

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S).4796/2012

CARGILL INDIA PRIVATE LIMITED

APPELLANT(S)

VERSUS

COMMISSIONER OF CUSTOMS & CENTRAL EXCISE,
VISAKHAPATNAM-II

RESPONDENT(S)

WITH

C.A. No. 4320/2012

J U D G M E N T

A.K.SIKRI, J.

Both these appeals are filed by the same appellant who is an exporter of a variety of food and agriculture related products. During the period 08.11.2007 to 23.01.2008, the appellant had filed as many as 14 shipping bills for export of Soyabean meal through Visakhapatnam Port to Vietnam and Japan. While filing the shipping bills, the appellant did not claim any duty drawback under the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 (hereinafter referred to as 'the Rules') and instead free shipping bills for export were filed. On 06.08.2008, the appellant submitted an application to the Commissioner (Customs) for conversion of the said free shipping bills into drawback shipping bills under Rule 12(1)(a) of the Rules. At the time of arguments,

before the Commissioner, the appellant also referred to Circular No. 04/2004 dated 16.01.2004 on the basis of which it was argued that even the conversion of free shipping bills into drawback shipping bills was not needed as the said circular, under the given circumstances, gave discretion and authorized the Commissioner to give the duty drawback even without conversion.

The Commissioner (Customs) after hearing the appellant rejected the request for conversion vide order dated 24.10.2008. Insofar as, the request for conversion is concerned, the Commissioner held that under Rule 12(1)(a) of the Rules the request could be made for change/conversion only for the reasons because of which the shipping bills filed earlier were beyond the control of the exporter and since the appellant could not satisfy this requirement, it was not permissible for him to seek conversion of the free shipping bills into duty drawback bills under the aforesaid Rules. Referring to Circular No. 04/2004 dated 16.01.2004, the Commissioner opined that since the goods under free shipping bills were not physically examined and there was no evidence to support the description, quantity and value in the absence of physical examination of the goods which is the case of regular drawback shipping bills, the benefit of the said circular also could not be given to the appellant.

The appellant challenged the aforesaid order by filing an appeal before the Central Excise and Services Tax Appellate Tribunal (CESTAT). The CESTAT vide its final order dated 23.12.2009 set aside the order of the Commissioner(Customs) holding that the appellant was entitled to get the bills converted from free

shipping bills to duty drawback bills in terms of Rule 12(1) (a) of the Rules, ingredients whereof are satisfied by the appellant.

The Department challenged the aforesaid order by filing an appeal under Section 35 of the Central Excise Act read with Section 130 of the Customs Act. In this appeal, the Department has succeeded. A perusal of the order of the High Court would show that the appeal of the Department is allowed for reasons recorded in CEA No. 280/2010. Copy of the order passed in CEA No. 280/2010 has also been annexed along with the present appeal filed by the appellant challenging the order of the High Court.

We may record here that almost on identical facts the conversion sought by the appellant is disallowed in other appeals.

From the aforesaid it would be clear that two issues arise for consideration:

- 1 Whether the appellant is entitled to claim conversion of free shipping bills into drawback shipping bills on the basis of Rule 12(1) (a) of the Rules?
- 2 If the answer to the aforesaid question is in the negative, whether the appellant is entitled to the benefit of duty drawback on the strength of Circular No. 04/2004 dated 16.01.2004 even without seeking conversion?

Insofar as the first issue is concerned, after going through the order of the High Court, we are in complete agreement therewith. Rule 12(1) (a) of the Rules read as under:

"Rule 12. Statement/Declaration to be made on exports other than by Post.-(1) In the case of exports other than by post, the exporters shall at the time of export of the goods -

(a) state on the shipping bill or bill of export, the description, quantity and such other particulars as are necessary for deciding whether the goods are entitled to drawback, and if so, at what rate or rates and make a declaration on the relevant shipping bill or bill of export that -

(i) a claim for drawback under these rules is being made;

(ii) in respect of duties of Customs and Central Excise paid on the containers, packing materials and materials and the service tax paid on the input services used in the manufacture of the export goods on which drawback is being claimed, no separate claim for rebate of duty or service tax under the Central Excise Rules, 2002 or any other law has been or will be made to the Central Excise authorities.

Provided that if the Commissioner of Customs is satisfied that the exporter or his authorised agent has, for reasons beyond his control, failed to comply with the provisions of this clause, he may, after considering the representation, if any, made by such exporter or his authorised agent, and for reasons to be recorded, exempt such exporter or his authorised agent from the provisions of this clause."

A bare reading of the aforesaid Rule demonstrates that such conversion is permissible only when the exporter is able to satisfy the Commissioner that "for reasons beyond his control" drawback was not claimed. In the instant case, a finding of fact is arrived at by the Commissioner (Customs), which has been accepted by the High Court also, that no case was made out by the appellant to suggest that claim for duty drawback was beyond the control of the

appellant. It is rightly pointed out that merely because the appellant was not aware of the correct legal position would not afford any such ground that it was beyond his control.

Coming to the second issue as noted above, the appellant had made a specific plea before the Commissioner(Customs) at the time of personal hearing to the effect that even without the request for conversion of free shipping bills into drawback shipping bills, the appellant was entitled to duty drawback claim having regard to Circular No. 04/2004 dated 16.01.2004. The appellant had also cited the judgment of the Tribunal in Nucleus Satellite Communications Vs. CC (Sea Port) Chennai [2007(216)ELT 67(Tri.Chennai)]. This plea of the appellant was, however, rejected in the following words:

"Further Board's Circular No. 04/2004 - Cus dated 16.01.2004 of F.No.609/176/2002-DBK states that, "no provision exists for permitting conversion of free shipping bills into drawback shipping bills". It also states that there is no need to allow conversion as Commissioner may examine and consider individual requests on merits and facts in terms of the provisions as per the Customs and Central Excise duties and Service tax Drawback Rules, 1995. In the subject case, the goods under free shipping bills were not physically examined. Let export order was given, EGMs were closed in the EDI system and the EP copies of the shipping bills were also generated. The bills are no more alive and are in the current status of history. As per the Rule 13(1) of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995, in respect of manual shipping bill whenever the exporter files drawback shipping bills, Triplicate copy of the Shipping bill itself is a claim for Drawback on the date on which the Proper officer of Customs makes an order permitting the clearance and loading of the goods for exportation under Section 51 of the Customs Act, 1962. In respect to EDI shipping bill subject to the provisions of Rule 13(2), 13(3) and

13(4) the electronic shipping bill itself shall be treated as the claim for drawback. In this case, the department did not prevent him from filing drawback shipping bills nor any valid reasons exist for not filing the drawback claim by the exporter himself. In view of this, question of conversion does not arise. Further, the exporter, after filing free shipping bills in EDI, had submitted his claim through their lawyer for conversion of the same into drawback shipping bills after a lapse of over six to eight months without assigning any valid reasons for such a delay. Moreover, there is no evidence to support the description, quantity and value as the goods were not subjected to physical examination as in the case of regular drawback shipping bills."

Since the Tribunal had accepted the appeal of the appellant on the first issue namely permitting the appellant to seek conversion under Rule 12(1)(a) of the Rules, the Tribunal did not go into this issue at all. It appears that when the matter was argued before the High Court, the High Court also confined the discussion only on the first issue. Since on the first issue we have accepted the view taken by the High Court, it becomes necessary to deal with this issue though it has not been gone into either by the Tribunal or the High Court.

After perusing Circular No. 04/2004 dated 16.01.2004, along with some relevant provisions of the Customs Act, we find that the treatment given by the Commissioner to the aforesaid argument is not legally tenable. Circular No. 04/2004 refers to the discussion that was held in the Conference of Chief Commissioner on Tariffs and allied matters held on 25th/26th September, 2003 and notes that in the said conference it was felt that in cases where the exporters had filed free shipping bills on their own, it would not

be advisable to permit such conversion. This view of the Commissioner's Conference was deliberated by the Central Board of Excise & Customs and the issue was reexamined, which resulted in the issuance of the aforesaid circular. After taking note of the provisions contained in Rule 12(1)(a) of the Rules which undoubtedly state that "no provision exists for permitting conversion of free shipping bills into drawback shipping bills", the Board was still of the opinion that it was permissible for the Commissioner to examine and consider individual requests on merits and facts in terms of the aforesaid provisions and the relaxation shall only apply in respect of drawback claims pertaining to All Industry Rates of drawback and it would not apply to brand rate of duty drawback, where rate is claimed in terms of Rule 6 or Rule 7 of the Customs & Central Excise Duties Drawback Rules. The clarification is given precisely in the following terms:

"In view of above, it is clarified that there is no need for allowing conversion. However, in terms of the proviso to Rule 12(1)(a) of the Customs and Central Excise Duties Drawback Rules, 1995, the Commissioner may examine and consider individual requests on merits and facts in terms of the aforesaid provisions. The aforesaid relaxation shall only apply in respect of drawback claims pertaining to All Industry Rates of drawback and it would not apply to brand rate of duty drawback, where rate is claimed in terms of Rule 6 or Rule 7 of the Customs & Central Excise Duties Drawback Rules."

It is not in dispute, as has been recorded by the Tribunal as well, that the appellant wanted only "All Industry Rates of duty drawback". In view of the above, the reasons given by the

Commissioner that the goods were not physically examined would be of no relevance. This view of ours further stands substantiated on the reading of Sections 50, 51 and 113 of the Customs Act. Sections 50 and 51 of the Customs Act are re-produced for ready reference as under:

"50. Entry of goods for exportation.-

(1) The exporter of any goods shall make entry thereof by presenting to the proper officer in the case of goods to be exported in a vessel or aircraft, a shipping bill, and in the case of goods to be exported by land, a bill of export in the prescribed form.

(2) The exporter of any goods, while presenting a shipping bill or bill of export, shall at the foot thereof make and subscribe to a declaration as to the truth of its contents.

51. Clearance of goods for exportation.-Where the proper officer is satisfied that any goods entered for export are not prohibited goods and the exporter has paid the duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance and loading of the goods for exportation."

What the aforesaid provisions state, particularly Section 51, that the proper officer is to satisfy itself only to the extent that the goods which are entered for export are not prohibited goods and the exporter has paid the duty at the time of clearance of the goods meant for export and therefore, the inspection is confined to the aforesaid aspect viz. the goods are not prohibited. Since in the present case, goods are not dutiable, no duty has to be paid. Therefore, there was no reason for denying the benefit

only on the ground that at the time when the appellant had sought the duty drawback, the goods could not be physically examined. This position is further supported when we compare the fundamental provisions of Section 113 with the amendment to the said Section carried out by the Finance Act, 2003 (w.e.f. 14th May, 2003). In the instant case amended provisions are applicable. The provisions of unamended and amended Section 113 read as follows:

"Unamended Section 113. Confiscation of goods attempted to be improperly exported, etc.—The following export goods shall be liable to confiscation:—

(a) any goods attempted to be exported by sea or air from any place other than a customs port or a customs airport appointed for the loading of such goods;

(b) any goods attempted to be exported by land or inland water through any route other than a route specified in a notification issued under clause (c) of section 7 for the export of such goods;

(c) any dutiable or prohibited goods brought near the land frontier or the coast of India or near any bay, gulf, creek or tidal river for the purpose of being exported from a place other than a land customs station or a customs port appointed for the loading of such goods;

(d) any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;

(e) any dutiable or prohibited goods found concealed in a package which is brought within the limits of a customs area for the purpose of exportation;

(f) any dutiable or prohibited goods which are loaded or attempted to be loaded in contravention of the provisions of section 33 or section 34;

(g) any dutiable or prohibited goods loaded or attempted to be loaded on any conveyance, or water-borne, or attempted to be water-borne for being loaded on any vessel, the eventual destination of which is a place outside India, without the permission of the proper officer;

(h) any dutiable or prohibited goods which are not

included or are in excess of those included in the entry made under this Act, or in the case of baggage in the declaration made under section 77;

(i) any dutiable or prohibited goods 1[or goods entered for exportation under claim for drawback] which do not correspond in any material particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 in respect thereof;

2[(ii) any goods entered for exportation under a claim for drawback which do not correspond in any material particular with any information furnished by the exporter or manufacturer under this Act in relation to the fixation of rate of drawback under section 75;]

(j) any goods on which import duty has not been paid and which are entered for exportation under a claim for drawback under section 74;

(k) any goods cleared for exportation under a claim for drawback which are not loaded for exportation on account of any willful act, negligence or default of the exporter; his agent or employee, or which after having been loaded for exportation are unloaded without the permission of the proper officer;

1[(1) any specified goods in relation to which any provisions of Chapter IVB or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened.]

"Amended Section 113. Confiscation of goods attempted to be improperly exported, etc.—The following export goods shall be liable to confiscation:—

(a) any goods attempted to be exported by sea or air from any place other than a customs port or a customs airport appointed for the loading of such goods;

(b) any goods attempted to be exported by land or inland water through any route other than a route specified in a notification issued under clause (c) of section 7 for the export of such goods;

(c) any 1[***] goods brought near the land frontier or the coast of India or near any bay, gulf, creek or tidal river for the purpose of being exported from a place other than a land customs station or a customs port appointed for the loading of such goods;

(d) any goods attempted to be exported or brought within the limits of any customs area for the

purpose of being exported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;

(e) any 1[***] goods found concealed in a package which is brought within the limits of a customs area for the purpose of exportation;

(f) any 2[***] goods which are loaded or attempted to be loaded in contravention of the provisions of section 33 or section 34;

(g) any 3[***] goods loaded or attempted to be loaded on any conveyance, or water-borne, or attempted to be water-borne for being loaded on any vessel, the eventual destination of which is a place outside India, without the permission of the proper officer;

(h) any 4[***] goods which are not included or are in excess of those included in the entry made under this Act, or in the case of baggage in the declaration made under section 77. 5[(i) any goods entered for exportation which do not correspond in respect of value or in any material particular with the entry made under this Act or in the case of baggage with the declaration made under section 77;] 6[(ii) any goods entered for exportation under a claim for drawback which do not correspond in any material particular with any information furnished by the exporter or manufacturer under this Act in relation to the fixation of rate of drawback under section 75;]

(j) any goods on which import duty has not been paid and which are entered for exportation under a claim for drawback under section 74;

(k) any goods cleared for exportation 7[***] which are not loaded for exportation on account of any willful act, negligence or default of the exporter; his agent or employee, or which after having been loaded for exportation are unloaded without the permission of the proper officer;

8[(l) any specified goods in relation to which any provisions of Chapter IVB or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened.]

We thus hold that the provisions of Circular No. 04/2004 dated 16.01.2004 would be applicable in the instant case. The Commissioner may examine and consider the individual request on merits and facts in terms of the aforesaid provisions. We remit the case back to the Commissioner to examine and consider the request

of the appellant on merits as per the stipulation contained in Circular No. 04/2004 dated 16.01.2004. The Commissioner shall decide the same, after giving opportunity of hearing to the respondent within a period of three months from the date of receipt of the copy of this Judgment.

Both these appeals are, accordingly, disposed of.

.....J.
[A.K. SIKRI]

.....J.
[ROHINTON FALI NARIMAN]

NEW DELHI;
OCTOBER 27, 2015

ITEM NO.102

COURT NO.13

SECTION III

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Civil Appeal No(s). 4796/2012

CARGILL INDIA PVT.LTD.

Appellant(s)

VERSUS

COM. OF CUSTOMS & CENT.EXCISE,VISAKHAPA.

Respondent(s)

(with appln. (s) for permission to file additional documents and office report)

WITH

C.A. No. 4320/2012

(With Office Report)

Date : 27/10/2015 These appeals were called on for hearing today.

CORAM : HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE ROHINTON FALI NARIMAN

For Appellant(s) Mr. V. Sridharan, Sr. Adv.
Mr. M. P. Devanath, Adv.
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Ms. Shagun Arora, Adv.
Mr. Hemant Bajaj, Adv.
Mr. Anandh K., Adv.
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For Respondent(s) Mr. A.K. Sanghi, Sr. Adv.
Mr. Arijit Prasad, Adv.
Mr. Vikas Singh Jangra, Adv.
Ms. Rashmi Malhotra, Adv.
Mr. B. Krishna Prasad, Adv.

UPON hearing the counsel the Court made the following
O R D E R

The civil appeals are disposed of in terms of the signed judgment.

Interlocutory Application(s) pending, if any, shall stand disposed of accordingly.

(Ashwani Thakur)
COURT MASTER

(Renu Diwan)
COURT MASTER

(Signed reportable judgment is placed on the file)