

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
Principal Bench, West Block No.2, R.K .Puram, New Delhi 110 066

Appeal Nos. C/52769-52770/2016-DB

Date of Hearing : 05.10.2017

Date of Decision : 12.12.2017

[Arising out of Order-in-Appeal No. CC (A) CUS/D-II/ICD TKD (Exp.)/537/2016 dated 29.06.2016/10.07.2016 passed by the Commissioner (Appeals) Central Excise & Customs, New Delhi]

M/s. Avanti Overseas Pvt. Limited
Shri Siddharth Modi. MD

: Appellant

vs.

Commissioner of Central Excise & Customs, New Delhi **: Respondent**

Appearance:

Shri A.K. Prasad & Ms. Surbhi Sinha, Advocates for the Appellant(s)
Shri R.K. Manjhi, A.R. for the Respondent(s)

CORAM:

Hon'ble Mr. Ashok Jindal, Member (Judicial)
Hon'ble Mr. B. Ravichandran, Member (Technical)

Final Order No. /2017

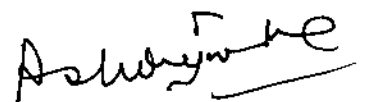
Interim order No. 94 - 95/2017

Per : Ashok Jindal

The appellants are in appeal against the impugned order wherein the
Id. Commissioner (Appeals) dismissed the appeals holding that the appellants
is an 100% EOU therefore, they are not entitled to avail draw back.

Ashok Jindal

2. The brief facts of the case are that the appellants are a unit in DTA, and are engaged in the manufacture and export of stainless steel pet bowls. They availed drawback on these exports. The appellants set up a separate EOU unit in the same premises and obtained LOP from Development Commissioner on 31.03.2006, which was valid up to 31.03.2009. As per the terms of the LOP, the appellants executed the LUT but could not get the premises customs bonded within the validity period of the said LOP despite getting LOP extended upto 31.03.2010. During the year 2012, the Customs at ICD, TKD sought a clarification from the jurisdictional Central Excise officer as to whether appellants were a functional EOU or not, in which case they would not be eligible for drawback. The Central Excise authorities clarified that the appellant had never functioned as an EOU as they could not get the premises customs bonded within the validity period of LOP. Based on this clarification, Customs ICD, TKD released all the pending drawback claims of the appellants. Subsequently, in the year 2014, the DRI initiated fresh investigations into the matter and came to the conclusion that as the appellants were EOU since they had sought benefits from the Income Tax authorities under Section 10B of the Income Tax Act, 1961 which is available only to an 100%EOU. On the basis of this allegation, the show cause notice was issued to the appellants proposing recovery of draw back sanctioned and paid to them during the period 2006-07 to 2009-10. The appellants contested the show cause notice on the premise that the appellant's unit is not an EOU as they have no customs bonded premises and therefore, the unit of the appellant is DTA and hence, impugned show cause notice is not required to be issued. The matter was adjudicated



an it was held that, as the appellant claimed benefit from the Income Tax authorities under Section 10B of the Income Tax Act showing that they are 100% EOU and therefore, the appellant's unit is 100% EOU. As such, the demands proposed in the show cause notice was confirmed along with interest and penalties on both the appellants have also been imposed. The said order was challenged before Ld. Commissioner (Appeals) who held that appellant's unit is 100% EOU and therefore, dismissed the appeals filed by the appellants. Aggrieved from the said order, the appellants are before us.

3. The matter came up for hearing before this Tribunal. The Id. AR raised the preliminary objection that this is a case of claim of drawback and therefore, the appeal is not maintainable before the Tribunal, in terms of proviso (1) to Section 129A of the Customs Act. The objection raised by the Id. AR was strongly opposed by the Id. Counsel for the appellants. Ld. Counsel submits that the appellant is not challenging the issue of drawback as if it is held that appellant unit is 100% EOU there is no case of the appellant. The appellant is challenging the observations of the authorities below that the appellant's unit is an 100% EOU. Therefore, he prayed that the short issue to be decided by this Tribunal is whether the appellant is 100% EOU or not.

4. Heard the parties. First, the issue to be decided is whether the appeals are maintainable before this Tribunal or not. For better appreciation, proviso (1) to Section 129A of the Customs Act, 1962 are extracted as below:-

Ashwini

" 129A. Appeals to the Appellate Tribunal. — (1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order—

(a) a decision or order passed by the 301 [Commissioner of Customs] as an adjudicating authority;

(b) an order passed by the [Commissioner (Appeals)] under section 128A;

(c) an order passed by the Board or the Appellate [Principal Commissioner of Customs or Commissioner of Customs] under section 128, as it stood immediately before the appointed day;

(d) an order passed by the Board or the [Principal Commissioner of Customs], either before or after the appointed day, under section 130, as it stood immediately before that day:

[Provided that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to,—

(a) any goods imported or exported as baggage;

(b) any goods loaded in a conveyance for importation into India, but which are not unloaded at their place of destination in India, or so much of the quantity of such goods as has not been unloaded at any such destination if goods unloaded at such destination are short of the quantity required to be unloaded at that destination;

(c) payment of drawback as provided in Chapter X, and the rules made there under:"

As per the said provisions, against the order of Commissioner (Appeals) with regard to payment of drawback, as per proviso and Chapter X and Rules made there under, the appeal will not lie before this Tribunal.

We find that admittedly, against the order of Commissioner (Appeals), dealing with the issue of drawback, appeal is not maintainable before this Tribunal. To that effect, the decision in the case of *CCE, New Delhi vs. DCS International Trading Company Pvt. Limited – 2017-TIOL-2093-CESTAT-DEL* is applicable.



5. We find that, in this case, the appellant has not challenged the issue of draw back and have disputed the status of the appellant whether the appellant is 100% EOU or not. The contention of the Id. Counsel for the appellant is that if the appellant's unit is 100% EOU, then they are not disputing repayment of drawback already sanctioned to them but if they are not 100% EOU and it is a DTA unit, that issue is to be decided by this Tribunal.

6. We find that as the appellant has not disputed the issue of claim of drawback and in the case of *M/s. Fancy Images & Others vs. CC, New Delhi – 2017-TIOL-410-CESTAT-DEL*, but the appeal was entertained against the order of Commissioner (Appeals) in the case of dis-allowance of drawback, therefore, we have to see what is issue before us. A similar issue has come up before the Punjab & Haryana High Court in the case of *Principal Commissioner of Central Excise & Service Tax vs. M/s. Raja Dyeing, Ludhiana* in CEA-18-2016 (O&M) and the Hon'ble High Court vide order dated 14.03.2017 has made the following observations:-

“18. In *Commissioner of Central Excise vs. Vimla Rolling Mills – 2015 (317) ELT 702 (Del.)*, the following order was passed:-

[Order]. - In these appeals by the Revenue, substantial question of law were framed on 24th February, 2014 and 25th February, 2014. However, the High Court does not have jurisdiction to entertain the present appeals under Section 35G of the Central Excise Act, 1944. In the order-in-original, several issues were decided including the question whether the activity undertaken by the respondent-assessee amounts to manufacture. The said question or dispute pertains to levy of duty, which is a question relating to rate of duty as held in CEAC No. 12/2013, *Commissioner of Service Tax v. Ernst and Young Pvt. Ltd.* and other connected cases decided on 25th February, 2014 [2014 (34) S.T.R. 3 (Del.)]. In this decision, it has been observed that the issues and contentions decided in the order-in-original would determine whether an appeal would lie before the High Court under Section 35G of the Central Excise Act, 1944 or before the Supreme Court under Section 35L of the aforesaid Act. The issue decided by the Tribunal and raised before the appellate court would not be relevant on the question of jurisdiction of the



Supreme Court or the High Court under Section 35L or 35G of the aforesaid Act. This was apparent from the language and words of the two provisions and a contrary interpretation would lead to unacceptable results with one party filing appeal under Section 35G and the other party under Section 35L of the said Act. Further, the respondent may be denied right to file cross objections. It is noticeable that in the first round also, against the order of the Tribunal, an appeal was preferred before the Supreme Court by the assessee.

2. In these circumstances, the appeals are returned as they are not maintainable before the High Court. It is open to the appellant-Revenue to file an appeal under Section 35L of the Central Excise Act, 1944, if so advised, and in accordance with the law."

We, however, must express a reservation regarding the observation that the issues and contentions decided in the order-in-original would determine whether an appeal would lie in the High Court under Section 35G or in the Supreme Court under Section 35L. In our view, it is not the order-in-original i.e. the order of the adjudicating authority but the order of the Tribunal that would determine the issue as to whether the appeal lies to the High Court under Section 35G or to the Supreme Court under Section 35L. Section 35G provides for an appeal to the High Court from every order passed in appeal by the appellate Tribunal. It is, therefore, the order of the Appellate Tribunal that must determine the issue. Moreover Section 35G restricts the ambit of the appeal to orders of the Tribunal "not being an order relating, among other things, to the determination... .." The words "an order" relate to the order passed in appeal by the Appellate Tribunal.

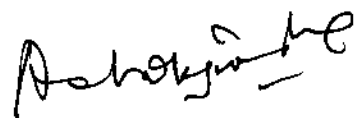
7. In the light of the decision of the Hon'ble High Court, we have to see what the prayer of the appellant in their appeal is and, what are the observations of the Id. Commissioner (Appeals) in the impugned order. In the impugned order, Id. Commissioner (Appeals) has observed as under:-

"5. Discussion and findings:

I have carefully gone through the contents of impugned Order, grounds of appeal, and oral as well as written submissions made by the appellants. I find that the issue for discussion and determination in the case is whether findings of the adjudicating authority in impugned order are legally tenable or not. From perusal of evidence on record, I find that acting on an intelligence that EOUs had adopted a modus operandi for availing simultaneous export benefits under different Export Promotion Schemes from different Authorities/Departments by resorting to mis-declaration, the appellant unit i.e. M/s Avanti Overseas Pvt. Ltd. was taken up for investigation by DRI. During the course of investigation, it was found by DRI that the unit had, wrongly availed duty drawback on the exports done by them and simultaneously had availed exemption

Ashwini

from Income Tax Department by declaring themselves as an operational EOU. I find the appellant no.1 had set up a unit at Village-Diwana, Distt. Panipat as 100% EOU. A license called Letter of Permission (LOP) was issued by NSEZ authorities and a Legal Undertaking (LUT) was executed V by the unit to abide by the terms and conditions of the LOP. The appellant have contended that the EOU was never set up and the warehousing licence granted, was of no avail, as the LOP had already expired. I find that it would be appropriate to look into the scheme of Export Oriented Units. Under the EOU scheme, the units are allowed to procure locally without payment of duty all types of materials, components, packing material, consumables, spares and various other specified categories of equipments including material handling equipments, required for export production or in connection therewith. The exporters are treated as a special class. I find that it is on record that the appellant had set up a unit as 100% EOU and letter of permission to this effect was issued by NSEZ authorities. I find that the fact, which is undisputed, is that at the time of exportation, the appellant unit did not disclose their identity of being an EOU to Customs and claimed duty drawback on the exported goods. I find that having been accepted the terms and conditions of LOP through executing Legal Undertaking (LUT), it was incumbent upon the appellant unit to declare the true status of unit while exporting the goods from India. From perusal of ANNEXURE A regarding Details relating to the claim by the exporter for deduction under Section 10 of the Income Tax Act, 1961 for the Assessment year 2007-08, I find that date of commencement of manufacture of production is shown as 01.06.2000. I find that claim of the appellant that unit was non operational fall flat on this count only. From combined reading of the provisions of Customs Act, 1962, Foreign Trade (Development Policy) Act, 1992, Foreign Trade (Regulation) Rules, 1993, Customs & Central Excise Duties Drawback Rules, 1995, it is evident that the regulations relating to All Industry Drawback prohibit the benefit of drawback on the goods manufactured and exported by a unit licensed as a 100% ECU. All Industry drawback is prohibited to ECU vide Notification No. 68/2007-Cus (NT) dated 16.07.2007 as amended. Duty drawback scheme and ECU scheme are mutually exclusive scheme. The appellant have contended that the unit never implemented under ECU scheme as the Customs Bonded warehouse was issued by the Customs Authority on 13.04.2010 i.e. only after expiry of validity period of extended LOP and as such it remained non functional during the relevant time I find that it is on record that the appellant unit had declared the status of the unit as operational EOU with the Income Tax Department and at the same time claimed that the unit was not EOU. I find that the contention of the appellant is not in consonance with the scheme of EOU. I find that Duty Drawback notification's have carried the Condition/Notes-" the rates of Drawback specified in the schedule shall not be applicable to export of a commodity or product if such commodity or product is manufactured and/or exported by a unit licensed as hundred percent export-oriented unit in terms of the provisions of the relevant Export and Import Policy and the Foreign Trade Policy". Thus the necessary inference that emerges is that an Export Oriented Unit which has been issued an LOP by Development Commissioner is not entitled to claim duty drawback



benefits irrespective of the fact whether it has claimed any benefit under Income Tax laws, or not and irrespective of the fact whether it has been issued Public Bonded Warehouse License under Section 58 and 65 of the Customs Act, 1962 and the unit may be treated as functional EOU. I find that CBEC's instruction vide F.No. DGEP/EOU/01/2014 dated 01.05.2014 has clarified the position in this regard. I have gone through the recorded statement of Appellant No.2 in which he has admitted that they declared their unit as functional EOU to the Income Tax Authorities and that their company had never declared the status declared to Income Tax with Customs and Central Excise authorities. I am in agreement with the findings of the adjudicating authority that Appellant No.2 was the key person for following modus operandi of availing simultaneous benefits under different export promotion schemes. I find that the penalty imposed in the impugned order is just and proper and no interference is warranted. The ratio of the cases referred to by the appellant is confined to the facts and circumstances of the particular case and I find that all the said judgments were case specific and need to be applied provided the conditions/circumstances remains same. Further, there was nothing on record to suggest that the circumstances/conditions which prevailed in these judgments were existing in the present case. The appeal filed by the appellants does not merit consideration."

We find that in the impugned order, the Id. Commissioner (Appeals) has examined the issue whether the appellant unit is an 100% EOU or not and held that appellant is 100% EOU and therefore, dismissed their appeals. Therefore, in the spirit of the judgment of the Hon'ble High Court of Punjab & Haryana in the case of *M/s. Raja Dyeing (supra)*, from the impugned order itself, it can be seen that the issue has been considered in the impugned order and that is the grievance of the appellant. Admittedly, in the impugned order, Id. Commissioner (Appeals) has decided the issue whether the appellant is 100% EOU or not and the same is the prayer of the appellant before us. In that circumstance, we hold that, in terms of Section 129A, the appeal is maintainable before the Tribunal.

8. Now, we deal with the merits of the case that the appellant is 100% EOU or not. We find that the sole ground to hold that unit is 100% EOU by the

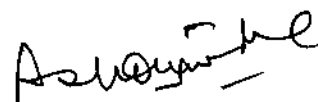


Revenue is that the appellant has claimed benefit from the Income Tax department, under Section 10B of the Income Tax Act, 1961 as 100% EOU. We further take note of the fact that, as per the Foreign Trade Policy, Para 9.24, an Export Oriented Unit means a unit for which an LOP has been issued by the Development Commissioner. Once the LOP is granted then in terms of LOP, the applicant is required to execute an LUT and get the unit customs bonded. In this case, although the appellant executed LUT but their unit could not be customs bonded within the validity period of LOP. The said fact has been affirmed by the office of the Commissioner of ICD, Tughlakabad. The relevant part of the said clarification is reproduced hereunder:-

"It is further mentioned that the party during the period from 13.04.2010 to 30.05.2012 continued to export Stainless Steel Utensils under claim of duty drawback.

The party has contended vide aforesaid letters dated 24.10.2011 and 31.05.2012 that

- (i) They have never set up 100% EOU due to financial constraints and conditions of raw materials prevailing in international markets.
- (ii) The party has submitted that no plant and machinery was got installed by them during the validity of LOP as per conditions laid down in the LOP. Meanwhile LOP was expired on 31.03.2010 which was not further extended.
- (iii) Further the party has submitted that no benefit under the EOU scheme was claimed by them as all the goods exported have been manufactured out of duty paid raw materials and the same fact has also been confirmed by jurisdictional excise department



vide their letter C.No. CE-20/misc/Excise/R-III/PNP/10/578 dated 17.01.2011 (copy enclosed).

- (iv) The party has submitted that after expiry of their LOP on 31.03.2010 they could not have acted as 100% EOU unit and they are eligible for drawback benefit all along exports made after 31.03.2010.

In view of above circumstances, it appears that the said unit has never operated as an EOU."

9. We further taken note of the fact that, as per letter dated 05.10.2006, issued by the Development Commissioner, in which it has been clearly stated that the appellant unit will be treated as working under 100% EOU scheme from the date from which it starts working in customs bonded and as per the clarification given by the office of the Commissioner of Customs, ICD, Tughlakabad dated 24.07.2012 that the appellant has never functioned as an EOU and released the pending drawback claims. We find that without customs bonding, the unit cannot be considered as an EOU. Further, as per the Customs Manual of supplementary instructions, Para 3.4, which is reproduced below, the EOU must be custom bonded:-

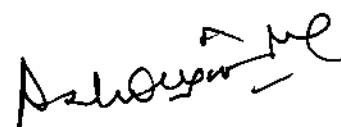
"3.4 On approval for setting up an EOU by Unit Approval Committee, a letter of Permission (LOP/LOI) is issued by the jurisdictional Development Commissioner. It mentions *inter alia* the capacity and items of manufacture and export, capital goods permitted to be imported/ procured. Thereafter, the unit has to execute a legal undertaking with the Development Commissioner. The LOP/ LOI issued is construed as a license for all purposes. After obtaining the LOP and execution of legal undertaking, the unit is required to apply for a license for Private Bonded Warehouse and In-bond manufacturing sanction order under provisions of section 58 and 65 of the Customs Act, 1962 respectively from the jurisdictional Assistant/ Deputy Commissioner of Central Excise and Customs."

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In fact, without customs bonding, the department will never permit the unit to receive any raw material, inputs or capital goods as duty free. The same has been clarified in CBEC Circular No. 09/2008-Cus dated 25.06.2008, wherein it has been clarified as under:-

"3. The matter has been examined in the Board. For the purpose of ensuring uniformity in practice and also to prevent misuse of the facility, the aforesaid instructions issued vide Board's Circular No. 68/95-Cus. dated 15-6-1995 and Circular No. 132/95-Cus., dated 22-12-1995 entrusting the specified functions to the Commissioners are hereby reiterated. However, it is clarified that in case of 100% EOUs, the licensing u/s 58 and grant of permission for in-bond manufacturing facility u/s 65 of the Customs Act, 1962 shall continue to be considered and decided by Assistant Commissioner of Customs or Deputy Commissioner of Customs.

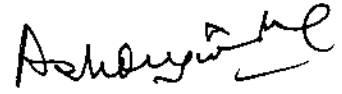
10. We further take note of the fact that appellant has never opted for any benefit of duty under Central Excise or Customs as an EOU scheme in respect of inputs/ capital goods. The sole case of the Revenue is that, as the appellant has claimed the benefit of Section 10B under Income Tax Act as 100% EOU, therefore, the appellant is 100% EOU. Merely by claiming a wrong benefit under the different ^{Income Tax} Act, which is not relevant for the Customs Act, it cannot be held that appellant is 100% EOU and taking benefit from the Income Tax department cannot determine the status of the appellant as 100% EOU. Once, under the Customs Act, there is specific provision for claiming the benefit of 100% EOU and for that, certain conditions have to be fulfilled, which the appellant has failed to do so. The Revenue has failed to establish that appellants were functioning as 100% EOU under the provisions of Customs Act or Foreign Trade Policy. In that circumstance, we hold that the appellant's unit is not 100% EOU and it is only a DTA Unit.



11. In view of the above terms, the impugned order is set-aside and the appeals are allowed with consequential relief to the appellants.

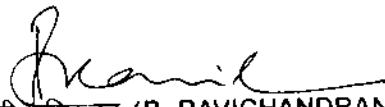
(Order pronounced in the court on 12.12.2017)

B. Ravichandran
Member (Technical)


Ashok Jindal
Member (Judicial)

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Seperate order attached.

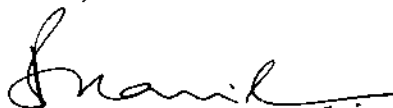

बी. रविचन्द्रन / B. RAVICHANDRAN
सदस्य (तकनीकी) / Member (Technical)
सी.शु.उ.शु. एवं सेवाकर अपीलीय अधिकरण
Customs Excise & Service Tax Appellate Tribunal
पश्चिमी खण्ड-2 / West Block No. 2,
रा. क. पुरम, नई दिल्ली- 66 / R.K. Puram, New Delhi- 110066

Appeal No.C/57269-57270/2016

Difference of Opinion

I have perused the Final Order proposed by the Id Member (Judicial). With due regard, I am not able to accept the Final Order recorded by the Id Member (Judicial) with reference to admissibility of the present appeal before the Tribunal. The reasons for my disagreement are recorded as below:

- a) The present proceedings emanated by issue of SCN dated 04.09.2014 by the Joint Commissioner of Customs (ICD), Tughlakabad. The SCN proposed a denial of drawback amounting to Rs.6.91 crores and sought to recover the same under the provisions of Rule 16 of Customs and Central Excise Duties Drawback Rules, 1995.
- b) The notice was decided by the original authority vide order dated 19.10.2015. The original authority held that the drawback amounting to Rs.6.91 crores is to be denied and the amount already sanctioned was ordered to be recovered under Rule 16 ibid. The order also decides regarding confiscation of goods and penalties on the appellant.
- c) The Commissioner (Appeals), vide impugned order dated 10.07.2016, upheld the original order. He categorically held that drawback as claimed by appellant is not available to them as held by the original authority.
- d) Drawback Rules, 1995 were framed in terms of Section 75 of Customs Act, 1962 which falls under Chapter X of the Act.



e) Section 129A of the Act deals with appeals to the Tribunal. The relevant portion of the said Section is as below:

"No appeal shall lie to the Appellate Tribunal and the Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to:

(a).....

(b).....

(c) Payment of drawback as provided in Chapter X, and the rules made thereunder."

f) Commissioner (Appeals) in the impugned order interpreted Notification 68/2007 Cus (NT) which deals with drawback eligibility to the exporters.

2. The above factual deals will make it manifestly clear that the present dispute is essentially with reference to drawback claim filed by the appellant and is clearly barred for appeal before the Tribunal in view of the above statutory provisions. It is clear that the primary dispute is not with reference to the status of the appellant, whether 100 % EOU or not, though the same is the basis for resolving the dispute with reference to the claim of the appellant for drawback. The evidence or reason for a decision by itself cannot be considered as point of dispute. In other words, it is the claim of the appellant for drawback which is the point of dispute and the basis or evidence for resolving such dispute cannot alter the nature or essence of dispute.



3. With due regard, I also find that the case laws referred to by the Id Member (Judicial) have no application to the facts which are narrated above. It is noted that while examining an appeal by the Revenue in DCS International Trading Company (P) Ltd-2017-TIOL-2093-CESTAT-DEL, the Tribunal relying on various earlier decisions held that when the main issue is export rebate which may be linked with some other issues, the Tribunal has no jurisdiction to take up the appeal against the order of Commissioner (Appeals). It was held that when an appeal is involved, the question of fact/law of both drawback as well as classification, the appeal cannot be maintained before the Tribunal. It is to be further noted that in M/s ESSAR Overseas Company, 2017 (348) ELT 171 (Tri-Mumbai), the Tribunal held that payment of drawback also includes the recovery of drawback. Any proceedings for recovery of drawback cannot be appealed before the Tribunal when the order is passed by Commissioner (Appeals).

4. In view of the above analysis, I find that the present appeal cannot be entertained by the Tribunal in view of the statutory bar mentioned above. When the appeal is not maintainable due to lack of jurisdiction, the question of examining the merits of the appeal does not arise.


(B. Ravichandran) 29.11.17.
Member (Technical)

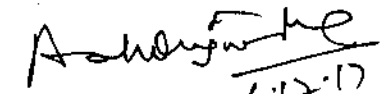
Point of difference for reference

In view of findings recorded by Member (Tech) and Member (Judicial), as above, the following difference of opinion needs to be resolved:

"Whether the appeal is maintainable before the Tribunal in view of the bar of Section 129A of the Customs Act as held by the Member (Tech) or the appeal can be entertained by the Tribunal and on merit can be decided as held by the Member (Judicial)."

The appeal file may be placed before Hon'ble President for further action.


(B. Ravichandran) 29.11.17.
Member (Technical)

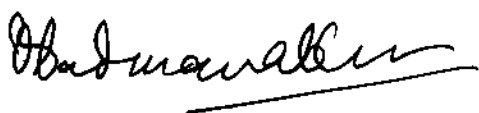

(Ashok Jindal) 6.12.17
Member (Judicial)

pcs

Per V. Padmanabhan:

The appellant is engaged in the manufacture of Stainless Steel bowls. They exported a consignment from ICD TKD and claimed drawback. Since the appellant had obtained Letter Of Permission for setting up a 100% EOU, the Customs Authorities at ICD obtained clarification from jurisdictional Central Excise Authority to the effect that the appellant was not a 100% EOU, sanctioned and paid the drawback claim to the appellant. Subsequently, DRI investigated into the matter and concluded that the appellant is to be considered as a 100% EOU. Subsequently, after the issuance of show cause notice, the drawback already sanctioned was ordered to be recovered. The appeal against the original authority's order was decided by the Commissioner (Appeals) vide the impugned order dated 10.07.2016 against the appellant. Against such order, the present appeal has been filed.

2. The appeal was heard by the regular bench and learned Member (Judicial) in his order dated 12.12.2017 held that since in the impugned order, the Commissioner (Appeals) decided the issue whether the appellant was a 100% EOU or not, he was of the view that the present appeal is maintainable before the Tribunal and will not be hit by the proviso to that Section 129A barring the jurisdiction of the Tribunal in drawback case. He went on to decide the issue on merit in favour of the appellant.



3. The learned Member (Technical), however, disagreed with the view that the Tribunal had jurisdiction to hear the present appeal. In his dissenting order, he expressed the view that the present dispute is essentially with reference to drawback claim filed by the appellant, and hence, is clearly barred for appeal before the Tribunal as per the statutory provision. He held that the clear and primary dispute is not with reference to the status of the appellant, though the same is the basis for resolving the dispute with reference to claim of drawback.

4. On account of difference of opinion between the learned Member (Judicial) and learned Member (Technical), the following points of difference have been cited before me as per the orders of the honourable President:

"Whether the appeal is maintainable before the Tribunal in view of the bar of Section 129A of the Customs Act as held by the Member (Tech) or the appeal can be entertained by the Tribunal and on merit can be decided as held by the Member (Judicial)."

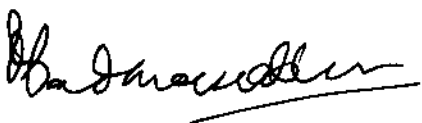
5. With the above background, I heard Shri A.K. Prasad, learned Advocate for the assessee, as well as Shri Amresh Jain and Shri R.K. Manjhi, learned DRs for the Revenue.

6. The arguments raised by Shri A.K. Prasad are summarized below:

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(i) On the question of jurisdiction, the learned Member (Judicial) and learned Member (Technical) have taken opposing views. This itself indicates that the issue is debatable, and hence, the benefit of doubt should be extended to the assessee.

(ii) He submitted that Section 129A of the Customs Act, 1962, deals with appeals to the Appellate Tribunal. The proviso to Section 129A bars the jurisdiction of the Tribunal in respect of, among other things, "(c) Payment of drawback as provided in Chapter X and the Rules made thereunder". Section 35B of the Central Excise Act, 1944, deals with similar provisions on the Central Excise side, in which the jurisdiction of the Tribunal is barred in respect of orders which relate to "(b) A rebate of duty of excise on goods exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India". He submitted that in Central Excise Law, the jurisdiction of Tribunal is barred in respect of any order relating to rebate of duty. But, in the Customs provision, the jurisdiction is barred only if it relates to payment of drawback. He further submitted that the dispute in the present case is not with reference to payment of drawbacks, but, is regarding eligibility of the appellant for claim of drawback, depending on his status.



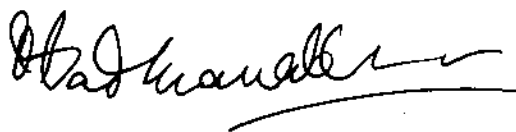
(iii) The learned Member (Technical) has referred to the case of DCS International Trading Company (P) Ltd., 2017-TIOL-2093-CESTAT-Del., but that decision was in respect of Central Excise Law, and hence, can be distinguished.

(iv) He referred to the decision of the Honourable Supreme Court in the case of "2004 (167) ELT 3 (S.C.) Tamil Nadu Yana Mandapam Assn. vs. Union of India" and submitted that the jurisdiction is to be decided on the basis of the "pith and substance" of the case. In the present case, the status of the appellant – whether 100% EOU or not – constitutes the pith and substance of the dispute to decide the payment of drawback. Consequently, he argued that the jurisdiction for such dispute lies before the Tribunal and not before the Joint Secretary (Revisionary Authority).

7. The learned DR argued as follows:

(i) The crux of the dispute is regarding the payment of drawback. The status of the appellant – whether 100% EOU or not – is material in deciding whether drawback is payable or not. Since the order of the lower authority relates to payment of drawback, the Tribunal has no jurisdiction to adjudicate the dispute.

(ii) He referred to the Three Member Bench decision of the Tribunal in the case of Commissioner vs. Jindal Stainless Steel



Limited in 2012 (285) ELT 118 (Tri. – Del) in which a difference of opinion between the Member (Technical) and Member (Judicial) was referred to a Third Member.

(iii) On the question of jurisdiction of the Tribunal, the Tribunal in that case, by majority, has decided that if the main issue is of export rebate and for deciding the issue, some other issues have to be decided, the Tribunal would not have jurisdiction under Section 35B (1st proviso). He submitted that the decision of the Three Member Bench is binding and may be followed.

(iv) Shri R.K. Manjhi, learned DR, relied on the Tribunal's decision in the case of DCS International Trading (Supra) and submitted that in the present case, the fundamental dispute is one of payment of drawback and the status of the appellant is an issue to be considered in deciding the drawback.

8. Heard both sides and perused the records.

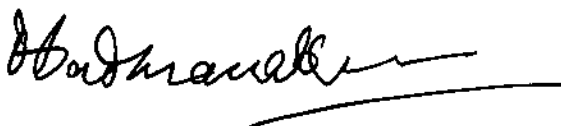
9. The appellant exported goods through ICD TKD, under claim for drawback. The same was originally paid, but was ordered to be recovered by the lower authorities, for the reason that the appellant was a 100% EOU, which is not entitled to claim for drawback. In the present appeal before the Tribunal, the appellant has argued that the lower authorities have incorrectly held that the status of the appellant was a 100% EOU, but the



actual status was of a DTA unit. The difference of opinion between the learned Member (Judicial) as well as learned Member (Technical) has arisen on the question of jurisdiction of the Tribunal to entertain the present appeal. The relevant Section 129A of Customs Act, 1962 is reproduced below:

"SECTION 129A. Appeals to the Appellate Tribunal. – (1) Any person aggrieved by any of the following orders may appeal to the Appellant Tribunal against such order –

- (a) a decision or order passed by the Principal Commissioner of Customs or Commissioner of Customs as an adjudicating authority;*
- (b) an order passed by the Commissioner (Appeals)] under section 129A;*
- (c) an order passed by the Board or the Appellate Commissioner of Customs under Section 128, as it stood immediately before the appointed day;*
- (d) an order passed by the Board or the Principal Commissioner of Customs or Commissioner of Customs, either before or after the appointed day, under section 130, as it stood immediately before that day:*



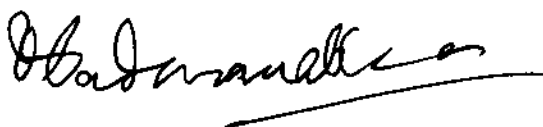
Provided that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to, –

- (a) any goods imported or exported as baggage;
- (b) any goods loaded in a conveyance for importation into India, but which are not unloaded at their place of destination in India, or so much of the quantity of such goods as has not been unloaded at any such destination if goods unloaded at such destination are short of the quantity required to be unloaded at that destination;

(c) **payment of drawback as provided in Chapter X, and the ruled made thereunder:**

Provided further that the Appellate Tribunal may, in its discretion, refuse to admit an appeal in respect of an order referred to in clause (b) or clause (c) or clause (d) where –

- (i) the value of the goods confiscated without option having been given to the owner of the goods to pay a fine in lieu of confiscation under section 125; or
- (ii) in any disputed case, other than a case where the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment is in



issue or is one of the points in issue, the difference in duty involved or the duty involved; or

(iii) the amount of fine or penalty determined by such order, does not exceed two lakh rupees.

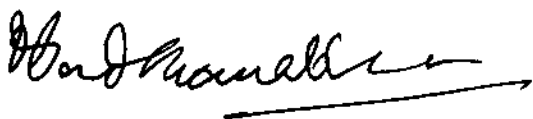
.....”

10. The above section bars the jurisdiction of the Tribunal in respect or any order which relates to, among other things, payment of drawback. If the order impugned before the Tribunal relates to payment of drawback, the Tribunal will not have jurisdiction to decide the same. The learned Member (Technical) is of the view that the dispute involves payment of drawback, and hence, the jurisdiction is barred. However, the learned Member (Judicial) has taken the view that Commissioner (Appeals), in the impugned order, has decided the issue whether the appellant is 100% EOU or not, and since the appellant has made the same plea in the present appeal, the present appeal is maintainable in terms of Section 129A.

11. I am of the view that the difference of opinion can be resolved by reference to the decision of the Three Member Bench in the case of Commissioner (Central Excise) vs. Jindal Stainless Steel Limited (Supra). The difference of opinion between the two Members in that case was also on the question of jurisdiction of the Tribunal, in relation to the admissibility

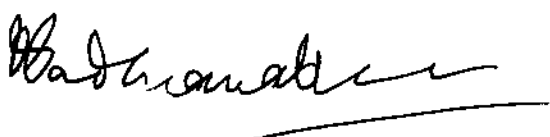
of export rebate in Central Excise. The learned Member (Technical), while resolving the difference of opinion, has observed as follows:

"As regards the second point of difference, the main dispute in this case is over the admissibility of export rebate under Rule 18 in respect of export of Ice buckets and Waste baskets. The issue of export rebate depends upon the issue of classification. In terms of first proviso to Section 35B(1), the Tribunal has no jurisdiction over the appeals against the orders passed by Commissioner (Appeals) in the matters relating to rebate of duty of excise on the goods exported to any country or territory outside India or of rebate on excisable material used in the manufacture of goods which are exported to any country or territory outside India. Under Section 35EE where the order is of nature referred to first proviso to Section 35B(1), a revision applications lies before the Central Government. In my view, in the case the main dispute is dispute over admissibility of export rebate as the Asst. Commissioner's order was in respect of rebate claim filed by the Respondent. Even if for the decision on the question of rebate any issue relating to classification is to be decided, that would not change the forum of appeal. Only in a situation where the Commissioner (Appeals) in the same order decides two issues one issue relating to export rebate and other issue relating to



classification/valuation or Cenvat credit and the two issues are totally independent issues, the order of the Commissioner (Appeals) can be treated as two orders one in respect of export rebate and the other in respect of classification or valuation or Cenvat credit and only in such a case different portions of the order can be challenged before different authorities. But in a situation where the main issue is export rebate covered by first proviso to Section 35B(1) and if for deciding the issue relating to export rebate, some other issues have also to be decided, the Tribunal would not have jurisdiction and that order of Commissioner (Appeals) can be challenged only before the Jt. Secretary (RA) by filing a revision application."

12. The decision by the Three Members Bench is to be considered on par with a Larger Bench Decision and is a binding precedent. Applying the ratio of the above case to the current one, I note that in the present case, to decide the issue of eligibility of drawback, it is necessary to first decide the issue of the status of the appellant – whether they are a 100% EOU or not. The two issues are not totally independent issues. The issue of status of the appellant has to be resolved in order to decide the fundamental issue of entitlement of drawback to the appellant. The pith and substance of the dispute in the appeal is about payment of drawback. Consequentially, I am of the view that the present case will fall within the category of orders

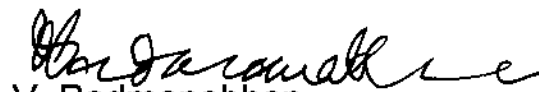


against which the appellate jurisdiction of the Tribunal is barred. The order of the Commissioner (Appeals) can be challenged only before the Revisionary Authority of Government of India by filing a Revisionary Application.

13. In view of the above discussion, the point of difference is answered as above, by agreeing with the view expressed by the learned Member (Technical). The case is referred to the regular Bench for passing orders.

[Pronounced on 16/3/2018]



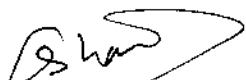

V. Padmanabhan
Member(Technical)

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Final Order No. 51071-51072/2018 Date: 16/03/2018.

In view of the decision of the third Member, as above, the appeal is not maintainable before the Tribunal as the same is barred by provisions of Section 129A of Customs Act, 1962.

(Order pronounced in open court on 16/03/2018.)


(Justice Dr. Satish Chandra)
President


(B. Ravichandran)
Member (Technical)

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