IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI

E/214/2007

(Arising out of letter C.No.VIII/48/18/2004-Cus.pol. dated 08.12.2006 by the Commissioner of Central Excise, Commissionerate-III, Chennai)

M/s. Ashok Leyland Limited : Appellant

Vs.

CCE & ST, Chennai-II : Respondent

Appearance

Shri M. Kannan, Advocate
for the appellants

Shri K.P. Muralidharan, AC (AR)
for the Respondent.

CORAM :

Hon'ble Ms. Sulekha Beevi, Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing/Decision: **28.08.2017**

FINAL ORDER No. 42139 **/2017**

Per Bench

The above appeal is filed against a letter dated 08.12.2006 issued by the Commissioner, Commissionerate-II, Chennai, conveying rejection of fixation of drawback applications (85 nos.) filed by the appellant and clarifying that simultaneous availment of both DEPB and Draw back on the exported product is not permissible. Aggrieved appellants are before this forum.

Customs, Excise & Service Tax Appellate Tribunal

2. Ld. Advocate, Shri M. Kannan, appearing on behalf of the appellant submitted that the letter states that the Board is against simultaneous availment of both the benefits DEPB & drawback. He also placed a letter F.No. 609/10/2006-DBK dated 10.11.2006 from the Dy. Secretary (Drawback), Ministry of Finance, CBEC on the subject of fixation of Brand rate of drawback in respect of passenger buses exported by the appellant. As per the Board's Circular No. 39/2001-Cus. dated 06.07.2001, the appellant can avail of a combination of DEPB benefits with brand rate of drawback of CVD paid in cash on imported inputs and /or excise duty paid on non-SION indigenous inputs on the strength of the duty paid documents subject to the condition that Cenvat benefit is not availed on such inputs.

3. Ld. AR, Shri K.P. Muralidharan, AC, appearing on behalf of the Revenue reiterated the condition that if Cenvat credit availed on such inputs, they cannot avail DEPB benefit with brand rate of drawback on imported inputs and/or excise duty paid on the strength of duty paid documents. Since the Commissioner sent only a letter to the appellant, the same cannot be considered as an appealable order under Section 129A of Customs Act, 1962.

4. Heard both sides and perused the records.

5. The foremost objection put forward by the Ld. AR is that there is no speaking order issued and that the appeal is filed upon a letter informing the appellant that he cannot avail both benefits.

It is indeed correct that the appeal is filed against a letter dated 8.12.06. However, such letter communicates the decision of the department to deny the benefit of DEPB/Drawback whereby his right to claim benefit is affected. Therefore merely because the department chooses to issue a letter denying the benefit instead of issuing a SCN and passing an adjudication order, the appellant cannot be prevented from exerting his right to appeal against such decision. Similar issue was discussed by the Tribunal in the case of *Bhagwati Gases Ltd. Vs. CCE, Jaipur* – 2008 (226) ELT 468 (Tri.-Del.) where the Tribunal held as under:-

> **8.** It would thus appear that the question as to whether particular letter or communication amounts to order or decision so as to make the appeal maintainable would depend on facts of each case. If on consideration of the facts and circumstances, it is found that the order communicated by the impugned letter is such as to affect the rights of the party, the appeal should be maintainable. We put a pointed question to the learned Departmental Representative that if the appeal is held to be not maintainable, what would be the remedy of the appellant. The law does not countenance a situation where the person is rendered remediless. In the circumstances of the case, the only option available to the appellant was to approach the Commissioner and the Commissioner was obliged to decide the matter on merit. The order of the Commissioner holding the appeal to be not maintainable cannot, therefore, be sustained. Accordingly, we set-aside the order of the Commissioner and remit the matter back to him to pass a fresh order on merit in accordance with law as early as possible preferably within two months of receipt of a copy of this order.

Identical view was taken in the case of *Instant Clearing Services (I) Pvt. Ltd.* – 2016 (341) ELT 468 (Tri,-Chen.) and *Mandvi Casting Pvt. Ltd. Vs. CCE, Goa* – 2012 (276) ELT 103 (Tri.-Mum.). Following the proposition laid in above decisions we find that the objection raised by the department is unsustainable.

6. On perusal of the letter dated 08.12.2006, it is seen that the Board has denied simultaneous availment of both benefits of DEPB and Drawback. The Ld. Counsel has relied on the letter dated 10.11.06 from Ministry of Finance, CBEC. In the said letter, it had been mentioned that brand rate of drawback along with a combination of DEPB, was envisaged only under situations specified in Circular No. 39/2001-Cus. dated 06.07.2001, which provides for claiming of drawback along with DEPB subject to production of duty payment documents relating to inputs for which drawback is claimed. In other words, the MOF Circular would allow drawback only based on documents evidencing payment of excise duty on the inputs used in the body portion and not the adhoc rate of 7% fixed by the MOF itself for the product in question under export, considering its peculiarity and other reasons. MOF having clarified about the eligibility of duty drawback vide their letter dated 10.11.2006, the appellants presume that there is no ambiguity on the point that there is no double claim or benefit or the same export product. The appellants seek a chance to make their submission on merits as to how they are entitled for the adhoc rate of 7% drawback fixed by the MOF vide their Circular dated 1988 and also that there is no double benefit of DEPB and

Drawback for the same export product ie., body portion contained in fully built vehicle. Accordingly, we deem it fit to remand the matter to the Commissioner of Customs, directing him to give reasonable opportunity for furnishing evidence and for personal hearing. The impugned order is set aside. Appeal allowed by way of remand.

(Operative portion of the order was pronounced in open court)

(MADHU MOHAN DAMODHAR)
MEMBER (TECHNICAL)

(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

BB

Customs, Excise & Service Tax Appellate Tribunal

प्रमाणित प्रति / Certified True Copy

4/x

सहायक पंजीकार / Asst. Registrar
सीमाशुल्क उत्पादशुल्क एवं सेवा कर अपील अधिकरण / (CESTAT)
चेन्नै / CHENNAI