IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.01.2020

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE R.SURESH KUMAR

Writ Appeal Nos.2122, 2123, 2128, 2129 of 2019

1.The Central Board of Excise and Customs,
Rep. by its Chairman,
Ministry of Finance, Government of India,
South Block, New Delhi - 110 001.

2.Directorate General of Central Excise,
Intelligence, Coimbatore
Regional Unit, 386-A, Pankaja Mill Road,
Ramanathapuram,
Coimbatore - 641 045.

3.Director General of Foreign Trade,
Udyog Bhavan,
New Delhi - 110 011.

4.The Joint Director General of Foreign Trade,
India Life Building (Annexe),
1544, Trichy Road,
Coimbatore - 641 018. ... Appellants in all WAs

Vs.

M/s.K.G.Denim Limited,
(Rep. by V.Arulanandham,
Dy. General Manager),
Jadayampalayam, Mettupalayam Taluk,
Mettupalayam 641 302. ... Respondent in all WAs

Prayer : Appeals filed under Clause 15 of the Letters Patent Act, praying to set aside the common order dated 14.11.2017 passed by this Court in W.P.Nos.11645 to 11648 of 2003.

For Appellants : Mr.G.Karthikeyan

For Respondent : Mr.P.Sridharan

For M/s.Lakshmi Kumaran
and Sridharan Attorneys

COMMON JUDGMENT

(Judgment of the Court was delivered by DR.VINEET KOTHARI,J.)

The Appellants/Revenue have filed the present intra Court appeals aggrieved by the order of the learned Single Judge dated 14.11.2017 in W.P.Nos.11645 to 11648 of 2003, whereby the learned Single Judge allowed the writ petitions filed by respondent/M/s.K.G.Denim Limited.

2.The learned Single Judge, by the order impugned before us, held that the Policy Circular Nos.6 and 35 could not override the statutory provisions in favour of the Assessee for granting the benefit of the DEPB or Duty Drawback, in case the Assessee in Domestic Tarrif area gets the job work of manufacturing yarn converted into Denim Fabrics through 100% EOU Unit and the said goods are exported out of India. The relevant reasons given by the learned Single Judge in the impugned order are quoted below for ready reference.

"11.In my considered view, the ratio of decision of the High Court of Karnataka would very well apply to the facts of the case. The Export Import policy for the relevant year was formulated in exercise of the powers conferred under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992. The policy thus has a force of law and it is a statutory policy. In terms of the said policy, more particularly, para 7.17, the petitioner is entitled to drawback. The said para 7.17 reads as follows :-

Applicability of Drawback

7.17 The exports made under the DEPB Scheme shall not be entitled for drawback. However, the additional customs duty paid in cash on inputs under DEPB shall be adjusted as CENVAT Credit or Duty Drawback as per rules framed by the Deptt. of Revenue". In cases, where the Additional Customs Duty is adjusted from DEPB, no benefit of CENVAT/Drawback shall be admissible.

12.This benefit which flows from the statutory policy is sought to be denied based upon the policy Circular Nos.6 and 35 as held in the case of Karle International Vs. Commissioner of Customs, Bangalore reported in 2012 (281) E.L.T. 486 (Kar.), the right conferred in the statute which in the instant case is in the nature of Export Import Policy cannot be taken away by issuing Circulars. Thus, the benefit which has accrued to the petitioner by virtue of Export Import Policy cannot be denied by relying upon the impugned policy circulars. Though the petitioner has challenged the amendment to Circular No.31/2000,

eventually in the impugned order reference has been made to policy Circular Nos.6 and 31. In the light of the finding that the policy circulars cannot override the statutory benefit, the rejection of the petitioner's request for being eligible for DEPB Scheme vide order dated 28.02.2003 and the consequential communications of the 4th respondent dated 20.03.2003 and 04.03.2003 are held to be unsustainable in law.

13.For the above reasons, it may not be necessary for this Court to declare the policy circular as either null and void or ultravires and it would suffice to hold that the policy Circulars cannot overide the statutory policy which is the Export Import Policy of the year 1997 framed under the provisions of Foreign Trade (Development and Regulations) Act, 1992.

14. In the result, Writ Petition Nos.11646 to 11648 of 2003 are allowed and the impugned orders are set aside. Writ Petition No.11645 of 2003 is disposed of for the reasons stated in the preceeding paragraphs. No costs."

3.The learned Single Judge relied upon the Division Bench Judgment of this Court in the case of *Commissioner of Customs, Tuticorin Vs. L.T.Karle & Co. [2007 (207) E.L.T. 358 (Mad.)]* and the Karnataka High Court Judgment in the case of *Karle International Vs. Commissioner of Customs, Bangalore [2012 (281) E.L.T. 486 (Kar.)].*

4.The learned counsel for the Appellants/Revenue Mr.G.Karthikeyan however sought to rely upon some judgments of Gujarat High Court, Madhyapradesh High Court, Kerala High Court and the order passed by the learned Single Judge of this Court in W.P.No.15921 to 15924 of 2018 etc. batch and to submit that by a Statutory Notification, the policy decision of the State Government in this regard could be changed or clarified. However, the learned counsel for the Appellants/Revenue fairly submitted the cases, cited by him, did not deal with the Circulars, as was the case before the earlier Division Bench of the Madras High Court and the Karnataka High Court. The citations relied upon by the learned counsel for the Appellants/Revenue are as follows:

(i) Director General of Foreign Trade, New Delhi Vs. Mustafa Traders [W.A.No.480 of 2011 dated 02.11.2010 (Kerala High Court)]

(ii) Taj Agro Commodities Pvt. Ltd. Vs. Union of India through The Joint Secretary, New Delhi and others [W.P.(L)No.1810 of 2018 dated 03.07.2018 (Bombay High Court)]

(iii) Siddhi Vinayak & another Vs. Union of India & others [W.P.No.21438 of 2018 dated 25.10.2018 (Madhya Pradesh High Court)]

(iv) Premium Pulses Products Vs. Union of India, [R/ Special Civil Application Nos.16765, 17290, 17573 & 17664 of 2018 dated 19.12.2018 [(Gujarat High Court)]

(v) M/s.Hira Traders Vs. The Director General of Foreign Trade, New Delhi and others [W.P.No.15921 to 15924 of 2018 etc. batch dated 04.04.2019 (Madras High Court)]

5.The learned counsel for the respondent/Assessee Mr.P.Sridharan however heavily relied upon the aforesaid two Division Bench Judgments of the Madras High Court and the Karnataka High Court of the same Assessee M/s.Karle International and he submitted that the job work of conversion of yarn into Denim Fabrics by 100% EOU Unit was intended for fuller utilization of the capacity of 100% EOUs and the Import Export Policy had clearly allowed the benefit of DEPB/Duty Drawback in such cases. He further submitted that both the High Courts have clearly held that Departmental Circulars issued by the Central Board cannot restrict or curtail such benefits. The relevant extract from the two Judgments are also quoted below for ready reference.

(i) Judgment of the Madras High Court reported in ***2007 (207) E.L.T. 358 (Mad.) [Commissioner of Customs, Tuticorin V. L.T. Karle & Co.]:***

"12.2.4.Sections 74, 75 and 76 of the Act and Rules 3 and 4 of the Rules framed under the Act and the notifications as well as the circulars issuing clarifications in that regard, being fiscal statute should be strictly construed, also required to be construed harmoniously applying the principle of reasonable construction to give effect to the purpose or intention of the relevant provisions as apparent from the scheme of the Act.

12.2.5. Once there is no dispute as to the entitlement of the first respondent, a DTA unit, for availing the benefit of the duty drawback under Section 75 of the Act for the imported materials used in the manufacture of the goods which are exported, denial of the same on fictitious reason is, in our considered opinion, arbitrary and capricious. Refusal to sanction the duty drawback on the materials/inputs imported, on such imaginary reasons, would otherwise defeat the very intention of the legislature referred in detail supra.

12.2.6. As it is a settled law that fiscal laws must be strictly construed, words must say what they mean and nothing should be presumed or implied, at the risk of repetition, we observe that even though clause 2 (c) of the notification dated 1.9.98 states that the rates of drawback specified in the Table shall not be applicable to export of any of the commodities/products if such commodity/product is manufactured and/or exported by a unit licensed as hundred per cent export-oriented undertaking in terms of the relevant provisions of the Import and Export Policy in

force, the same stands clarified by a subsequent circular No.31 of 2000 dated 20.4.2000 to the effect that DTA units may utilize the idle capacity of EOU/EPZ units, the inputs which are supplied by DTA units for processing by EOU/EPZ units are procured by DTA units on payment of applicable duties and the DTA units shall be eligible for grant of drawback against duties suffered on their inputs which are processed by EOU/EPZ units for the manufacture of goods which are exported in accordance with the Circular No.67 of 1998.

12.2.7. The Constitution Bench of the Apex Court in COLLECTOR OF CENTRAL EXCISE, VADODRA v. DHIREN CHEMICAL INDUSTRIES, [2002] 139) E.L.T. 3 (S.C.) = [2002] 126 STC 122, held that if there are circulars which have been issued by the Central Board of Excise and Customs which place a different interpretation upon the said phrase, that interpretation will be binding upon the revenue. Similar view was taken by the Apex Court in COLLECTOR OF CENTRAL EXCISE, VADODARA v. DHIREN CHEMICAL INDUSTRIES, [2002] 143 ELT 19.

12.2.8. In COMMISSIONER OF CUSTOMS, CALCUTTA v. INDIAN OIL CORPORATION LTD., [2004] 165 ELT 257, the Apex Court held that the circulars issued by the revenue are binding primarily on basis of language of statutory provisions buttressed by need of adjudicating officers to maintain uniformity in levy of tax/duty throughout the country and not on the basis of promissory estoppel, and that when a circular remains in operation, the revenue is

bound by it and cannot be allowed to plea that it is not valid nor that it is contrary to the terms of statute.

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 the 100% EOUs, without sending them back to the DTA units.

12.3.0. In the light of the above discussion, we hold that question of mis-declaration in column 7 of the shipping bills by the first respondent does not arise and the duty drawback sanctioned to the first respondent, a DTA unit, as per Rule 3 read with Rule 4 of the Rules and the notification and the circulars issued therein cannot, therefore, be denied on the ground that the finished goods were manufactured in the 100% EOU. Hence, the second issue is answered in favour of the assessee.

13.1. The third question of law is whether the Tribunal is correct in law in ignoring the fact that the required permission from the Assistant Commissioner in charge of the 100% EOU was not obtained by the exporter.

13.2. In view of the circular dated 14.9.98 issued in clarification to clause 2 (c) of the notification dated 1.9.98 which was issued in accordance with Rule 3 read with Rule 4 of the Rules, the question of getting permission from the authorities concerned does not arise at all and in any event, when Section 75(3) of the Act provides that the power to make rules conferred by sub-section (2) shall include the power to give drawback with retrospective effect, the refusal to give due weightage to the permission obtained by the first respondent in July 1999, even though it is post-period permission, cannot be appreciated, as such permission has to be considered not only to advance but also to achieve the object of the purpose and intention of Section 75 of the Act, viz., sanctioning the duty drawback suffered by the first respondent on the materials/inputs imported and used in the manufacture of finished goods, which are exported and not to defeat the same. Hence, we answer the last question of law also in favour of the assessee.

14. Accordingly, the appeal is dismissed answering the questions of law raised in the affirmative, in favour of the assessee and against the Revenue. No costs."

(ii) Judgment of the Karnataka High Court reported in ***2012 (281) E.L.T. 486 (Kar.) [Karle International V. Commissioner of Customs, Bangalore***]

"In the Circular No.74/99, dated 5-11-1999 dealing with manufacture of goods in EOU Unit as job work and

Drawback, it is stated as under:

"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 units, 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 or any other officer as may be specified by Commissioner of Customs at Gate way 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 the 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."

Further in Circular No.31/2000 dated 20-4-2000, again dealing with the same subject, it has been held as under:

"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 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."

14. Relying on these two Circulars, the Duty drawback is denied to the first appellant. It is settled law that a right vested under a statutory provisions cannot be taken away by virtue of Circulars issued from time to time, if they are

contrary to statutory provisions. Under Section 75, to be eligible for Duty drawback, all that the exporter has to satisfy is that the goods are manufactured, processed or on which any operation has been carried out in India. It is immaterial where the said manufacturing or processing has taken place. It may be in his Unit or it may be in EOU unit. Guiding principle is, it should have been manufactured or processed in India and exported. The Circular 67/98 was issued only to enable EOU Units to overcome the problems which they were facing, so that, instead of keeping their machinery idle, they were permitted to accept job work so that the capacity is utilized and they are able to over come the recession in the world market. It is by virtue of the said Circular, the EOU undertook the job work. The Circular makes it very clear that if the idle capacity of EOU/EPZ Units is utilized and the textile, ready-made garments, agro-processing and granite sectors undertakes job work from the DTA Units, then the finished products produced by such EOU/EPZ Units will have to be exported directly from EOU/EPZ Unit itself and these goods will not be sent back to the DTA. The reason is obvious. The appellant's product does not belong to EOU. It belongs to DTA and in fact export is done in the name of DTA. Once DTA exports the manufactured goods and if they have paid duty on raw materials, then, under Section 75, they are eligible for Duty Drawback. The said right conferred in the statute cannot be taken away by issuing circulars, which runs counter to these statutory provisions. Similarly the Circular 31/2000 where it is stated that under no circumstances the exporter will be allowed to claim All

Industry rate, also runs counter to the Act and Rules. However, that Circular makes it very clear that DTA units are eligible for duty drawback. If we look into the scheme of the Rules, it becomes clear that if the Government by notification decides what is public policy known in trade terms as All Industry rate, irrespective of the duty paid on raw materials, the exporter of the finished products, would be entitled to Duty Drawback at such rates. Under the Rules, if he has paid more duty and the All Industry Rate is low, he has to approach the authorities under the Rules for enhancement of the Duty Drawback to which he is legally entitled to. If on such application, on being satisfied from the material produced by such exporter, the authority can fix a higher rate than the All Industry rate, which is known as Brand Rate Drawback rate. Therefore, the Circular making it obligatory for DTA to get the goods manufactured in a EOU to necessarily approach the authorities for fixation of Brand Rate Drawback rate. Therefore declaring that he is not entitled to All Industry rate, is arbitrary, absurd and does not stand to reason. As always brand Rate Drawback rate is higher than the All Industry rate, the choice is that of the exporter. If he is satisfied with the All Industry rate, if he is not interested in approaching the authorities, he cannot be denied the all Industry rate, fixed by the Government."

6.Having heard the learned counsel for the parties and in view of the legal position, we are of the opinion that there is no merit in the present intra Court Appeals filed by the Revenue and the view of the

learned Single Judge deserves to be upheld. We are of the opinion that the Circulars like Circular No.74/1999-Cus dated 05.11.1999 as well as the Circular No.31/2000-Cus dated 20.04.2000 could not have restricted or denied the benefit of Drawback or DEPB if such manufacturing was done by 100% EOU Units and then exports were made by such 100% EOUs. We have quoted below Paragraph No.4 of the Circular No.74/1999-Cus illustratively to explain the said point.

> "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 units, 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 or any other officer as may be specified by Commissioner of Customs at Gate way 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 the parties. <u>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.</u>*"

The said para 4 clearly reveals that by the said Circular 74/1999, the Central Board intended to prescribe the authority as to who will assess and clear the consignments in question, where the exports were made by EOU/EPZ units or the Bills of Entries will mention as well as the DTA Units viz., the present Assessee/Respondent. The Para 4 however ends up with another alleged clarification saying that no drawback/DEPB benefits shall be admissible either to EOU/EPZ units or to the DTA unit for such exports. This denial of benefit to the Assessee under the guise of a clarification for which, in our opinion, no power was bestowed on the Central Board. More so, if such Circulars come in direct conflict with clear statutory provisions of law or Import Export Policy having statutory character.

7.Therefore, respectfully agreeing with the views of the earlier Division Bench Judgments of this Court in the case of *Commissioner of Customs, Tuticorin V. L.T. Karle & Co., reported in 2007 (207) E.L.T. 358 (Mad.)* as well as the Karnataka High Court in the case of *Karle International V. Commissioner of Customs, Bangalore, 2012 (281) E.L.T. 486 (Kar.),* we do not find any merit in these Writ Appeals filed by the Revenue Department. We hold that the Judgments relied upon by the Appellant/Revenue were rendered in different context and they pertain to statutory Notifications issued by the Central Government and not with the

Circulars issued by the Central Board of Excise and Customs.

8.In view of the aforesaid observations, the present Writ Appeals are bound to be dismissed and they are dismissed. No costs.

(V.K. J.) (R.S.K. J.)

10.01.2020

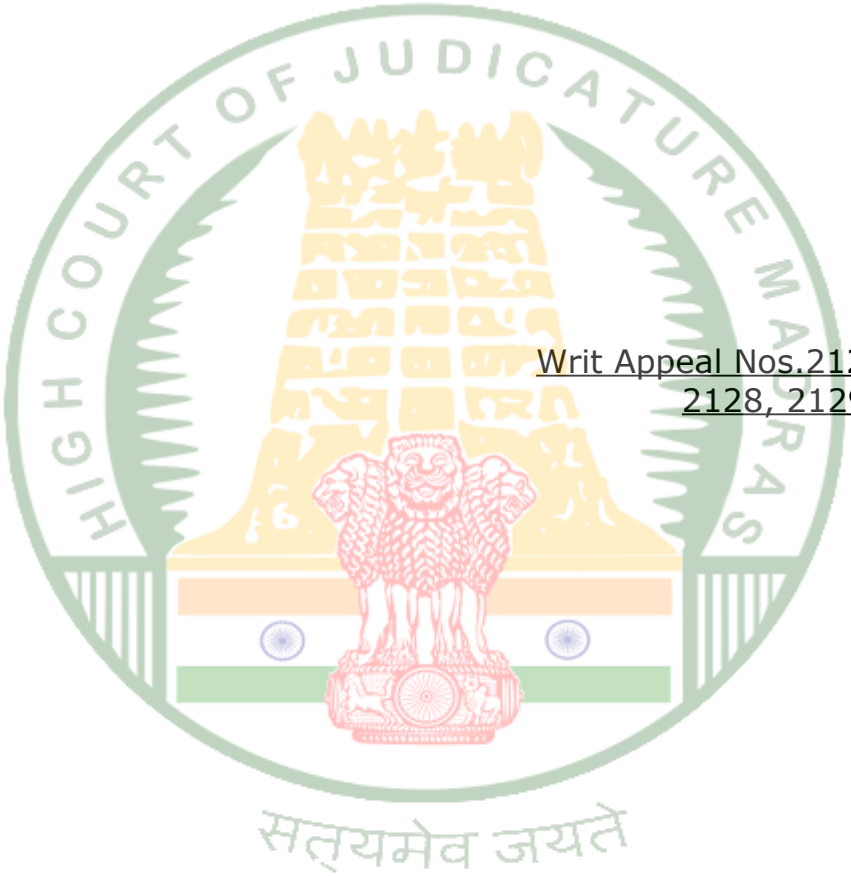
Index : Yes/No

Speaking Order : Yes/No

Sgl

DR.VINEET KOTHARI, J.
And
R. SURESH KUMAR, J.

Sgl



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