

Collector of C. Excise Vs. Ga

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-11-1994

Reported in : (1994)LC377Tri(Delhi)

Appellant : Collector of C. Excise

Respondent : Ga

Judgement :

1. The above appeals involve identical issues and are hence heard together and disposed of by this common order.

2. M/s. Gavs Laboratories P. Ltd. who are holders of L 4 Licence for the manufacture of tooth paste, cosmetics, etc., entered into an agreement on 28-2-1989 with M/s. Usha Intercontinental (India) Ltd. (merchant exporter) for manufacture and supply of Usha Tooth paste (Fluoride) for export to USSR against a contract entered into by the merchant exporter with M/s. Sojuzchem Export in June 1989. Merchant Exporter applied for an advance licence under Duty Exemption Scheme in terms of para 19 of the Import and Export Policy AM 1988 -1991 wherein M/s. Gavs Laboratories was shown as the supporting manufacturer. The Advance Licensing Committee approved issue of advance licence and accordingly JCCIE issued advance licence dated 16-8-1989 for import of Glycerine, Sodium Lauryl Sulphate, Sodium Monofluorophosphate, Spearment Oil and Peppermint Oil. A Duty Exemption Entitlement Certificate was also issued. As provided under Appendix 19 of the Import Policy, the supporting manufacturer effected 100% export of tooth pa"te under bond, utilising duty paid indigenous raw

materials in the manufacture final product (for which requisite declaration under Rule 57A of Central Excise Rules was filed and approved), under cover of various shipping bills supported by AR 4 forms. In September 1989 M/s. Gavs laboratories filed an application for cash refund of modvat credit under Rule 57F against AR 4 covering shipments made during the period July to September 1990 which was rejected in April 1990 as not maintainable.

Similarly refund claim for the period October to December 1989 was rejected by order dated 26-6-1990 of the Assistant Collector. By order dated 27-12-1990 the lower appellate authority set aside the orders of the Assistant Collector, holding that there is nothing in Rule 57F(3) to compel a manufacturer to avail of drawback or claim rebate of duty nor is the Rule restricted to a situation where the manufacturer does not export his entire products. He further held that the Assistant Collector had not cited any specific authority of law nor any detail of benefits arising to M/s. Gavs Laboratories in terms of Clause 12(a) of their agreement with M/s. Usha Intercontinental (India) Ltd. (Merchant Exporter) to justify rejection of the refund claim. Accordingly he annulled the two orders of the Assistant Collector and ordered that the refund of credit of duty as due and admissible (emphasis supplied) be allowed to the appellants if otherwise in order.

3. Subsequent to the passing of this order, the Assistant Collector went into the issue once again and by order dated 15-2-1991 rejected the refund claim on the grounds inter alia that the benefit of modvat credit under Rule 57F(3) of the Central Excise Rules is not available to a supporting manufacturer working under DEEC Scheme and exporting the goods through the Merchant Exporter for fulfilment of their DEEC export obligation. By order dated 28-6-1991 the Collector of Central Excise (Appeals) disposed of the appeal of the supporting manufacturer, following the reasoning adopted by him in his order-in-appeal No. 442 to 444/91 dated 24-4-1991 in which he held inter alia that there is nothing in Notification 116/88-Cus., dated 30-3-1988 which touches upon the Central Excise or export procedure or referred to goods cleared for home consumption. He held that there is nothing in Rule 57F(3) to compel a manufacturer to avail of drawback or claim rebate of duty and also that the rule is not applicable only to a case where the manufacturer does not export his entire products and that M/s. Gavs

Laboratories being a Central Excise licensee who has exported the goods through the merchant exporter following the procedure prescribed in Chapter IX, the Assistant Collector erred in holding that the refund of modvat credit was not due to them. He directed the Assistant Collector to examine only the aspect of unjust enrichment to satisfy himself that the duty incidence had not been passed on by M/s. Gavs Laboratories to Merchant Exporter and in case he was so satisfied, the refund due and admissible was directed to be sanctioned. Aggrieved by the order dated 28-6-1991, the Revenue has preferred E/4123/91-NRB and the supporting manufacturer has preferred E/3092/91-NRB.4. Shri M.M. Mathur, learned J.C.D.R. submits that M/s. Gavs Laboratories are only supporting manufacturers as shown in Part B of the DEEC Pass Book issued to M/s. Usha Intercontinental (India) Ltd. with whom they had entered into an agreement for manufacture and supply of subsequent exports and Usha Intercontinental (India) P. Ltd. had imported raw materials free of duty under Notification 116/88 and passed on the same to the supporting manufacturer who manufactured the product and cleared it under bond for export against AR 4 and exported the goods on behalf of Usha Intercontinental in fulfilment of its DEEC obligation. He draws attention to the shipping bills filed wherein Usha Intercontinental (India) P. Ltd. have been clearly indicated as the exporters and to the AR 4s stating that the application for removal of excisable goods for export has been filed by Gavs Laboratories "through M/s. Usha Intercontinental (India) Ltd." He invites our attention to the agreement executed between Usha Intercontinental and Gavs Laboratories and in particular to the opening clause wherein Usha Intercontinental has been described as a trading company and Gavs Laboratories as manufacturers of the products who executes part of the foreign order "on behalf of and in the name of Usha Intercontinental" (the first party) to the overseas buyers. The shipment condition in clause 4 also stipulates that Usha Intercontinental will be shown as the exporter and that the name and address of M/s. Gavs Laboratories shall be mentioned as a manufacturer on the shipping bill only. He further refers to clause 9 containing the terms of payment, stipulating that Usha Intercontinental will make payment to M/s. Gavs Laboratories by opening LC payable at 15 days sight 30 days prior to delivery date.

Clause 12 is also referred to, which sets out that the export performance, export house benefits and all turnover benefits arising out of all shipments under that agreement will be to the account of Usha Intercontinental and only applicable export incentives, i.e. cash compensatory support if any, will be to the account of M/s. Gavs Laboratories. According to the learned J.C.D.R., the respondents sought to avail of dual benefit to fulfil the export obligation under DEEC as well as modvat credit on inputs which is not permissible since input relief in respect of goods exported under bond is available only in terms of para 246(1) of the Import Policy 1989-91 which reads as under : "No drawback will be admissible on the products exported under this scheme in respect of any duty exempt materials allowed against such exports. In respect of any other duty paid materials whether imported or indigenous used in such products, a suitable brand rate may be fixed by the Ministry of Finance, Directorate of Drawback on request by the registered exporter concerned." He contends that Rule 57F(3) applies only to an exporter and not to a supporting manufacturer like M/s. Gavs Laboratories who will be eligible only to benefits of Rules 12 and 13 dealing with the rebate and export under bond of goods on which duty has not been paid.

According to him the concept of supporting manufacturer embodied in the DEEC scheme cannot be extended to the scheme under the Central Excise Rules in the absence of any express provision to that effect and Rule 57F(3) has to be harmoniously construed, and cannot be interpreted at a tangent from Rules 12 and 13. Lastly he submits that if the cash refund is granted to M/s. Gavs Laboratories under Rule 57F(3), it would result in undue benefit and unjust enrichment as they would have already obtained the benefit of duty free imported materials to replenish the stock of duty paid indigenous raw materials used by them in the manufacture of the final products i.e. tooth paste exported on behalf of Usha Intercontinental (India) Ltd. He, therefore, prays for setting aside of the order of the Collector (Appeals) and restoration of the order of the Assistant Collector rejecting the refund claims. He submits that the Assistant Collector was empowered to go into the issue of eligibility to refund as the order dated 27-12-1990 of the Collector (Appeals) was only in the nature of a remand and only directed refund as due and admissible, if otherwise in order.

5. Shri A.S. Sunder Rajan, learned Consultant submits that once the lower appellate authority by order dated 27-12-1990 had annulled the orders of the Assistant Collector and ordered refund, it was not open to the Assistant Collector to reopen the issue and, therefore, the order dated 15-2-1991 of the Assistant Collector is without jurisdiction. He further submitted that all that remains to be done by the Assistant Collector was to sanction the refund. On the merits of the matter his only contention is that the doctrine of unjust enrichment is not applicable to the facts of the present case. He, therefore, prays for modification of the order-in-appeal dated 28-6-1991 to the extent that the order of the Assistant Collector being without jurisdiction, nothing survives for consideration and for quashing of the order of 15-2-1991 of the Assistant Collector as non est in law.

6. We have heard both sides and perused the records. The contention of the learned Counsel that the order dated 15-2-1991 of the Asst.

Collector is without jurisdiction is not well founded. By order dated 27-12-1990 the Collector of Central Excise (Appeals) passed the following order : "I find from the records that the decision of the Asst. Collector in this case is in the form of a letter to the appellants in which they were informed that they may resort to drawback provisions under the Customs and Central Excise Duties (Drawback) Rules, 1971 as the provisions of refund under Rule 57F(3) cannot be applied to a manufacturer exporting his entire products and more so because in terms of clause 12(a) of the appellants' agreement with the merchant exporter, the turnover benefits with regard to export would accrue to the merchant exporter only. On these grounds the Asst. Collector observed that the refund claim is not tenable. The reference, I notice, is to the proviso to Rule 57F(3) which stipulates that no refund of credit of duty shall be allowed if the manufacturer avails of drawback allowed under the Customs and Central Excise Duties (Drawback) Rules, 1971 or claims rebate of duty under Rule 12A in respect of such duty. There is nothing in this provision to compel a manufacturer to avail of the drawback or claim rebate of duty. It merely says that in case a manufacturer avails of either of these two facilities, then he will not be entitled to the refund of credit of duty under Rule 57F(3). There is also nothing in Rule 57F(3) to restrict it to a situation where the manufacturer does not export his entire products. I am, therefore, unable to find the logic behind these

two grounds taken by the Asst. Collector. The third point is in respect of Clause 12(a) of the appellants' agreement with the merchant exporter. This clause, as referred to by the Asst.

Collector stipulates that the terminal benefits of export would accrue to the merchant exporter. Here again, I am unable to see exactly what benefits the Asst. Collector had in mind to justify the denial of refund claimed by the appellants. Neither any specified authority of law nor any details of the benefit arising to the appellants because of this clause has been cited by the Asst.

Collector to justify disallowing of the refund to them.

In view of the above, I annul the two orders of the Asst Collector in this case and order that the refund of credit of duty, as due and admissible, be allowed to the appellants, if otherwise in order. The two appeals are disposed of accordingly.

7. We agree with the learned J.C.D.R. that this order is only in the nature of the remand order even though the expression "remand" is not explicitly mentioned therein. We, therefore, hold that it was open to the Assistant Collector to consider the eligibility to the refund to M/s. Gavs Laboratories. E/3092/91-NRB filed by M/s. Gavs Laboratories is accordingly rejected.

8. Coming to the merits of the matter, the crucial issue to be determined is whether this case is covered by the first proviso to Sub-rule (3) of Rule 57F of the Central Excise Rules which provides that the credit of specified duty in respect of inputs used in the final products cleared for export under bond shall be allowed to be utilized towards payment of duty of excise on similar final products cleared for home consumption on payment of duty. For the purpose of determination of this issue relevant clauses of DEEC scheme and the terms and conditions of the agreement executed between Usha Inter-continental and M/s. Gavs Laboratories will be required to be considered. Under the Duty Exemption Scheme, during the relevant period i.e. 1988-91, advance licences were issued to registered exporters for import of duty free materials in terms of Notification 116/88-Cusv dated 30-3-1988 for manufacture and export of resultant products which have gone into the production of the resultant products already exported in anticipation of the grant of

the advance licence. The objective of the scheme as set out in para 219(1) of the 1988-91 Import Policy was to make available to the registered exporters, necessary inputs for export production at international prices without payment of customs duty so as to make the exports competitive in the international market. A licence issued under the scheme to a registered exporter is subject to actual user condition and exempt material imported by a registered exporter, when given to supporting manufacturer for production as prescribed in the scheme is also subject to actual user condition. In terms of para 235, a licence issued under the scheme bears a suitable export obligation and in terms of para 237, shipping bills relating to exports covered by this scheme are to bear such declarations and follow such procedures as may be laid down by the customs authorities concerned. Exempt materials imported against a licence under this scheme shall be utilised for the manufacture of the resultant products specified in the Duty Exemption Entitlement Certificate (DEEC) except where it is by way of replenishment. The replenishment would be on account of export supplies already made by utilising materials of the same characteristics and technical specifications in anticipation of import of duty exempt materials specified in the Licence issued under this scheme. Exempt materials shall not be loaned, sold or transferred or disposed of otherwise under any circumstances. In cases where the export obligation has been partially or fully met before making any import against the licence, the manufacturer/exporter after fulfilment of export obligation imposed against the licence may utilise the replenished material for further export/domestic production and subject to actual user conditions.

Similarly, Licensing authorities may consider the request of registered exporters after fulfilment of export obligation for transfer of the replenished material to the supporting manufacturers concerned whose names appear in the DEEC for further export/domestic production and subject to actual user conditions [para 244(1)]. In the DEEC issued to Usha Intercontinental, M/s. Gavs Laboratories, are shown as the supporting manufacturer. The agreement refers to Usha Intercontinental as a trading company engaged in export of various products and M/s.

Gavs Laboratories as the manufacturer of Fluoride tooth paste who will execute the foreign order on behalf of and in the name of the first party i.e. Usha

Intercontinental to the overseas buyers. All the shipping documents are to indicate Usha Intercontinental as exporter and M/s. Gavs Laboratories are to be shown as the manufacturer on the shipping bill only. According to Clause 9 of the agreement payment will be made by Usha Intercontinental to M/s. Gavs Laboratories against presentation of the following documents :- Full set of 'Clean on Board' Bill of Lading showing Usha Intercontinental (India) as shippers.- Certificate of Quality and Analysis issued by the 'Second Party'.- Original Certificate of Quality & Drawal of samples issued by Shri Ram Test House/Italab Pvt. Ltd./SGS India Pvt. Ltd.- Disclaimer Certificate issued by the 'Second Party' that for the FOB value of the goods shipped, the 'Second Party' will not claim any Export House benefits and Export Incentives (Proforma as per Annexure V)- Disclaimer Certificate issued by the 'Second Party' confirming that the 'Second Party' will not claim REP Licence/CCS/Duty Drawback and that these can be claimed by the 'First Party' (Proforma as per Annexure VI) The payment is to be made by opening the LC 30 days prior to delivery date as per Clause 3 of the agreement for each lot separately subject to receipt of the original bank guarantee to be executed by M/s. Gavs Laboratories for a stipulated percentage of the contracted value for maintaining quality standards, for adhering to the delivery schedule, etc.

9. A perusal of the shipping bill and the above agreement clearly shows that the goods were actually exported by Usha Intercontinental and were so shipped in their name as per the shipping bill and the terms of the contract. Further, the goods, although manufactured and cleared under Bond by M/s. Gavs Laboratories, were actually sold by them within India to M/s. Usha Intercontinental. Therefore, the former were only the manufacturers (and not the exporters) of the goods. Since they had cleared the goods under the agreement, it is also clear that the goods were traded within India i.e. in the Indian Market in the first instance. In these circumstances, it was incorrect on the part of M/s.

Gavs Laboratories to have taken clearance under Bond and they ought to have cleared the goods for home consumption after discharging the duty liability and following the procedure for such clearances.

10. In view of the above facts and circumstances, Rule 57F(3) does not come to their rescue. The Assistant Collector had, therefore, rightly rejected the claims. Since the goods have actually been exported under the relevant shipping bill in terms of the provisions of the Customs Act by M/s. Usha Intercontinental, it would be for M/s. Usha Intercontinental to claim the benefits if any, due under that Act or otherwise in terms of the agreement (which incorporates the provision of disclaimer certificate) and the relevant provisions of law. In these circumstances, M/s. Gavs Laboratories are not entitled to the benefits claimed and the Collector (Appeals) has erred in passing the impugned order.

11. The Order of the Collector (Appeals) is set aside and the appeal of the Department (E/4123/91-NRB) is allowed whereas the appeal of the M/s. Gavs Laboratories (E/3092/91-NRB) is rejected.

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