

WavIn India Ltd. and anr. Vs. Union of India (Uoi) and anr.

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SooperKanoon Citation : sooperkanoon.com/705388

Court : Delhi

Decided On : Dec-02-2004

Reported in : 116(2005)DLT101; 2005(79)DRJ279; 2005(98)ECC743; 2005(184)ELT254(Del)

Judge : B.C. Patel, C.J. and; Badar Durrez Ahmed, J.

Acts : [Customs Act,1962](#) - Sections 74(1) and 74(2)

Appeal No. : WP(C) 2643/1996

Appellant : WavIn India Ltd. and anr.

Respondent : Union of India (Uoi) and anr.

Advocate for Def. : None

Advocate for Pet/Ap. : H.L. Tiku, Sr. Adv. and; Yashmeet Kaur, Adv

Disposition : Writ petition allowed

Judgement :

B.C. Patel, C.J.

1. By filing this writ petition the petitioners have approached this Court, inter alia, for issuance of a writ of mandamus or any other appropriate writ, order or direction directing the respondents to refund to the petitioners the duty drawback at the rate

of 98% under the provisions of Section 74(1) of the [Customs Act,1962](#) (hereinafter referred to as "the Act").

2. The facts relevant to these proceedings required to be noted are as under.

The petitioners, engaged in the manufacturing activity, imported machine from Germany and on installation it was realised that the machine was not operating satisfactorily and cannot be used for the purpose of production. Different parts of the machinery were imported vide different bills of entry in the year 1990 (to be precise from 11.5.1990 to 24.6.1991) as noted in the Order No. 731/95 made by the Government of India. They were re-exported under claim of supplementary drawback under Section 74 of the [Customs Act,1962](#) on 23.9.1992 i.e. after two years and four months.

3. It is contended by the petitioners that during this intervening period the goods were not used by them and, therefore, according to the petitioners Section 74(1) of the Act would be applicable and the petitioners would be entitled to get duty drawback at the rate of 98%. We are not examining the matter in detail as the appellate authority has not recorded a finding in so far as use is concerned. However, it stated as under:-

"It is not necessary for the Customs to look for any proof or evidence in support of their contention as no such drill is warranted in terms of the Notification issued under sub-section 2 of the Section 74 of the [Customs Act,1962](#).

4. The Revisional Authority vide order dated 13.12.1995 made observations as under:-

"Government holds that once the goods are out of customs charge it is neither practical nor possible for the customs authorities to know whether the goods were used or not or what was the extent of use."

5. Thus, it appears that without carrying out the exercise stipulated under Section 74(2) of the Act, the order has been made. If such findings are to be recorded, then sub-section (2) of the Act would be rendered nugatory. Sub-section (2) of Section 74 of the Act reads as under:-

" (2) Notwithstanding anything contained in sub-section (1), the rate of drawback in the case of goods which have been used after the importation thereof shall be such as the Central Government, having regard to the duration of use, depreciation in value and other relevant circumstances, may, by notification in the Official Gazette, fix."

6. The precondition is "goods which have been used after the importation thereof". The rates are to be determined on the basis of a finding of fact as to whether the machine is used or not. It is true that merely because the goods are re-exported, automatic benefit is not required to be granted. But, at the same time it is equally true that if the petitioner produces the evidence on record about the non-use of machine, then it is the bounden duty of the customs authority exercising powers under Section 74 of the Act to arrive at a conclusion whether the machine was used or not and if used, then to what extent the benefit is required to be granted. Such an exercise not having been carried out in this case, we deem it fit to remand the matter to the appellate authority to examine the matter in detail. It would be open to the petitioners to place on record evidence in this behalf.

7. In view of the reasons given above, the order dated 8.6.1995 passed by the appellate authority and the order dated 13.12.1995 passed by the revisional authority are quashed and set aside.

8. With the aforesaid directions the writ petition is allowed and disposed of. As this is an old matter, it is directed that the appellate authority shall decide this matter within a period of six weeks from the date of receipt of a copy of this judgment.