

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
CUSTOMS APPEAL BRANCH

Appeal No. C/15 /2010 - CU[DB]

Date 16/09/2011

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S KULTAR EXPORTS,
1ST FLOOR, PLOT NO. 3, ADARSH COMPLEX,
WAZIRPUR INDUSTRIAL AREA,
NEW DELHI-110052.

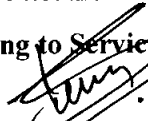
M/S KULTAR EXPORTS,

Appellant

Vs
Respondent

C.C. (EXPORT) NEW DELHI

I am directed to transmit herewith a certified copy of **Final order No.C/411/ 2011 CU[DB]** dated 14.09.2011
passed by the Tribunal under **Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax**


Assistant Registrar

(Customs Appeal Branch)

Copy to :

1. Respondent

C.C. (EXPORT) NEW DELHI

AIR CARGO EXPORT,
NEW CUSTOM HOUSE,
NEW DELHI 110037

2. Adv. / Consult SH. T.R. RUSTAGI, ADV.,
SD-84, TOWER APPTS.,
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3. C.D.R

4. Bar association, CESTAT, New Delhi

5. Director Publications, Customs, Excise. I.P. Estate, New Delhi

6. M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -

7. Company Law Institute of India Pvt Ltd., No.2(Old No. 36), Vaithyaram Street, T. Nagar, Chennai -17

8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005

9. Easy Service Tax Online Dot Com Pvt.Ltd.407A, Iscon Mall, Above Star India Bazar, Satellite Road,
Ahmedabad-15

10. LAWCRUX Advisors Pvt Ltd, LAW House, 1-8, Sector - 10, Faridabad 121003 (Harvana)

11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor, Vasant Arcade, Nelson Mandela Road,
Vasant Kunj, New Delhi - 110070

12. Office Copy

13. Guard file


Assistant Registrar

(Customs Appeal Branch)

**CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
Court No.III**

C/Appeal No.15/2010

(Arising out of order No.ACE/DDR/53/2009 dated 26.10.09 passed by the Commissioner of Customs, New Delhi)

Date of Hearing: 13.7.2011

Date of Pronouncement: 14-09-11

For Approval and signature:

Hon'ble Mr S.S. Kang, Vice President
Hon'ble Mr.Mathew John, Technical Member

1. Whether Press Reporters may be allowed to see the order for publication as per Rule 27 of the CESTAT(Procedure) Rules, 1982?
2. Whether it would be released under Rule 27 of the CESTAT (Procedure) rules, 1982 for publication in any authoritative report or not?
3. Whether their lordships wish to see the fair copy of the order?
4. Whether order is to be circulated to the Department Authorities?

M/s Kultar Exports

Appellants

Vs

CC, New Delhi

Respondent

Appeared for the Appellant : Shri T.R.Rastogi, Advocate
Appeared for the Respondent: Shri Sonal Bajaj, SDR

Coram: **Hon'ble Shri S.S. Kang, Vice President**
Hon'ble Shri Mathew John, Member (Technical)

Final ORDER No. C/411/11

Per Mathew John (for the Bench):

The Appellants are engaged in the business of export of readymade garments and textiles. They purchase such items from traders and export them and claim drawback, of duties borne by inputs going into the manufacture of such items, at drawback rates notified by Ministry and commonly known as All Industry Rates. These rates have two components viz that for customs duties and that for excise duties. During the period 2003-04 to 2006-07 they claimed both the components of such drawback on 369 Shipping Bills and the department sanctioned drawback including excise portion amounting to Rs. 1,43,15,400/-. An amount of Rs. 6,40,759/- is yet to be paid to the Appellants and the balance is already paid. Revenue made out a case that they were not eligible for the excise portion of the drawback and they claimed such drawback on the basis of false declarations. A Show Cause Notice dated 18-09-2008 issued in this regard was adjudicated by the impugned order.

2. The impugned order confirmed demand of drawback amounting to Rs. 1,43,15,400/- held to be erroneously paid in terms of section 75A (2) of the Customs Act, 1962. Aggrieved by the order the Appellants have filed this Appeal.

3. The main case of the Revenue is that excise portion of duties paid on inputs used in goods manufactured is refunded through the Cenvat Credit Scheme and this component cannot be again refunded through drawback scheme and to avoid such double refund government has prescribed a procedure that the exporters claiming excise portion should produce a certificate that Cenvat Credit has not been availed on the goods exported. The case of the revenue is that the Appellant should have submitted certificates in forms Annexure-I or Annexure-II prescribed in Circular No. 54/2001-Cus dated 19-10-2001, but the Appellant did not submit such certificates for any of the 369 consignments. The SCN further

alleges that the CHA had declared that such certificates were attached to many of the shipping bills and thus there were mis-declarations in many shipping bills.

4. Here it is relevant to note that the charge in the SCN is about not furnishing certificate as required under Circular 54/2001-Cus. There is no reference to any earlier circulars. For the sake of clarity relevant portion of para 57 of the SCN is reproduced below:

"57. From the investigation, as discussed above, it appears that M/s Kultar Exports, 1st Floor, Plot No.3 Adarsh Complex, Wazirpur Industrial Area, New Delhi-110052 has claimed and availed Central Excise portion of Drawback amounting to Rs. 143.15 lakhs on FOB value of Rs. 90,32,98,529/- against 326 shipping Bills between the period 2003-04 to 2006-07 either by not submitting the non-availment of cenvat certificate declaration in Annexure I as required under Board Circular No. 54/2001 dated 19.10.2001 and No. 8/2003 dated 17.2.03 or by giving a false declaration that non-availment of cenvat certificate attached whereas in their statements both the partners of the party have denied having sourced the exported goods through job worker/supporting manufacturer. The CHAs M/s Genuine Cargo Services and M/s Innovative Services who handled the exports of the party at different points of time had filed the shipping bills under their signatures confirming that the non-availment of cenvat certificate was attached. During the investigation both these CHAs in their written replies have taken a U turn that they neither filed any Annexure for claiming higher rate of duty drawback (Central Excise Portion) nor it was given to them by the party at the time of export of the goods as such they did not furnish the required declaration for claiming the higher rate of duty drawback. This fact is further strengthen from the statement of the partners of the party that they had exported the goods as it

is after procuring from the open market without carrying out any manufacturing or job work activities on the goods. The random market enquiries carried out in Delhi from the local suppliers of the fabrics to the party and the verification report received from Central Excise, Surat, Gujarat also confirmed that the supplier of the goods were simply traders who have no manufacturing or job work facilities of their own. It is evident that both the party and CHAs had worked hand in glove in providing the false information with the clear intention to fraudulently claim the drawback of Central Excise portion which was admissible to them. This fact is further substantiated from the reports of the market enquiry/verification that the exported goods were purely traded goods and the traders who sourced the goods had neither worked as supporting manufacturer nor job worker of the party. With regard to the seized goods i.e. 21428.20 metres of textile of foreign origin valued at Rs. 21,42,820/- the party failed to provide any proof of lawful importation/possession/acquisition of the same. The party was given opportunity to show its bonafide with regard to trading activities of this imported goods which he stated to have imported vide bill of entry No. 615740/07 dated 30.7.2007, the party provided the copies of sale bills and stock register. The entries in the stock register were appearing to have been made in a single day by one person in the undefined manners of maintenance of records especially daily stock account. The sale invoices which are 614 numbers covering the sale of approximately 80,000 yards of textile are surprisingly have not even a single invoice/bill in which name of the buyer is given irrespective of the quantity of the goods sold through each invoice. This amply clears that the party manipulated and fabricated the records to show its bonafide trade of textile of foreign origin."

5. In this context there are three types of exporters as under,-
- (i) a manufacturer who himself exports the goods himself called as manufacturer-exporter
 - (ii) a person who gets raw materials send the raw-materials for job-workers to manufacture goods to be exported obtain the goods from such persons and export them. This category of exporters are hereinafter referred to as merchant-manufacturer-exporter.
 - (iii) a person who purchases goods from the market and exports, called a merchant-exporter.

6. The Counsel for the Appellant argues that certificate as per Circular 54/2001-Cus dated 19-10-2001 is applicable only to the first two categories of exporters and not the third category of exporters to which the Appellant belongs. To support his argument he took us through the various Circulars issued by the Board in this regard, which are the following:

6.1 Circular 54/2001-Cus dated 19-10-2001

Sub : Problems faced by Merchant Exporters regarding availment of drawback on garments-Reg

All categories of Ready-made woven garments (other than raincoats, undergarments and clothing accessories) falling under Chapter 62 of Customs & Central Excise Tariff Act are now subject to central excise levy as a result of the changes announced in the Union Budget, 2001-2002(Finance Bill stage and those made thereafter till the Finance Bill was enacted.) Though normally it is the actual manufacturer who is to pay duty of excise leviable on any commodity, considering the peculiar and very decentralised nature of garment producing sector certain special provisions have been made, wherein the merchants who get their garments produced by supplying materials to producing job working units have been recognised for registration/ duty payment etc. purposes. Vide Rule 4(3) of Central Excise (No.2) Rules, 2001, a merchant manufacturer, i.e., a merchant, who gets the goods manufactured from a job worker on his own account, is required to pay duty on the garments manufactured on his behalf on job work basis, either himself or authorise such job worker(s) to pay duty on his behalf. When merchant manufacturer pays duty, he is also entitled to avail of CENVAT for inputs procured and used for garment production by job workers.

- 2 Since the manufacturer or merchant manufacturer whose domestic turnover exceeds rupees one crore has to pay excise duty and can avail of Cenvat credit

in respect of inputs used in the manufacture of woven garments, separate drawback rates have been provided with effect from 7.6.2001 for the garments where Cenvat facility is availed or not availed. In case the Cenvat facility is availed, the drawback rate has only Customs allocation and if such facility is not availed, the rate includes both the Customs & Central Excise allocations. It has been brought to the notice of the Board that the customs formations while scrutinising Drawback claims of woven garments exporters are insisting on the production of the certificate evidencing non-availment of Cenvat facility in every case. This is stated to be causing undue hardship to garment exporters-very large number of which are said to be only merchant manufacturer who are basically export oriented and whose domestic clearances are nil or negligible.

- 3 Export Organisations have, however, represented that in the present scenario where a merchant getting the goods manufactured from other manufacturers / job workers is under liability to pay the Central Excise duty and especially since such manufacturers / job workers are scattered, it is not possible to furnish such certificate in every case. Further, it has also been represented that most of garment exporters are merchant-manufacturers who are exempted from the levy of Central Excise as their domestic clearances do not exceed Rs.1 crore. They have, therefore, requested that instead of insisting on a Cenvat non-availment certificate in every case, drawback at higher rate may be permitted on the basis of suitable declaration from such exporters. The Department could check independently if need be to check its veracity.
- 4 The issue and request has been examined and the production and export pattern and system of excise control and duty payment/CENVAT in garment industry also looked into. It is observed that in the case of the goods manufactured by manufacturer-exporters, there shall not be any difficulty in verifying the declaration that Cenvat facility has not been availed in as much as for dutiable garments, if cleared for export under bond/rebate claim, movement has to be made under ARE-1 and such exporters can evidence the same through production of an ARE-1 issued
- 5 For the exports, where ARE-1 is not issued, it has been decided that they should clearly declare on the Shipping Bills, the name(s) of the job worker(s)/ supporting manufacturing unit(s) through whom the garments covered by the Shipping Bill have been manufactured. These exporters shall also be required to give a declaration in the format given in the Annexure-I certifying inter alia that they are not registered with the Central Excise and that they are not paying any Central Excise duties and not availing of the Cenvat facility and that they have not authorised any supporting manufacturer/job-worker to pay excise duty and comply with the provisions of Central Excise (No.2) Rules, 2001.
- 6 These exporters shall also be required to furnish a certificate-cum- declaration as given in Annexure-II, from their supporting manufacturers/ job workers inter alia clarifying that they are manufacturing and supplying garments to this particular merchant exporter only and that they are not registered nor availing of any Cenvat facility for any garments manufactured by them.
- 7 Such merchant-manufacturer exporters can be allowed higher drawback on the basis of these declarations
- 8 The Custom Houses shall get the veracity of the declaration given by the exporters and their supporting manufacturers/ job workers, verified at random by the jurisdictional Deputy / Assistant Commissioner of Central Excise on

quarterly basis. The criteria for random selection of such declarations to be verified by the Excise authorities, may be formulated by the Commissioner of Customs. If on verification any misdeclaration is discovered, the higher drawback granted by the Customs would be recovered and only lower benefits admitted for future shipments to such exporters.

- 9 All Chief Commissioners of Central Excise are requested to cause preparation of a list of all duty paying manufacturing and merchant manufacturing units of woven garments, who are availing Cenvat facility. These lists may be circulated to all the major Custom Houses / Air Cargo Complexes/Inland Container Depots from where the exports of garments are effected.
- 10 Suitable public notices for the trade and standing orders for the staff concerned may be issued at your end.
- 11 Working of this system will be reviewed by the Board after getting feedback from the field formations. A report on its working may, therefore, be submitted to the Board by 31st March, 2002. Feedback on its working, including instances of misuse / attempted misuse may also be reported to the Board in the meantime. In case it is felt that procedure as above is causing undue and avoidable hassles to the exporters in effecting exports or in sanction and disbursement of drawback due to them or interest of revenue is being jeopardised, the same may be reported at once to the Board, with suggested course of action, for necessary remedial measures.

Annexure - I

Exporters' Declaration required for Exports of Woven Garments for availing higher All Industry Rate of Drawback.

(Circular No. 54/2001-Cus, dated 19th October, 2001).

- 1 Description of the Goods:
- 2 Invoice No. and Date:
- 3 Name and address of the Exporter
along with the name of the
Jurisdictional Central Excise
Commissionerate / Division / Range:
- 4 Name of the Supporting
Manufacturer (s) / Job worker (s)
alongwith the name of the
Jurisdictional Central Excise
Commissionerate/ Division/Range:
- 5 Address of the Manufacturing
Unit(s)/ Job Work Premises:

We, M/s. _____, the Exporters of the above mentioned goods,
hereby declare that -

- (a) we are not registered with Central Excise authorities,
- (b) we have not paid any Central Excise duty on these goods, and
- (c) we have not availed of the Cenvat facility under the CENVAT Credit Rules, 2001 or any notification issued thereunder, and (d) we have not authorised any

supporting manufacturer/job-worker to pay excise duty and discharge the liabilities and comply with the provisions of Central Excise (No.2) Rules, 2001, under the proviso to Rule 4(3) of the said Rules.

We also undertake that in case it is discovered that the Cenvat facility has been availed by us or by our supporting manufacturers in respect of these export goods, we shall return the excess drawback paid to us on the basis of above declaration.

Exporters' Signature & Seal

ANNEXURE-II

Supporting Manufacturers'/Job Workers' Declaration required for Exports of Woven Garments for availing higher All Industry Rate of Drawback.

(Circular No.54/2001-Cus, dated 19th October,2001).

- 1 Description of the Goods:
- 2 Invoice No. and Date:
- 3 Name and address of the Exporter
alongwith the name of the
Jurisdictional Central Excise
Commissionerate / Division / Range:
- 4 Name of the Supporting
Manufacturer (s) / Job worker (s)
alongwith the name of the
Jurisdictional Central Excise
Commissionerate/ Division/Range:
- 5 Address of the Manufacturing
Unit(s)/ Job Work Premises:

We, M/s. _____, the supporting manufacturers / job workers,
hereby, declare that -

- (a) are not registered with Central Excise authorities,
- (b) have not paid any Central Excise duty on these goods, and
- (c) have not availed of the Cenvat facility under the CENVAT Credit Rules, 2001 or any notification issued thereunder, and

We also declare that we are manufacturing and supplying garments to the above merchant exporters only.

Supporting Manufacturers'/Job Workers' Signature & Seal

It is argued that from paras 1 and 6 as also from item 4 of Annexure-I and items 4 and 5 of Annexure-II of the Circular it is clear that this circular and certificates are not applicable to merchant exporters who buy goods from open market.

6.2 Circular 8/2003 dt 17-02-2003

Sub: Acceptance of self-declaration as to the non-availment of Cenvat facility for extending the duty drawback.

Attention is invited to the Ministry's Circular Nos.25/98-Cus, 34/98-Cus and 50/98-Cus. As per the existing instructions, the exporters who avail the Central Excise portion of duty drawback in case the drawback involves both Customs & Central Excise portions, or the full duty drawback when the rate has only Central Excise allocation, have to produce a certification from the jurisdictional Deputy Commissioner/Assistant Commissioner of Central Excise certifying that they have not availed Cenvat facility in respect of the goods exported. The rationale behind this condition is that no double benefits should accrue to the exporters because through the Cenvat facility as well as duty drawback, exporters are rebated the duties of Central Excise suffered on the inputs used in the manufacture of the export products.

2. There have been a large number of representations from the trade that they find it difficult to furnish the certificate from Central Excise authorities for every export consignment. This matter had been considered by the Kelkar Committee set up to examine the possibility of reforms in the Indirect Tax Administration.
3. After accepting the recommendations of the Committee, the Board has decided that henceforth the manufacturer-exporters who are not registered with Central Excise or such merchant exporters whose supporting manufacturer are not registered with the Central Excise, shall not be required to furnish any certificate as to the non-availment of Cenvat facility from the jurisdictional Central Excise authorities.
4. It has been decided that instead these manufacturer exporters and merchant exporters with a supporting manufacturer shall be required to give a self-declaration that such manufacturer-exporters or the supporting manufacturers are not registered with Central Excise and that they do not avail / have not availed Cenvat facility. The form of self-declaration is enclosed.
5. It is also clarified here that as regards such manufacturer- exporters and supporting manufacturers who are registered with Central Excise, the fact of non-availment of Cenvat facility can be confirmed from ARE-I which these exporters shall be furnishing. Therefore, in case of registered manufacturer-exporters and merchant exporters with registered supporting manufacturers the earlier practice of acceptance of ARE-I shall continue.
6. Suitable public notices for information of the Trade and standing orders for guidance of the staff may kindly be issued accordingly.
7. The receipt of this Circular may kindly be acknowledged.

It is argued that paras 3, 4 and 5 of the above circular it is clear that the circular is not applicable to merchant exporters who buy goods from open market.

6.3 Circular 19/2005-Cus dated 21-03-2005

"Sub: Admissibility of All Industry Rates of Duty Drawback on Export Goods Manufactured from out of Inputs, some of which are Non-Duty Paid

I am directed to invite your attention to the above subject and to say that a doubt has been raised as to whether the All Industry Rate of duty drawback is to be denied / reduced on export goods using inputs some of which are non-duty paid. It has been represented that the All Industry Rate of duty drawback is sought to be denied / reduced on floor coverings and made ups on the ground that a part of yarn used has not suffered any duty. Likewise, it has been brought to the notice of the Board that Show Cause Notices are being issued to the garment exporters at the various places and the All Industry Rate of drawback is sought to be denied / reduced on the ground that they have used duty free trimmings & embellishments in the manufacture of export goods. The exporters are being charged with misdeclaration / non-declaration and are being asked to return duty drawback amounts received by them by an amount equal to the duty exemption enjoyed. This, according to trade, amounts to taking away by the left hand what has been given by the right hand.

2. The matter has been examined by the Ministry. In this connection, attention is invited to Board's Circular No. 24/2001-Cus dated 20.4.2001 whereunder it was clarified that All Industry Rates of drawback are based on the concept of averages, where the drawback rate itself as well as its customs and excise portions are based on weighted averages of consumption of imported / indigenous inputs of a representative cross-section of exporters and the average incidence of duties suffered on such inputs. These rates have no relation to the actual input consumption pattern or the actual duty incidence suffered on inputs of a particular exporter or individual consignments exported by any exporter under drawback claim. It was categorically stated in the said Circular that the first proviso to rule 3 of Drawback Rules, 1995 is meant for the Ministry and that it essentially provides a guideline as to how the duty drawback rates are to be determined in certain situations and is not intended for the field formations to use this rule for arbitrarily altering All Industry Rates of duty drawback in the case of individual exporters for individual consignments.

3. From the above it may be noted that the concept of All Industry Rate of duty drawback is that the rates are determined taking into account the average duties paid on the inputs and in determining the rates, the average (weighted average) consumption of imported / indigenous inputs of a representative cross-section of exporters is taken into account. In view of this, it is not open to the field

officers to question as to how the rate has been determined in the case of individual export goods and to probe whether certain exempted inputs have been used in the manufacture of the same. Accordingly, it is clarified that All Industry Rate of duty drawback is to be allowed in the cases referred to above.

4. Suitable Public Notices for information of the Trade and Standing Orders for guidance of the staff may be issued. Difficulties faced, if any in implementation of the Circular may be brought to the notice of the Board.

Kindly acknowledge receipt of this Circular."

The Appellant relies heavily on this Circular and argues that SCNs of the type impugned in this proceeding should not have been issued. We notice that the impugned SCN is not of the type discussed in this Circular and this argument is not correct.

6.4 Circular 16/2009 dated 25-05-2009

"Sub: - Grant of All Industry rate of duty drawback to merchant exporters— reg.

I am directed to refer to Para (vi) of Ministry's Circular No. 64/98-Cus dated 01.09.1998, where it was clarified that in the case of merchant exporter who procures the export goods from the open market, the benefit of All Industry Rates of Duty Drawback shall be restricted to the Customs allocation only, if any. Export goods purchased from the market shall be treated as having availed the Modvat facility and would not be entitled to the Central Excise allocation of the All Industry Rate of Drawback.

2. In this regard references have been received in the Board from the Directorate General of Foreign Trade (DGFT), Federation of Indian Export Organizations (FIEO) and exporters stating that some Custom Houses were insisting on non-availment of Cenvat declarations from merchant exporters of garments who were not purchasing their goods from manufacturers but were sourcing their export goods from traders. The Custom Houses were denying full All Industry rate of duty drawback (including the excise rate) in case exporters were not able to furnish such declarations. The FIEO/DGFT and the exporters have represented that the merchant exporters without supporting manufacturers cannot give non-Cenvat availment declarations as they are not aware of the manufacturers and can at best declare the names of traders from whom the goods have been purchased. Further, most of the garments are being manufactured by petty manufacturers/small scale cottage industries/largely unorganized sector outside the Cenvat chain and, therefore, the higher rate of drawback may be given on garments without insisting on any Cenvat non-availment declaration.

3. The matter was discussed with some field formations. A view was expressed that the proviso to Rule 3 of the Drawback Rules does not permit full drawback (both customs and central excise portions) if Cenvat has been taken on inputs used

in the manufacture of export goods and therefore full drawback (including the excise portion) cannot be granted to such goods.

4. The matter was referred to the Committee constituted by the Government to formulate All Industry Rate of Duty Drawback for the year 2008-09. The Committee in its report for the year 2008-09 has recommended that the merchant exporters who source their export goods from the market should be given higher rate of drawback without any declarations as *"they have to purchase the products from the manufacturer after excise clearance i.e. after payment of excise duty. Therefore as far as merchant exporters are concerned, the full drawback rate has to be made available to him for neutralization of excise duty paid when clearing the goods from the manufacturer's premises"*. The Committee has further remarked that *"in case of manufacturer exporters there could be a possibility of double benefit if he were to claim both Cenvat benefit as well as full duty drawback. Therefore, the only cases for checking whether Cenvat has been availed or not, can conceivably pertain to manufacturer-exporters and not to merchant exporters"*.

5. The report of the Drawback Committee has been examined in the Board. The goods available in the market are deemed to be duty paid goods. Hence they bear an element of central excise duty, which needs to be reimbursed, if such goods are exported. Ideally, the terminal central excise duty paid at the time of clearance from factory should be refunded. However, that is not possible in case of export of goods purchased from the market as the trader exporter doesn't have duty paying documents. The next best option is to grant All Industry Rate (AIR) of duty drawback as AIR drawback represents average incidence of taxes suffered by inputs used in the export product. Granting this rate on the condition that the exporter would furnish Cenvat non availment declaration may not be proper as such goods may have changed several hands before exports and the final exporter may not be aware of the actual manufacturer and whether Cenvat credit was availed on such goods.

6. As regards the proviso to Rule 3 of the Drawback Rules, it is viewed that the interpretation that this proviso permits only customs portion of drawback to goods exported by merchant exporters, unless they have a supporting manufacturer, is not correct. As mentioned earlier, the goods available in the market are deemed to be duty paid. Even if it is assumed that such goods had availed Cenvat, then such Cenvat would have been used to pay the duty on final products cleared for home market. The Cenvat availed has therefore been 'given back' to the Government when such goods were cleared for local market. The only possibility of double benefit would arise only when the exporter is able to take the drawback of the central excise portion and also the rebate of terminal excise duty paid on goods at the time of their clearance to the local market. Such rebate is presently not possible in terms of No.19/04- CE (NT) and 20/04-CE (NT) as the rebate is granted only if goods are exported directly from the factory/ warehouse and not from the market. However, as an abundant precaution, the merchant exporters sourcing their goods from the market and claiming central excise portion of duty drawback may be asked to specifically declare, at the time of export, that no rebate (both input rebate and final product rebate) shall be taken against the exports made against these shipping bills.

7. In view of the above, the Board has decided to accept the recommendation of the Drawback Committee in this regard. Thus merchant exporters who purchase goods from the local market for export shall **henceforth** be entitled to full rate of

duty drawback (including the excise portion). However, such merchant exporters shall have to declare at the time of export, the name and address of the trader from whom they have purchased the goods. They shall also have to declare that no rebate (input rebate and also the final product rebate) shall be taken against the Shipping bills under which they are exporting the goods. The merchant exporters who purchase goods from traders may therefore furnish the declaration, at the time of export, in the format annexed with this circular. This is issued in supersession of para (vi) of Circular No. 64/98-Cus dated 01.09.1998.

8. The Custom Houses shall get the veracity of such declarations verified at random and recover excess drawback in case the verification reveals that the declaration filed by the exporter was false or double benefit has been availed of.

9. Suitable public notice for information of the trade and standing order for the guidance of staff may be issued accordingly. Difficulties if any, noticed in implementation of this circular may be brought to the notice of the Board.

10. Receipt of this Circular may kindly be acknowledged."

It is argued that paras 5 and 6 of the above Circular makes it clear that certificates as per Circular 54/2001 is not required to be furnished by merchant exporters who buy goods from open market and export the same.

7. The Counsel for Appellant also places on record letter C. No. VIII/ICD/TKD/DBK/171/07 dated 08-01-08 issued by Additional Commissioner (DBK) of ICD Tuglakabad addressed to the Chief Commissioner, obtained by filing an application under RTI to the effect that in that formation they were considering the goods obtained from market as duty paid and excise portion of Drawback is being paid to such goods exported.

8. The Counsel further argues that drawback scheme and the circulars are a beneficial program of the Government and needs to be interpreted liberally. He argues that these circulars cannot be interpreted with retrospective effect to demand such huge amounts of drawback paid to the Appellant during 5 years prior to issue of SCN.

9.1 The Ld DR draws our attention to Rule 3 of Customs and Excise drawback Rules which reads as under:

"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,
- (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 on some of which only the duty chargeable thereon has been paid and not on the rest, or only a part of the duty chargeable has been paid; or the duty 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, 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:"

9.2. He further relies on Circular 17/97-Cus dated 04-06-97 which reads as under:

"Subject : General Note No. 11 of Notification No. 22/97- Cus. (N.T.), dated 30th May, 1977 - Requirement of Certificates regarding the non-availment of Modvat facility - Regarding.

It has come to the notice that there is no uniformity in regard to interpretation of General Note 11 of Notification No. 22/97-Cus. (N.T.), dated 30-5-1997 (erstwhile Notification No. 49/96-Cus.(N.T.), dated 20-10-1996) regarding All Industry Rates of Drawback. It also appears that declarations by the Merchant Exporters have been accepted regarding non-availment of Modvat. With a view to standardising the application of General Note 11, the following guidelines regarding acceptance of Certificate may be followed in future:-

- (i) In the case of manufacturer-exporter, the Asstt. Commissioner of Customs may, if necessary, require such exporter to obtain a Certificate

from the Asstt. Commissioner of Central Excise, in whose jurisdiction the factory of production is located, to the effect that no Modvat credit has been availed on any of the inputs used in the manufacture of such export product.

- (ii) In the case of goods exported under claim for rebate of Central Excise duty, or Bond, the provisions of General Note 11 (ii) shall continue.
- (iii) In the case of Merchant exporter (s) where the name and address, including the factory address of the supporting manufacturer (s) from whom the export goods have been procured, have been declared in the Shipping Bills duly accompanied by a certificate issued in favour of the declared supporting manufacturer by Central Excise Suptt., incharge of the factory of production to the effect that such Manufacturer has not availed the Modvat on any of the inputs used in the manufacturer of export goods, in such cases the merchant exporters should not be asked to produce a separate certificate regarding non-availment of Modvat credit in his own favour.
- (iv) In the case of merchant exporter who procures the export goods from the open market, the benefit of All Industry Rates of duty drawback shall be restricted to the Customs allocation only, if any. Export goods purchased from the market shall be treated as having availed the Modvat facility.
- (v) Where the export goods are unconditionally exempted from duty of Central Excise, and manufacturers thereof are not registered with Central Excise authorities, the Asstt. Commissioner of Customs may subject to his satisfaction permit drawback to be paid without the exporter having to furnish a certificate regarding non- availment of Modvat.

This Circular is being issued in supersession of all earlier instructions issued on this subject."

9.3. He further relies on Circular 64/98-Cus dated 01-09-98 which reads as under:

"Subject: General Note No. 11 of Notification No. 22/97-Cus. (N.T.), dated 30-5-1997 - Requirement of Certificates regarding the non-availment of Modvat facility - Regarding.

In supersession of Circular No. 17/97-Cus., dated 4-6-1997 issued by the Directorate of Drawback, Deptt. of Revenue, Ministry of Finance, on the above subject, the following guidelines regarding requirement/acceptance of certificates of non-availment of Modvat facility for the purposes of processing the drawback claims may be followed in future :

- (i) In the case of goods exported under Bond or claim for rebate of Central Excise duty, an AR-4 Form duly certified, or a certificate from the concerned Supdt. of Central Excise in charge of factory of production shall be produced to the Customs to establish that no Modvat facility has been availed for the goods being exported.
- (ii) In respect of goods being exported without AR-4 Form, which are not unconditionally exempt from Central Excise duty or are dutiable, the

manufacturer-exporters under Central Excise control shall produce a certificate twice a year (one in the beginning of the Financial Year, i.e., First Quarter and once around January-March, i.e., Last Quarter) from the Asst. Commissioner of Central Excise in whose jurisdiction the factory of production is located to the effect that no Modvat credit has been availed on any of the inputs used in the manufacture of export product clearly indicating the name of the manufacturer-exporter and the export products instead of producing such certificate for each and every shipment.

For any new commodity (other than those mentioned in the certificates) a fresh certificate should be obtained by the manufacturer-exporters regarding non-availment of Modvat credit in respect of inputs used in the new commodity.

- (iii) (a) Where the export goods being exported by the manufacturer-exporter are unconditionally exempt from the Central Excise duty, a self-declaration of the exporter regarding non-availment of Modvat may be accepted. However, in suitable cases, wherever necessary a certificate may be asked to be produced only once in a year.
 - (iii) (b) The Commissioner of Central Excise concerned shall also issue a Trade Notice listing the goods which are unconditionally exempt from Central Excise duty in respect of goods manufactured in his jurisdiction. The Customs Officers while processing the drawback claims shall not insist on the production of a certificate regarding non-availment of Modvat where the export product figures in such lists of unconditionally exempt goods.
- The Commissioners of Central Excise shall continuously monitor and update such lists of unconditionally exempt goods pertaining to their Commissionerates and endorse copies of such Trade Notices listing the unconditionally exempt goods to the Director General of Inspection and Director (Central Excise), CBEC for information and further necessary action, if any.
- The DG (Inspection) may consolidate and suggest modification in such lists to the Board if any change is required during the financial year.
- (iv) (a) Where the manufacturer-exporter is outside the excise control, a self-declaration of the manufacturer-exporter regarding non-availment of Modvat facility may be accepted. However, in suitable cases, wherever necessary, a certificate may be asked to be produced only once in a year and it should not be insisted upon with every Shipping Bill.
 - (iv) (b) Where the manufacturer-exporter is in the unorganised/cottage sectors, which are unregistered with the Central Excise, the certificate issued by the concerned Council/Association in respect of non-availment of Modvat credit by their member-exporters specifying the export product, name and address of the manufacturer clearly may also be accepted.
 - (v) In the case of merchant-exporter(s) where the name and address, including the factory address of the supporting manufacturer (s) from whom the export goods have been procured, have been declared in the Shipping Bills, duly accompanied by a certificate issued in favour of the declared supporting manufacturer by Central Excise Supdt. in charge of the factory of production to the effect that such

manufacturer has not availed the Modvat on any of the inputs used in the manufacture of the export goods, in such cases the merchant exporters should not be asked to produce a separate certificate regarding non-availment of Modvat credit in his own favour.

- (vi) In the case of merchant exporter who procures the export goods from the open market, the benefit of All Industry Rates of Duty Drawback shall be restricted to the Customs allocation only, if any. Export goods purchased from the market shall be treated as having availed the Modvat facility and are not entitled to the Central Excise allocation of the All Industry Rate of Drawback."

9.4. Further the Ld. DR draws attention to the last sentence of para 7 of circular **16/2009** (para 6.4 above) which makes it clear that the circular is in supersession of earlier circulars clearly implying that earlier circulars were to the contrary. He also draws our attention to the word "henceforth" used in para 7 of the Circular (see para 6.4 above) and argues that the circular clearly shows that the practice earlier was to the contrary.

9.5. He also submits that the Appellant had availed the drawback by giving false declarations that they were attaching the required certificate regarding non-availment of Cenvat scheme and hence the SCN issued to recover drawback erroneously paid during 5 years is legally maintainable.

10. The matter in dispute is about interpretation of Rule 3 of the drawback Rules and a bunch of executive instructions issued by CBEC. The Revenue wants us to go by circulars 17/97-Cus dated 04-06-97 and Circular 64/98 dated 01-09-1998 and also to take note of the word "henceforth" used para 7 of Circular 16/2009-Cus. None of these is relied upon in the SCN. In fact circular 16/2009-Cus could not have been relied upon because it was issued much after the SCN was issued.

11. The Appellants wants us to go by Circular 54/2001-Cus which was the reason cited in the SCN and all later circulars and even Circular 16/2009-Cus to understand the scope of Rule 3 of the Drawback Rules.

12. On a careful reading of paras 1 and 6 as also from item 4 of Annexure-I and items 4 and 5 of Annexure-II of Circular 54/2001-Cus it is clear that this circular and certificates as per this Circular are not applicable for merchant exporters who buy goods from open market and we have no difficulty in concluding that this circular is not applicable to merchant exporters who procure goods from the open market and the Appellant was not required to give such certificates. So the very basis of on which SCN is issued is not sound.

13. The only issue to be examined is whether the demand is to be sustained in view of para (iv) of Circular 17/97-Cus and para (vi) of Circular 64/98-Cus though these are not relied upon in SCN. As per these circulars the Appellant should not have been given the impugned drawback. There was no question of taking any declarations. The only relevant information was that the Appellant was a merchant exporter, which was always known to the department. As may be seen from para 1 (iv) of Circular 17/97-Cus and para 1 (vi) of Circular 64/98-Cus there was no question of taking any declaration from merchant exporters who buy goods from the open market as in the case of this Appellant but the drawback was supposed to be restricted to the customs portion only. However Revenue chose to grant drawback for excise portion also and after lapse of five years to one year, the drawback amounts granted on various shipping bills have been demanded to be paid back. There is also an argument that this Appellant is being singled out for such treatment. This argument is relevant not in the sense whether a wrong can be corrected in the hands of one when others go scot free but in the context that there was a bonafide belief because of the circulars from 2001 onwards that they were eligible for the impugned drawback.

14. We are not inclined to confirm such huge liability for past periods based on Circulars which were in the knowledge of the

department and which were not implemented. We would like to rely more on the legal provisions. The only legal provision relied upon is Rule 3 of the drawback Rules. We agree with the interpretation to this Rule given by the Board in Circular 16/2009-Cus. The argument that this interpretation is applicable from date of issue of circular 16/2009-Cus is repugnant to logic because the Rule has remained the same except for amendment on 13-07-2006, to take care of incidence and rebate of service tax. So we are not inclined to rely on the word "henceforth" used in para 7 of this circular and uphold this demand.

15. In the facts and circumstances of the case the impugned order is set aside and appeal is allowed.

(Pronounced on 14/09/11)

(S. S. Kang)
Vice President

(Mathew John)
Member (Technical)