid on all excisable goods falling under the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), exported to any country other than Nepal and Bhutan, subject to the conditions, limitations and procedures specified hereinafter,-

(2) Conditions and limitations : -

(a) that the excisable goods shall be exported after payment of duty, directly from a factory or warehouse, except as otherwise permitted by the Central Board of Excise and Customs by a general or special order;

(b) the excisable goods shall be exported within six months from the date on which they were cleared for export from the factory of manufacture or warehouse or within such extended period as the Commissioner of Central Excise may in any particular case allow;

(c) that the excisable goods supplied as ship's stores for consumption on board a vessel bound for any foreign port are in such quantities as the Commissioner of Customs at the port of shipment may consider reasonable;

(d) the rebate claim by filing electronic declaration shall be allowed from such place of export and such date, as may be specified by the Board in this behalf;

(e) that the market price of the excisable goods at the time of exportation is not less than the amount of rebate of duty claimed;

(f) that the amount of rebate of duty admissible is not less than five hundred rupees;

(g) that the rebate of duty paid on those excisable goods, export of which is prohibited under any law for the time being in force, shall not be made.

(3) Procedures:-

(a) Sealing of Goods and examination at the place of dispatch and export:-

(i) The manufacturer exporters registered under the Central Excise Rules, 2002 and merchant-exporters who procure and export the goods directly from the factory or warehouse can exercise the option of exporting the goods sealed at the place of dispatch by a Central Excise Officer or under self-sealing;

(ii) Where the exporter desires self-sealing and self-certification, the manufacturer of the export goods or owner of the warehouse shall take the responsibility of sealing and certification;

(iii) The merchant-exporters other than those procuring the goods directly from the factory or warehouse shall export the goods sealed at the place of dispatch by a Central Excise Officer;

(iv) For the sealing of goods intended for export, at the place of dispatch, the exporter shall present the goods along with four copies of application in the Form ARE-I specified in the Annexure to this notification to the Superintendent or Inspector of Central Excise having jurisdiction over the factory of production or manufacture or warehouse;

(v) The said Superintendent or Inspector of Central Excise shall verify the identity of goods mentioned in the application and the particulars of the duty paid or payable, and if found in order, shall seal each package or the container in the manner as may be specified by the Commissioner of Central Excise and

endorse each copy of the application in token of having such examination done;

(vi) The said Superintendent or Inspector of Central Excise shall return the original and duplicate copies of application to the exporter;

(vii) The triplicate copy of application shall be -

(a) sent to the officer with whom rebate claim is to be filed, either by post or by handing over to the exporter in a tamper proof sealed cover after posting the particulars in official records, or

(b) sent to the Excise Rebate Audit Section at the place of export in case rebate is to be claimed by electronic declaration on Electronic Data Inter-change system of Customs;

(viii) The exporter may prepare quadruplicate copy of application for claiming any other export incentive. This copy shall be dealt in the same manner as the original copy of application;

(ix) Where goods are not exported directly from the factory of manufacture or warehouse, the triplicate copy of application shall be sent by the Superintendent having jurisdiction over the factory of manufacture or warehouse, who shall, after verification, forward the triplicate copy in the manner specified in sub-paragraph (vii);

(x) In case of export by parcel post after the goods intended for export have been sealed, the exporter shall affix to the duplicate application sufficient postage stamps to cover postal charges and shall present the documents, together with the package or packages to which it refers, to the postmaster at the office of booking;

(xi) Where the exporter desires self-sealing and self-certification for removal of goods from the factory or warehouse or any approved premises, the owner, the working partner, the Managing Director or the Company Secretary, of the manufacturing unit of the goods or the owner of warehouse or a person duly authorized by such owner, working partner or the Board of Directors of such Company, as the case may be, shall certify on all the copies of the application that the goods have been sealed in his presence, and shall send the original and duplicate copies of the application along with the goods at the place of export, and shall send the triplicate and quadruplicate copies of the application to the Superintendent or Inspector of Central Excise having jurisdiction over the factory or warehouse within twenty four hours of removal of the goods;

(xii) In case of self-sealing, the said Superintendent or Inspector of Central Excise shall, after verifying the particulars of the duty paid or duty payable and endorsing the correctness or otherwise, of these particulars-

(a) send to the officer with whom rebate claim is to be filed, either by post or by handing over to the exporter in a tamper proof sealed cover after posting the particulars in official records, or

(b) send to the Excise Rebate Audit Section at the place of export in case rebate is to be claimed by electronic declaration on Electronic Data Inter-change system of Customs;

(xiii) On arrival at the place of export, the goods shall be presented together with original, duplicate and quadruplicate (optional) copies of the application to the Commissioner of Customs or other duly appointed officer;

(xiv) The Commissioner of Customs or other duly appointed officer shall examine the consignments with the particulars as cited in the application and if he finds that the same are correct and exportable in accordance with the laws for the time being in force, shall allow export thereof and certify on the copies of the application that the goods have been duly exported citing the shipping bill number and date and other particulars of export:

Provided that if the Superintendent or Inspector of Central Excise sealed packages or container at the place of dispatch, the officer of customs shall inspect the packages or container with reference to declarations in the application to satisfy himself about the exportability thereof and if the seals are found intact, he shall allow export.

(xv) The officer of customs shall return the original and quadruplicate (optional copy for exporter) copies of application to the exporter and forward the duplicate copy of application either by post or by handing over to the exporter in a tamper proof sealed cover to the officer specified in the application, from whom the exporter wants to claim rebate:

Provided that where the exporter claims rebate by electronic declaration on the Electronic Data Inter-change system of Customs, the duplicate shall be sent to the Excise Rebate Audit Section at the place of export.

(xvi) The exporter shall use the quadruplicate copy for the purposes of claiming any other export incentive.

(b) Presentation of claim for rebate to Central Excise:-

(i) Claim of the rebate of duty paid on all excisable goods shall be lodged along with original copy of the application to the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise having jurisdiction over the factory of manufacture or warehouse or, as the case may be, the Maritime Commissioner;

(ii) The Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise of Central Excise having jurisdiction over the factory of manufacture or warehouse or, as the case may be, Maritime Commissioner of Central Excise shall compare the duplicate copy of application received from the officer of customs with the original copy received from the exporter and with the triplicate copy received from the Central Excise Officer and if satisfied that the claim is in order, he shall sanction the rebate either in whole or in part.

(c) Claim of rebate by electronic declaration:-An exporter may enter the requisite information in the shipping bill filed at such place of export, as may be specified by the Board, for claiming rebate by electronic declaration on Electronic Data Inter-change system of Customs. The details of the corresponding application shall be entered in the Electronic Data Inter-change system of Customs upon arrival of the goods in the Customs area. After goods are exported or order under section 51 of the Customs Act, 1962 (52 of 1962) has been issued, the rebate of excise duty shall, if the claim is found in order, be sanctioned and disbursed by the Assistant Commissioner of Customs or the Deputy Commissioner of Customs.

(d) Special procedure for store for consumption on board an aircraft on foreign run:- Notwithstanding anything contained in the above paragraphs, in case of mineral oil products falling under Chapter 27 of the First Schedule to the Central Excise Act, 1985 (5 of 1986) exported as stores for consumption on board an aircraft on foreign run, the rebate shall be granted for such quantity of the products as remain on board the aircraft after completion of an internal flight but prior to its reversion to foreign run. The concerned officer of Customs shall certify in the manner specified by the Commissioner of Central Excise the quantity of products left on board for determining the quantum of rebate.

(e) Cancellation of documents:- If the excisable goods are not exported, the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise shall cancel the export documents.

Explanation I - "duty" for the purpose of this notification means duties of excise collected under the following enactments, namely:

(a) the Central Excise Act, 1944 (1 of 1944);

(b) the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);

(c) the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978);

(d) the National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001 (14 of 2001), as amended by section 169 of the Finance Act, 2003 (32 of 2003) and further amended by section 3 of the Finance Act, 2004 (13 of 2004);

(e) special excise duty collected under a Finance Act;

(f) additional duty of excise as levied under section 157 of the Finance Act, 2003 (32 of 2003);

(g) Education Cess on excisable goods as levied under clause 81 read with clause 83 of the Finance (No.2) Bill, 2004.

.....,

11. Notification No.21/2004, cited by the revenue is also extracted below for the sake of completion as well as to establish support with the case of petitioner.

'Notification: 21/2004-C.E. (N.T.) dated 06-Sep-2004
Rebate of duty on excisable goods used in
manufacture / processing of export goods - Procedure
- Notification No.41/2001-C.E. (N.T.) superseded

In exercise of the powers conferred by of rule 18 of the Central Excise Rules, 2002 and in supersession of the Ministry of Finance, Department of Revenue, notification No.41/2001-Central Excise (N.T.), dated the 26th June, 2001 [G.S.R. 470(E) dated the 26th June, 2001], the Central Government hereby, directs that rebate of whole of the duty paid on excisable goods (hereinafter referred to as 'materials') used in the manufacture or processing of export goods shall, on their exportation out of India, to any country except Nepal and Bhutan, be paid subject to the conditions and the procedure specified hereinafter:-

(1) Filing of declaration. - The manufacturer or processor shall file a declaration with the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise having jurisdiction

over the factory of manufacture describing the finished goods proposed to be manufactured or processed along with proportion in which the materials are actually used as well as the quality. The declaration shall also contain the tariff classification, rate of duty paid or payable on the materials so used, both in words and figures, in relation to the finished goods to be exported.

(2) Verification of Input-output ratio. - The Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise shall verify the correctness of the ratio of input and output mentioned in the declaration filed before commencement of export of such goods, if necessary, by calling for samples of finished goods or by inspecting such goods in the factory of manufacture or process. If, after such verification, the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise is also satisfied that there is no likelihood of evasion of duty, he may grant permission to the applicant for manufacture or processing and export of finished goods.

(3) Procurement of material. - The manufacturer or processor shall obtain the materials to be utilized in the manufacture of the finished goods intended for export directly from the registered factory in which such goods are produced, accompanied by an invoice under rule 11 of the Central Excise Rules, 2002 :

Provided that the manufacturer or processor may procure materials from dealers registered for the purpose of the CENVAT Credit Rules, 2002 under invoices issued by such dealers.

(4) Removal of materials or partially processed material for processing. - The Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise may permit a manufacturer to remove the materials as such or after the said materials have been partially processed during the course of manufacture or processing of finished goods to a place outside the factory -

(a) for the purposes of test, repairs, refining, reconditioning or carrying out any other operation necessary for the manufacture of the finished goods and return the same to his factory without payment of duty for further use in the manufacture of finished goods or remove the same without payment of duty in bond for export, provided that the waste, if any, arising in the course of such operation is also

returned to the said factory of the manufacture or process; or

(b) for the purpose of manufacture of intermediate products necessary for the manufacture or processing of finished goods and return the said intermediate products to his factory for further use in the manufacture or process of finished goods without payment of duty or remove the same, without payment of duty for export, provided that the waste, if any, arising in the course of such operation is also returned to the factory of manufacturer or processor;

(c) any waste arising from the processing of materials may be removed on payment of duty as if such waste is manufactured or processed in the factory of the manufacturer or processor.

(5) Procedure for export. - The goods shall be exported on the application in Form A.R.E. 2 specified in the Annexure to this notification and the procedures specified in Ministry of Finance (Department of Revenue) notification No.19/2004-Central Excise (N.T.), dated the 6th September, 2004 or in notification No.42/2001-Central Excise (N.T.), dated 26th June, 2001 shall be followed.

(6) Presentation of claim or rebate. - The claim for rebate of duty paid on materials used in the manufacture or processing of goods shall be lodged only with the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise having jurisdiction of the place approved for manufacture or processing of such export goods.

....

12. A perusal of the aforesaid Notifications brings to light the procedure that is to be followed in matters of claims of rebate of the whole of the Duty remitted in cases of excisable goods (i) used in the manufacture or processing of goods exported (21/2004) or (ii) falling under the First Schedule to the Central Excise Tariff Act 1985 (19/2004). Neither of the Notifications stipulate anywhere that the claim for rebate should be by an exporter only. The procedures set out require categorically that the export shall be carried out by manufacturer-exporters and merchant-exporters only as well as all other details to be followed in matters of export.

13. In the present case, the petitioner has placed on record all the shipping documents duly scrutinised by the authorised officer of Customs as well as sample ARE forms that reveal that the proper officer has, upon verification of the consignments and on a comparison of the goods exported with the shipping

bills, certified unequivocally that the Jumbo bags have in fact being exported. This fact has not been denied anywhere, and on the contrary stands admitted. A disclaimer certificate had been issued by the merchant exporters confirming that the rebate available under the Central Excise Rules had been claimed only by the petitioner and there was no double claim in regard to the same.

14. The only ground raised and argued is that Notification No.21 of 2004 entitles only a merchant-exporter to claim rebate whereas in the present case, the rebate is claimed by the petitioner who is not an exporter. I find this objection hyper-technical. The thrust of both Notification Nos. 19 and 21 of 2004 is two-fold, one, upon verification and confirmation of export, the whole of the duty paid on the goods exported/goods used in the manufacture or processing of the goods shall be refunded, and secondly, that there shall be only one claim made in this regard. In the present case, both pre-requisites have been satisfied since the documentation issued by the Department establishes the position that the gunny bags have been exported. The Department appears to have lost sight of Notification bearing No.19/2004 dated 06.09.2004 which also supports the petitioners' case.

15. The argument of the Department is to the effect that the bags have not been exported as such, but have been packed with other materials, and thus, would at best, constitute inputs or packing material. This, in my view, does not change the position or fact that the bags have, admittedly, been exported under proper documentation. Section 2(18) and (19) of the Customs Act 1962 define 'export', with its grammatical variations and cognate expressions, as meaning 'taking out of India to a place outside India' and 'export goods' to mean 'any goods which are to be taken out of India to a place outside India'. In the present case, there is no quarrel with the position that the bags, duty paid, have been taken out of India to a place outside India. The factum of export is thus not denied.

16. A Division Bench of this Court in the case of Ford India Pvt. Ltd. Vs. Assistant Commissioner of Central Excise (272 ELT 353) considered a claim of rebate in the context of the denial of the same on the ground that the claimant was not the manufacturer. The Bench examined the requirement under Notification No.41 of 2001 that stands superseded by Notification No.21 of 2004 as well as Rule 18 of the Central Excise Rules, 1944, concluding that the petitioner in that case was entitled to the rebate sought. In doing so, this Court observed that the fact that the claimant had paid duty on the goods, the undisputed factum of export and the fact that there was only one claim in respect of the rebate would support the

claim of the petitioner, thus allowing the writ petition and directing the authorities to consider the claim within a stipulated time frame. This decision supports my intention to accept and allow the claims of the petitioner in this case.

17. In conclusion, where a beneficial and incentive oriented scheme has been extended by the Department and availed by the assessee, the benefit thereunder should not be denied on a mere technicality, particularly, when it is conclusively established that there is substantial compliance and all pre-conditions have been satisfied. A liberal interpretation, though of course in line with the substantive requirement of the Rules and applicable Notification is called for, to ensure that the purpose of incentive is not defeated by adopting a hyper-technical view.

18. The above is also the view expressed by this Court in Eveready Industries India Ltd. Vs. CESTAT (337 ELT 189), and the Bombay High Court in Union of India Vs. Fareen Texturisers (323 ELT 104) (approved by Supreme Court in 323 ELT A23) and India Dyestuff Industries Ltd. Vs. Union of India (161 ELT 12).

19. In the light of the discussion above, I have no hesitation in setting aside the impugned order of the first respondent and allowing this writ petition and I do so. No costs. Consequently, connected miscellaneous petition stands closed, if any.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The Joint Secretary to the Government of India
Ministry of Finance, 14, Hudco Vishala Building B Wing
6th Floor, Bhikaji Cama Place, New Delhi - 110 066.
2. The Commissioner of Central Excise,
Chennai II Commissionerate, M.H.U. Complex, 692, Anna Salai,
Nandanam, Chennai - 600 003.
3. The Assistant Commissioner of Central Excise,
Chennai V Division, Chennai II Commissionerate,
M.H.U. Complex, 692, Anna Salai,
Nandanam, Chennai - 600 0035.

+1 cc to M/s.A.P.Srinivas, Advocate Sr.No. 83543

+2 cc to M/s.N.Viswanathan, Advocate Sr.No.83581

AKM/13.11.19/13P-7C /

W.P.No.24766 of 2011