IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.11.2019

CORAM :

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

W.P.Nos.4846 and 4847 of 2007
and M.P.Nos.1 and 1 of 2007

M/s.GTN Textiles Limited
6-3-652, 5C, 5th Floor,
Kautilya Amruha Estates
Somajiguda
Hyderabad – 500 082.

... Petitioner in the above W.Ps

Vs.

1.Secretary to the Government,
Department of Revenue
Ministry of Finance, North Block,
New Delhi 110 001.

2.The Joint Secretary (Review) to the
Government of India
HUDCO Vishala Building,
14 B Wing, VI Floor, Bhikaji Cama Place,
New Delhi 110 066.

3.Commissioner of Customs
Customs House, Rajaji Salai,
Chennai – 600 001.

... Respondents in the above W.Ps

W.P.No.4846 of 2007:

Prayer: Writ Petition filed under Article 226 of the Constitution of India, for the issuance of Writ of Certiorari to call for the records and quash order No.462/2006 dated 29.08.2006 passed by the second respondent herein against petitioner.

W.P.No.4847 of 2007:

Prayer: Writ Petition filed under Article 226 of the Constitution of India, for the issuance of Writ of Declaration declaring the provisions of paras 2(a) and 2(c) of Notification 31/99 Cus NT Dated 20.05.1999 issued by the firsst respondent, in so far as the petitioner is concerned as ultra vires provisions of Rules 3 and 4 of

the Customs and Central Excise Duties Drawback Rules, 1995 and also ultra vires the provisions of Article 14, 19(1)(g) and 245 of the Constitution of India.

For Petitioner : Mr.G.Natarajan

For Respondents : Mrs.Hema Muralikrishnan
Senior Standing Counsel

C O M M O N O R D E R

Heard Mr.G.Natarajan, learned counsel for the petitioner and Mrs.Hema Muralikrishnan, learned Senior Standing Counsel for the respondents.

2. The admitted facts are the petitioner manufactures and exports readymade garments and claims drawback of excise and customs duties paid on the raw materials used in such manufacture. The claims had been made under All Industry Rate (AIR). Some of the processes engaged in the manufacture, such as 'silicon washing' and 'mercerizing' were sub-contracted by the petitioner to an entity by name Arun Processors Limited, an 100% Export Oriented Unit (in short 'EOU'). The EOU, after completion of the processes returned the goods for further finishing to the petitioner, who carried out the final processing and thereafter, exported the same. Initially the petitioners' claim for drawback was allowed. Thereafter and invoking Notification No.31 of 1999 dated 20.05.1999, show cause notice dated 02.04.2003 was issued to the petitioner seeking to reverse the drawback granted and recover the same. Order-in-original dated 28.11.2004 was passed confirming the demand along with interest and penalty.

3. The petitioner challenged the aforesaid order by way of appeal and the Commissioner of Customs (Appeals), Chennai by order dated 13.5.2005 rejected the same. The same fate awaited the Review Petition filed by the petitioner challenging the order of the Appellate Commissioner before the Government of

India (GOI) that dismissed the review by order dated 29.08.2006. The aforesaid order of the GOI is challenged in W.P.No.4846 of 2007.

4. Learned counsel for the petitioner has drawn my attention to various Notifications and, according to him, a conjoint reading of the same should bring home the position that there is no restriction or prohibition imposed by the Customs Act, 1962 (in short 'Act') for claim of drawback on job work carried out by a 100% EOU. Any additional conditions imposed by Notification would thus have to be viewed as impermissible.

5. The petitioner reiterates that the chemicals that were utilised in the job work were subject to duty. An interim order has been passed by this Court on 11.06.1999 in W.P.No.9789 of 1999 in the case of Arun Processors Limited (Petitioner in W.P.No.9789 of 1999) permitting the petitioner to proceed with business as usual subject to the petitioner paying applicable excise duty on all raw materials and inputs that have been utilised in the manufacturing process. This Writ Petition stands disposed on 15.11.2001.

6. Let us now examine the Notifications cited, in the context of the facts narrated above. The first of the Notifications relied on is 31/1999 dated 20.05.1999, which provides for new duty drawback rates, effective 01.06.1999. This Notification confirms that the rates of drawback specified therein shall not be applicable to export of commodities/products, if such commodities/products are as per clause 2(b) thereof, manufactured and/or exported in discharge of export obligation against an advance licence issued under the Duty Exemption Scheme of Export and Import Policy in force.

7. Then we come to Circular No.67 of 1998 dated 14.09.1998. The Circular is relevant in entirety and is extracted in full hereunder:

Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi

Subject: 100% EOUs/EPZ/EHTP Units Permission to send out goods for jobwork outside the unit Regarding.

I am directed to refer to Board's instructions issued from F.No.305/147/93-FTT, dated the 31st January, 1994 and Board's Circular No.59/98-Cus., dated the 12th August, 1998 on the sub-contrtacting by EOU/EPZ/EHTP units (hereinafter referred to as the said units).

2. On further requests from the Ministry of Commerce and the Trade, the Board has once again considered the issue of sub-contracting by the above said units.

3. It has now been decided that henceforth the permission to EOU/EPZ units for sub-contracting will be given by the Assistant Commissioner in-charge of the Export Oriented Unit (operating under Notification No.53/97-Cus., dated the 3rd June, 1997 as amended by Notification No.12/98-Cus., dated the 27th April, 1998). Further the EOU/EPZ and EHTP units may be allowed to get a part of their production completed either from the DTA units or from other EOU/EPZ/EHTP units, provided raw-material for the manufacture of such goods, whether imported or indigenous, shall first reach and be accounted for in the statutory records of the above said units. Subsequently, these raw materials may be sent to the job worker for production of the final products. Final products manufactured from such raw materials shall be brought back from job worker's premises to the unit for accounting. The units will ensure that the wastage generated during the said job work is also brought back from the job workers' premises.

4. Further to utilise the idle capacity of the EOU/EPZ units, it has also been decided that the EOU/EPZ units in textile, readymade garments, agro-processing and granite sectors may be permitted to undertake job work from the DTA units provided the finished products produced by such EOU/EPZ units will be exported directly from EOU/EPZ units itself and these goods will not be sent back to the DTA.

5. The instructions cited in para 1 above stand modified to the above extent.

8. This Circular has been issued to ensure full utilisation of the capacity of Export Oriented Units in the Export Processing Zone and states that such units may engage in activities of processing, subject to condition that such finished goods, post processing by the EOUs, shall be exported directly from the EOU/EPZ units and shall not be sent back to the Domestic Tariff Area (DTA).

9. Clarifications were sought by the Ministry of Commerce and Trade as to which entity would be responsible for filing the necessary shipping documents in cases where a part of the job work has been carried out by a unit in an EOU. To settle this ambiguity, Notification 74 of 1999 dated 05.11.1999 was issued wherein at paragraphs 1 to 4 the Board states as follows:

> *'I am directed to refer to paragraph 4 of Board's Circular No.67/98-Cus., dated the 14th September, 1998 on the above subject under which the EOU/EPZ units in textile, ready-made garments, agro-processing and granite sectors have been allowed to undertake job work on behalf of the DTA units. This is subject to the condition that the finished products produced by such EOU/EPZ units will be exported directly from EOU/EPZ unit itself and that these goods will not be sent back to the DTA unit.*
>
> *2. As per Paragraph 9.17(d) of Exim Policy, 1997-2002, as amended up to 1-4-1999, the EOU/EPZ units in aquaculture, animal husbandry, electronics hardware and software, can also undertake job work for export on behalf of DTA units with the permission of Asstt. Commissioner of Customs. In this connection, it has been brought to the notice of Board by Trade & the Ministry of Commerce that EOU/EPZ units are facing difficulty in doing job work from DTA units in the absence of a Department Circular extending the benefit of para 4 of above said circular to the sectors of aquaculture, animal husbandry, electronics hardware and software.*
>
> *3. The matter has been examined by the Board and it has been decided to extend the benefit of para 4 of Board's Circular 67/98-Cus., dated 14-9-1998, to the EOU/EPZ units in aquaculture, animal husbandry, electronics hardware and software sector also subject to the condition that finished products produced by such EOU/EPZ units will be exported directly from such units and these goods shall not be allowed to be brought back to DTA unit Boardscircular 67/98-Cus., dated 14-9-1998, stands modified to the above extent.*
>
> *4.It has been brought to the notice of the Board that there is a lack of clarity as to who will file the Shipping Bill and where the Shipping Bills of such exports will be assessed. It is clarified that the Shipping Bill in such case will be filed in the name of DTA unit and the name of EOU/EPZ unit will also be mentioned on the Shipping Bill as job worker. In case of job work by EPZ unit, the Shipping Bill will be assessed by the Assistant Commissioner in charge of zone. In case of EOU, as the Shipping Bill is filed at the Gateway Port, the Shipping Bill will be assessed by Assistant Commissioner in charge of Export of any other officer as may be specified by Commissioner of Customs at Gateway Port. However, the name of exporter i.e. the DTA unit and name of job worker i.e. EOU unit shall be required to be mentioned on the invoice and AR-4. Also the AR -4 shall be signed by*

both parties. It is also clarified that no drawback/DEPB benefits shall be admissible either to EOU/EPZ units or to the DTA unit for such exports.'

10. Then again, in Circular No.31 of 2000 dated 20.04.2000 a further clarification is given in regard to the rate of drawback available as against duty suffered on inputs upon proof being submitted in regard to payment of duty. The Circular reads as follows:

'CUSTOMS CIRCULAR No.31/2000-Cus. Dated 20-4-2000.

Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi

It was provided in Board's Circular No. 67/98-Cus. dated 14.9.98. issued vide F. No.305114719 8-FIT that DTA units may utilise the idle capacity of EOU/EPZ units in certain sectors for manufacturing export goods.

2. In such cases, the inputs which are supplied by DTA Units for processing by EOU/EPZ Units are procured by DTA units on payment of applicable duties. Various Trade Associations and the Ministry of Commerce have brought out that the incidence of such duty on inputs consumed in the manufacture of the export goods can be rebated only through the Brand Rate Drawback route.

3. The issue has been examined in the Board. It has been decided that in view of the above mentioned facts, the DTA units shall be eligible for grant of drawback against duties suffered on their inputs which are processed by EOU/EPZ units for die manufacture of goods which are exported in accordance with the said Circular No.67/98.

4. Such DTA Exporters will be eligible for payment of Brand Rate of Drawback against duties suffered on inputs, on submission of proof of payment of duty. Accordingly, drawback will be payable to such exporters under Rule 6(1) of the Customs and Central Excise Duties Drawback Rules, 1995, at the rate fixed on specific application. The procedure laid down under the said Drawback Rules will have to be followed for fixation of Brand rates of Drawback. Such exporters will have to apply to the Directorate of drawback for fixation of Brand rates on exports under DEPB. However, under no circumstances, such exporters will be allowed to claim All-industry Rate of Drawback.'

11. On 22.5.2000, Circular No.49-Cus was issued providing for various amendments in the Exim Policy and Handbook of procedures. After setting out

the trajectory of the various notifications yet another amendment was made to the original scheme at paragraphs 10 and 11 thereof, reading as follows:

> *'10. Under para 9.17(d), the EOU/EPZ units in specific sectors were allowed to undertake job work for export on behalf of DTA units. This paragraph has been amended to extend this facility to all sectors. It has also been provided that DTA units shall be entitled to brand rate of duty draw back.*
>
> *11. The EOU/EPZ units in textiles, ready made garments and granite sectors were allowed to undertake job work on behalf of DTA units by Board's Circular 69/98-Cus, dated 14th September 1998. This facility was subsequently extended to the EOU/EPZ units in aquaculture, animal husbandry, hardware, software sector vide Boards Circular No.74/99-Cus, dated 5th Nov, 1999. Now, it has been decided to extend this facility to EOU/EPZ units in all sectors. Further, it has been decided that the DTA units shall be entitled to avail of the brand rate of duty drawback for such job work undertaken by EOUs/EPZ units concerned.'*

12. It is the petitioners' case, on a combined reading of the aforesaid Notifications, that i) the Board has permitted EOUs/units in EPZ to engage in processing works/job works in order to optimize production capacity and ii) that the ultimate manufacturer/exporter is entitled to drawback claim in regard to duty component paid on raw materials/inputs, upon proof of payment of duty thereupon.

13. The petitioner relies in this regard, on a decision of the Division Bench of this Court in the case of *Commissioner of Customs, Tuticorin V. L.T.Karle & Co.* (2007 (207) ELT 358) and of a learned single Judge of this Court in *First Garments Manufacturing (I) P. Ltd. V. Jt.Secretary to the G.O.I* (2016 (344) ELT 67 (Mad).

14. Learned counsel for the respondents urges that a reading of the Notifications makes it clear that the ultimate export has to be effected by the 100% EOU itself. According to her, the intention of the Notifications was never to permit a drawback claim by a manufacturer or exporter in cases where there

had been job work carried out by EOU/units in EPZ. This is for the reason that various concessions are available already to exports from EOU/units in EPZ and the provision of drawback is an additional benefit not contemplated in law. She brings to the notice of the Court two conflicting decisions of the Karnataka High Court, one in the case of *Karle International V. Commissioner of Customs, Bangalore* (2012 (281) ELT 486) in favour of the assessee and an another of another Bench of the same Court in *Commissioner of Customs, Bangalore V. Leela Scottish Lace Ltd.* (2011 (268) ELT 185), adverse to the assessee.

15. The decision of *Karle International* (supra) is dated 23.08.2011, whereas the decision in *Leela Scottish Lace Ltd.* (supra) is dated 18.02.2011 but has not been brought to the notice of the subsequent Bench. The Revenue carried in appeal the decision of the Division Bench in *Karle International* (supra) and the Departmental SLP in Special Leave to Appeal (Civil) CC Nos.6104 and 6105 of 2012 came to be dismissed by the Supreme Court on 13.4.2012 in the following terms:

> *'Delay condoned.*
>
> *Admittedly, the decision of the Madras High Court in the case of the respondent-assessee itself, on the same issue has not been challenged by the Revenue. In that view of the matter, we decline to entertain these Special Leave Petitions which are dismissed accordingly'.*

16. She labours extensively on the decision of the Division Bench in *Leela Scottish Lace Ltd.* (supra) drawing attention to detailed analysis of the facts embarked upon by the Bench and the strictures passed against the Department in regard to the non-cooperation extended by the officials therein. In conclusion, the Bench has disagreed with the Division Bench of the Madras High Court in the

case of *L.T. Karle* (supra) holding that the claim of drawback by the assessee in that case was not liable to be accepted.

17. The learned single Judge in the case of *First Garments* (supra) has accepted the contention of the petitioner to the effect that any Notification that runs counter to the statutory provisions would have necessarily to be ignored, relying in this connection on the decision of the Division Bench in the case of *L.T.Karle* (supra). The learned single Judge also records the contention of the respondents therein that the decision of the Division Bench in *L.T.Karle* (supra) had been challenged by way of Special Leave, however, without it being stayed.

18. Before me, this contention was not raised and neither was a report placed on progress, if any, in that matter.

19. The Division Bench in *L.T.Karle* (supra) has considered all Notifications referred to before me as also the decisions of the CESTAT in *Leela Scottish Lace Ltd.,* though reversed by the High Court of Karnataka. After an exhaustive discussion in regard to the relevant Notifications, the Bench concludes at paragraph 12.2.9 as follows:

> *'12.2.9. The harmonious reading of Circular No.67 of 1998 dated 14-9-1998 and Circular No.31 of 2000 dated 20-4-2000 in the light of Clause 2 (c) of the Notification No.67 of 1998 dated 1.9.1998 and the proviso mentioned therein, therefore, makes it clear that the DTA units are eligible to send out the goods to the 100% EOUs for job work outside the DTA units and they are also eligible for the grant of duty drawback against the duties suffered on their inputs, which are processed by 100% EOUs for manufacturing the finished goods, which are exported directly from 100% EOUs, without sending them back to the DTA units.'*

20. The legal issue raised in this case is thus liable to be answered in favour of the petitioner and I do so holding that the petitioner is entitled to drawback at All India Rate in respect of the duty suffered on inputs utilised by 100% EOU/units in EPZ for manufacture.

21. The difficulty does not stop there, since in the present case, admittedly, the goods have not been exported directly from the 100% EOU, but have come back to the DTA for further processing. In such a case, it becomes necessary for the authorities to categorically ensure that the duty in respect of raw materials have, in fact, been remitted, prior to export.

22. I may make, in this connection, useful reference to Rule 3 of the Customs and Central Excise Duties and Service Tax Drawback Rules, 1995 that reads as follows:

> *'**Rule 3. Drawback. -***
> *(1) Subject to the provisions of -*
> *(a) the Customs Act, 1962 (52 of 1962) and the rules made thereunder,*
> *(b) the Central Excises and Salt Act, 1944 (1 of 1944) and the rules made thereunder,*
> *(bb) the Finance Act, 1994(32 of 1994), and the rules made thereunder; and*
> *(c) these 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:*
>
> *Provided that where any goods are produced or manufactured from imported materials or excisable materials or by using taxable services as input services, on some of which only the duty or tax chargeable thereon has been paid and not on the rest, or only a part of the duty or tax chargeable has been paid; or the duty or tax paid has been rebated or refunded in whole or in part or given as credit, under any of the provisions of the customs Act, 1962 (52 of 1962) and the rules made thereunder, or of the Central Excise Act, 1944(1 of 1944) and the rules made thereunder, or of the Finance Act, 1994(32 of 1994) and the rules made thereunder, the drawback admissible on the said goods shall be reduced taking into account the lesser duty or tax paid or the rebate, refund or credit obtained.*
> *Provided further that no drawback shall be allowed.*
> *(i)If the said goods, except tea chests used as packing material for export of blended tea, have been taken into use after manufacture;*
> *(ii)if the said goods are produced or manufactured, using imported materials or excisable materials or taxable services in respect of which duties or taxes have not been paid; or*
> *(iii)on jute batching oil used in the manufacture of export goods, namely, jute (including Bimlipatam jute or mesta fibre), yam, twine, thread, cords and ropes;*
> *(iv)if the said goods, being packing materials have been used in or in relation to the export of -*
> *(1)jute yarn (including Bimipatam jute or mesta fibre), twist, twine, thread and ropes in which jute yam predominates in weight:*
> *(2)jute fabrics (including Bimlipatam jute or mesta fibre), in which jute predominates in weight;*

(3)jute manufactures not elsewhere specified (including Bimlipatam jute or mesta fibre) in which jute predominates in weight.
(v)on any of the goods falling within Chapter 72 heading 1006 or 2523 of the of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975)'

23. A harmonious and purposive construction of the above Rule as well as Notifications, reveal to me that it could not have been the intention of Legislature or the authorities concerned, to deny drawback claim merely because some processes in the chain of manufacturing have been conducted in the premise of EOU/unit of EPZ, if the assessee is otherwise entitled to the benefit. Though the Notifications do specifically require that the export, after completion of job work, is to take place only from the EOU/EPZ, this can be given effect to only in a situation where the entire process of manufacture/finishing is occasioned in such EOU/EPZ. In a situation such as the present, where parts of the process are carried out in different locations, one can hardly conclude that this operational difference would result in denial of the benefit to the exporter. The original stipulation that no drawback was available for export was imposed to ensure that no double benefit was obtained. Subsequently, when an EOU was permitted to engage in job work, the original condition stood modified to the effect that a manufacturer/exporter would also be entitled to drawback, provided the finished commodity was exported from EOU/EPZ itself. A situation such as the present where the goods revert back to the assessee for further processing has not been envisaged and is thus not covered, though it is, in my view, also entitled to such benefit. Such a situation is clearly not intended to be kept out of the beneficial sweep of Notification 31 of 2000.

24. Thus, while answering the legal issue in favour of the petitioner and setting aside the impugned order, I remand the issue to the Assessing Authority

to verify specifically whether duty has been remitted on the raw materials utilised in job work. If the result of the enquiry is positive, the petitioner is entitled to the drawback of the duty paid in accordance with law. Let this exercise be completed within a period of three (3) months from date of receipt of this order after hearing the petitioner.

25. W.P.No.4896 of 2007 is disposed in the above terms.

26. W.P.No.4847 of 2007 is for a Writ of Declaration declaring the provisions of paras 2(a) and 2(c) of Notification 31/99 Cus NT Dated 20.05.1999 ultra vires the provisions of Rules 3 and 4 of the Customs and Central Excise Duties Drawback Rules, 1995 and also ultra vires the provisions of Article 14, 19(1)(g) and 245 of the Constitution of India. This Writ Petition is not pressed and is hence dismissed. No costs. Consequently, all connected Miscellaneous Petitions are closed.

Index:Yes/No
Speaking/Non-speaking order

15.11.2019

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To

1.Secretary to the Government,
Department of Revenue
Ministry of Finance, North Block,
New Delhi 110 001.

2.The Joint Secretary (Review) to the
Government of India
HUDCO Vishala Building,
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