$~J-1

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 26.07.2022
Judgment pronounced on: 02.09.2022

\+ **W.P.(C) 1644/2019**

M/S COMBITIC GLOBAL CAPLET PVT. LTD. ..... Petitioner
Through: Mr Rajneesh K. Verma with Mr D K Singh, Advs.

versus

UNION OF INDIA & ORS. ..... Respondents
Through: Ms Shiva Lakshmi, CGSC with Ms. Ritwik Sneha and Ms Srishti Rawat, Advs.

CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MS JUSTICE TARA VITASTA GANJU

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.:

TABLE OF CONTENTS

Preface:

1. This writ petition seeks to challenge Policy Circular No.9(RE-2013)/2009-14 dated 30.10.2013 [hereafter referred to as "2013 Circular"] and orders dated 26.04.2016 and 17.11.2016, passed by the Deputy Development Commissioner ('Deputy DC') and the Deputy Director General of Foreign Trade ('Deputy DGFT'), respectively.

2. The central issue which arises for consideration is: whether the petitioner is entitled to duty drawback, confined to customs duty component, against deemed exports, even where it has claimed cenvat credit.

2.1. The concomitant issue which is required to be addressed is: whether the petitioner should be allowed to claim duty drawback on the customs duty component based on All Industry Rates ('AIR'), without having to furnish evidence concerning actual duty suffered on imported or indigenous inputs used in the manufacture of goods.

3. Before proceeding further, it would be useful to set out the broad backdrop in which the instant writ petition has been instituted in this Court.

Background:

4. The petitioner is a manufacturer and exporter of pharmaceutical products. The petitioner claims that it has been in this business for over 15 years and has resultantly gained the status of a two-star export house. The petitioner also avers, an aspect which is not disputed, that it converted its Domestic Tariff Area ('DTA') unit into a 100% Export Oriented Unit ('EOU') w.e.f. 28.09.2012.

4.1. The conversion of the DTA Unit into 100% EOU, according to the petitioner, has been physically verified and certified by the jurisdictional

central excise authority.

5. After the conversion to 100% EOU unit had taken place, the petitioner claimed duty drawback *qua* custom duty component, on the premise that deemed export had taken place.

5.1. An application, in this behalf, was filed on 08.04.2013. *Via* this application, the petitioner claimed the duty drawback benefit for the period ending in September 2012, amounting to Rs.38,35,686/-.

5.2. The Assistant DC, however, had a different view and consequently, *via* order dated 10.05.2013 rejected the petitioner's claim. The principal reason given by the Assistant DC was that the claim for duty drawback (as a measure of deemed export benefit) could not be entertained, as the goods against which duty drawback was claimed, had been received in the unit, prior to it being declared an EOU.

5.3. The petitioner, it appears, revised the claim *via* a fresh application dated 17.06.2013.

5.4. The office of the Deputy DC, *via* order dated 08.08.2013 declined to consider the petitioner's claim.

5.4.(a) The analogy drawn in the communication dated 08.08.2013 was that where duty paid by EOUs is *ab initio* exempted from payment of duty, the refund of terminal excise duty ('TED') is not granted.

5.4.(b) The petitioner attempted to persuade the office of the Deputy DC, *via* a return response dated 09.09.2013. According to the petitioner, it did not receive any response to the same, despite having served a reminder on the said office on 07.12.2013.

6. The aforementioned application and the order passed, including the communication that was exchanged by the petitioner with the office of the

Deputy DC, concerned the claim of duty drawback on goods, which were received prior to the DTA unit being converted into 100% EOU.

7. The petitioner's experience was that even after the conversion had taken place i.e., 28.09.2012, applications filed to claim duty drawback, concerning customs duty component were rejected.

7.1. For the sake of convenience, the claims made by the petitioner for various periods from time to time, along with details regarding the order by which the said claims were rejected or kept in abeyance are set forth hereafter:

Date of Application	**Relevant Period**	**Amount claimed**	**Order by which it was rejected in the first instance/kept in abeyance**	**Whether the order dated 26.04.2016 dealt with the timeframe**
08.04.2013	Until September 2012	38,35,686/-	10.05.2013 (Rejected)	Yes
21.08.2013	October 2012-March 2013	1,07,92,534/- revised to 82,81,981/-	21.04.2014 (Rejected)	Yes
21.11.2013	April 2013-June 2013	37,20,762/-	18.02.2014 (Kept in abeyance)	Yes
21.04.2014	July 2013-September 2013	71,41,078/-	21.05.2014 (Kept in abeyance)	Yes
25.09.2014	October 2013-June 2014	93,99,853/-	N/A	No
24.06.2015	July 2014-	1,00,25,567/-	19.08.2015 (Kept in abeyance)	Yes

	March 2015			

8. The record shows that the petitioner had, in fact, made a consolidated representation, about its grievance concerning the failure of respondent no.3/Development Commissioner ('DC'), to extend duty drawback for the period spanning between 01.07.2012 and 31.03.2015 *via* communication dated 12.10.2015.

8.1. It is the petitioner's case that this communication was forwarded to respondent no.2/Director General of Foreign Trade ('DGFT'), as well.

9. The consolidated representation did not gain any traction and was rejected by the Deputy DC *vide* impugned order dated 26.04.2016.

9.1. Being aggrieved, on 11.07.2016, the petitioner preferred an appeal with the DGFT. Unfortunately for the petitioner, the result was no different, which was communicated to it, *via* impugned order dated 17.11.2016. It is also a matter of record that Deputy DGFT, *via* the order dated 17.11.2016, also took the same stance as the DGFT, which was communicated to the petitioner, *via* communication dated 12.05.2016.

9.2. *Inter alia,* what was put against the petitioner was the 2013 Circular, the provisions of the Foreign Trade Policy 2009-2014 [in short, "FTP"] as also the provisions of the Handbook of Procedures 2009-2014 [in short, "HBP".]

9.3. It is in this backdrop, as noticed above, that the petitioner has assailed in the instant writ action, the 2013 Circular, the order dated 26.04.2016 passed by the Deputy DC and the order dated 17.11.2016, passed by the Deputy DGFT.

10. The arguments on behalf of the petitioner were advanced by Mr Rajneesh K. Verma, while on behalf of the respondents, submissions were advanced by Ms Shiva Lakshmi.

Submissions on behalf of the petitioner:

11. Mr Verma, broadly, made the following submissions:

11.1. Since the transfer of goods from petitioner's DTA unit to its 100% EOU involved deemed exports, it was entitled to duty drawback, in respect of customs duty component, as the suppliers had already claimed cenvat credit, *qua* central excise duty and service tax.

11.2. The benefits available under the FTP, *vis-à-vis* deemed exports, were no different to those, that were available to units, which made physical exports.

11.3. The petitioner was entitled to claim duty drawback based on AIR, as the same was available, with respect to the goods in issue. In other words, the petitioner was not required to seek fixation of brand rates.

11.4. The petitioner was also not required to produce proof/material concerning payment of customs duty on inputs/components.

12. In support of his submissions, Mr Verma drew our attention to various provisions of the FTP, in particular, paragraphs 6.11, 8.3(b) and 8.5. Besides this, our attention was also drawn to paragraphs 8.3.3 and 8.3.6 of the HBP.

12.1. In addition to the aforementioned provisions of the FTP and HBP, reference was also made to the Notification No.92/2012-Cus.(N.T.) dated 04.10.2012, Notification No.98/2013-Cus.(N.T.) dated 14.09.2013 and Notification No.110/2014-Cus.(N.T.) dated 17.11.2014 and Circular No.24/2001 dated 20.04.2001, read with Circular No.13/2014-Cus dated 18.11.2014, issued by Department of Revenue, Ministry of Finance,

Government of India, New Delhi [in short, "DOR"] to buttress the petitioner's claim that where duty drawback is claimed *vis-à-vis* the custom duty component based on AIR, no evidence is required to be furnished, *vis-à-vis* actual duty suffered on imported or indigenous goods used, in the manufacture of subject goods.

13. It was, thus, contended that the aforesaid notifications were binding on the DGFT and the DC, having regard to the provisions of Rule 3 and 4 of the Customs Excise and Duty Drawback Rules 1995 [in short, "1995 Rules"] read with paragraph 8.3.6 of the HBP. The contention was that the provisions of the aforementioned notifications would apply *mutatis-mutandis* to deemed exports, as well.

14. In support of the aforementioned submissions, reference was made to the judgment of the Bombay High Court in W.P.7210/2017, dated 27.04.2018, titled ***Sarla Performance Fibers Ltd v. Union of India.***

Submissions on behalf of the respondents:

15. On the other hand, Ms Shiva Lakshmi, in opposition to the reliefs claimed by the petitioner, relied upon various provisions of the FTP, including paragraphs 1.3, 1.4, 1.5 and Chapters 6 and 8 of the said policy. In particular, our attention is drawn to paragraphs 8.1, 8.2, 8.3, 8.5 and 8.5.1. of the FTP. Besides this, reference was also made to Chapter 8 of the HBP. Insofar as provisions of the Foreign Trade (Development and Regulation) Act, 1992 [in short, "FTDR Act"] were concerned, reference was made to Section 2(e)(i), 5, 6(1) and 6(2).

15.1. The thrust of the submissions was that FTP, which was framed by the Central Government, was implemented through DGFT, who, also had the

power to interpret the same. In this regard, as noted above, our attention was drawn to Sections 6(1) and 6(2) of the FTDR Act.

15.2. Furthermore, it was contended that deemed export scheme has been devised to neutralize the duty component i.e., TED on finished products and excise duty/customs duty on inputs; the inputs being raw materials/components.

15.3. Insofar as excise duty on finished products is concerned, it is either exempted "ab initio" or the same is reimbursed. As far as inputs are concerned, they could either consist of imported components or indigenous/domestic components. Insofar as indigenous/domestic components are concerned, they bear excise duty while the imported inputs are burdened with customs duty.

15.4. Thus, as regards deemed exports, the domestic supplier has the option of claiming duties on inputs *via* the AIR route, provided for duty drawback. Thus, column A of the drawback schedule framed by DOR enables such suppliers to claim duty drawback, if cenvat credit is not claimed.

15.5. However, if the claimant opts to re-claim excise duty through cenvat credit, the customs duty on the inputs can only be reimbursed by fixing the brand rate based on the production of documentary evidence of having paid customs duty. Paragraph 8.5 of the FTP takes this circumstance into account.

16. The 2013 Circular clarifies the position concerning the admissibility of duty drawback, in cases where cenvat credit has been availed. The 2013 Circular also clarifies that duty drawback, in terms of paragraph 8.3(b) of the FTP, including the provisions of column B of AIR of duty drawback under the duty drawback schedule claimed by DOR, is not admissible if

cenvat credit has been availed. The rationale is, that where cenvat credit has been availed, with respect to duty paid on inputs purchased locally, then to that extent, central excise duty on inputs/components gets compensated.

16.1. Therefore, the petitioner would have to give a declaration in terms of paragraph 8.5 of FTP, read with Public Notice No. 35, dated 01.03.2011, that it has not availed and will not avail cenvat credit, in respect of inputs and components used in supplies, if it is to claim duty drawback against deemed exports. Since this is not the case as per the petitioner's own stand, it is not entitled to duty drawback on deemed exports.

17. Thus, in a nutshell, where cenvat credit is taken, in that case as well, basic customs duty can be claimed, *albeit*, based on the brand rate of duty drawback, which is founded on the evidence concerning payment of actual duty.

17.1. This option, under Column B of the AIR Duty Drawback Schedule issued by DOR, can be availed only for physical exports. For this purpose, reference was made to paragraph 8.5 of the FTP.

Analysis and Reasons:

18. Before we get into the nitty-gritty of the arguments advanced by the learned counsel for the parties, it may be relevant to note certain provisions of the FTDR Act, on which reliance is placed, in particular, by Ms Lakshmi.

19. First and foremost, it needs to be borne in mind, that it is Section 3 of the FTDR Act, which empowers the Central Government to make provisions for the development and regulation of foreign trade, by facilitating imports and increasing exports. The Central Government, in this behalf, is vested with the power to publish an order in the official gazette.

20. Section 5 of the very same Act, *inter alia,* empowers the Central Government to formulate and announce the FTP and also amend the same by issuing a notification in the official gazette.

21. Sub-section (1) of Section 6 invests in the Central Government, the power to appoint any person as DGFT.

21.1. Sub-section (2) of Section 6 confers power on the DGFT to advise the Central Government in the formulation of Foreign Trade Policy. The DGFT is also made responsible for implementing the said policy.

21.2. Furthermore, under sub-section (3) of Section 6, the Central Government can, by an order published in the official gazette, delegate the power exercisable by it under the FTDR Act, other than powers conferred on it, by Sections 3, 5, 15, 16 and 19, subject to such conditions as may be stipulated in the order.

21.3. This power can be delegated by the Central Government, either to the DGFT or such other officer subordinate to the DGFT, as may be specified in the said order.

22. Therefore, what is clear is that the Foreign Trade Policy, for any given period, can be framed and/or amended only by the Central Government. The DGFT is obliged to advise the Central Government, not only about the formulation of the Foreign Trade Policy but is also responsible for implementing the same.

22.1. Although the Central Government can, by an order published in the official gazette, delegate the power conferred upon it under the FTDR Act either on the DGFT or such other officer named therein, it cannot, *inter alia,* delegate the power conferred on it under Section 3, 5, 15 and 16.

22.1.(a) Section 3, as noted above, concerns amongst other things, the power

conferred on the Central Government to make provisions for the development and regulation of foreign trade, while Section 5 as alluded to hereinabove, concerns the power to formulate and amend the Foreign Trade Policy.

22.1.(b) Section 15 confers on a person aggrieved by an order passed by the adjudicating authority, the power to prefer an appeal to the Central Government. Likewise, Section 16 confers the power of review on the Central Government, concerning any decision or order of the Director General or any decision or order made by an officer subordinate to him.

22.1.(c) Section 19 confers on the Central Government, the power to make rules for carrying forward the provisions of the FTDR Act.

23. In the instant case, the FTP was brought into force on 27.08.2009 and remained valid till 31.03.2014. Therefore, the policy ring-fence (in a figure of speech) which is drawn for issuance of notifications, *inter alia*, is the FTP formulated by the Central Government, with the advice of the DGFT.

23.1. Therefore, what one needs to examine is the provisions of the FTP, insofar as they concern deemed exports.

23.2. Chapter 6 of the FTP, *inter alia,* deals with EOUs. Insofar as supplies from DTAs to EOUs are concerned, they are treated as deemed exports. This is evident on a bare perusal of paragraph 6.11(a) of the FTP. The same is extracted below:

> ***"Entitlement for supplies from the DTA***
> *6.11 (a)* ***Supplies from DTA to EOU / EHTP / STP / BTP units will be regarded as "deemed exports"*** *and DTA supplier shall be eligible for relevant entitlements under chapter 8 of FTP, besides discharge of export obligation, if any, on the supplier. Notwithstanding the above, EOU / EHTP / STP / BTP units shall, on production of a suitable disclaimer from DTA supplier, be*

eligible for obtaining entitlements specified in chapter 8 of FTP. For claiming deemed export duty drawback, they shall get brand rates fixed by DC wherever All Industry Rates of Drawback are not available." [Emphasis is ours.]

24. An important aspect to be noted is upon production of a suitable disclaimer from a DTA supplier, the recipient i.e., the EOU can also claim entitlements specified in Chapter 8 of the FTP. Insofar as deemed exports duty drawback is concerned, it can be claimed only as per brand rates fixed by the DC, albeit where AIR of drawback ***is not*** available.

24.1. As indicated above, Chapter 8 of the FTP deals with deemed exports. The definition of deemed exports is contained in paragraph 8.1 which reads thus:

"Deemed Exports

8.1 "Deemed Exports" refer to those transactions in which goods supplied do not leave country, and payment for such supplies is received either in Indian rupees or in free foreign exchange. Supply of goods as mentioned in Paragraph 8.2 below shall be regarded as "Deemed Exports" provided goods are manufactured in India."

24.2. The categories of supplies made by main or subcontractors, that are regarded as deemed exports under FTP, provided the goods are manufactured in India, include goods supplied to an EOU. This is evident upon a plain reading of paragraph 8.2(b) of the FTP. The same is extracted below:

"Categories of Supply

8.2 ***Following categories of supply of goods by main / subcontractors shall be regarded as "Deemed Exports" :***

xxx xxx xxx

(b) Supply of goods to EOU / STP / EHTP / BTP

xxx xxx xxx"

[Emphasis is ours.]

24.3. Amongst various benefits that can be extended *qua* deemed exports, one such provision concerns duty drawback. This, again, emerges upon a perusal of clause B of paragraph 8.3:

> ***"Benefits for Deemed Exports***
> *8.3 Deemed exports shall be eligible for any / all of following benefits in respect of manufacture and supply of goods qualifying as deemed exports subject to terms and conditions as in HBP v1:-*
> *xxx xxx xxx*
> ***(b) Deemed Export Drawback**.*
> *xxx xxx xxx"*
>
> [Emphasis is ours.]

24.4. The aforesaid clause is required to be read with Clause 8.4. of the FTP, which establishes that the supply of goods, *inter alia* to an EOU, makes it amenable for being accorded the benefit of duty drawback:

> ***"Benefits to the Supplier***
>
> *8.4. Following table shows the benefits available to different categories of supplies as mentioned in Para 8.2 above. In respect of* ***such supplies supplier shall be entitled to the benefits listed*** *in paragraphs* ***8.3****(a),* ***(b)*** *& (c) of the Policy, whichever is applicable.*

Relevant sub-para of 8.2	*Benefit available as given in Para 8.3, whichever is applicable*		
	(a)	***(b)***	***(c)***
xxx	*xxx*	*xxx*	*xxx*
(b)	***Yes***	***Yes***	***Exemption***
xxx	*xxx*	*xxx*	*xxx*

[Emphasis is ours.]

24.5. This brings us to the provision, that has been vigorously debated by both sides i.e., paragraph 8.5 of the FTP. The same is extracted below:

> *"**Eligibility for refund of terminal excise duty/drawback***

> *8.5 Supply of goods will be eligible for refund of terminal excise duty in terms of para 8.3(c) of FTP, provided recipient of goods does not avail CENVAT credit/rebate on such goods. A declaration to this effect, in Annexure II of ANF 8, from recipient of goods, shall be submitted by applicant. Similarly, supplies will be eligible for deemed export drawback in terms of para 8.3(b) of FTP on Central Excise paid on inputs/components, provided CENVAT credit/ rebate has not been availed of such duty paid by supplier of goods. A declaration to this effect, in Annexure III of ANF 8, from supplier of goods, shall be submitted by applicant.* ***Such supplies shall however be eligible for deemed export drawback on customs duty paid on inputs/components****."*
>
> [Emphasis is ours.]

24.6. A bare perusal of the aforesaid provisions of the FTP would show that duty drawback is available in respect of supplies made by a DTA unit to an EOU. It is not in dispute that supplies were made to the 100% EOU of the petitioner from its DTA unit.

25. The FTP provisions adverted to hereinabove attain greater clarity, when read along with provisions contained in the HBP. Before one sets forth the relevant provisions of HBP, it is important to note that while the petitioner claims that since AIR of duty drawback is available, and therefore, there is no requirement to seek fixation of brand rate, the respondents contend to the contrary.

25.1. However, a close perusal of para 8.3.3 of the HBP reveals that the petitioner's contention appears to be correct. The same is extracted hereafter:

> *"**8.3.3.** Where All Industry Rate of Drawback is not available or same is less than 4/5th of duties actually paid on materials or components used in production or manufacture of the said goods, an application in ANF 8 along with prescribed documents may be made to RA or DC, for fixation of brand rate. Recipient may claim benefits*

on production of a suitable declaration from supplier in the format given in Annexure III of ANF 8."

25.2. Furthermore, a plain reading of para 8.3.6 of the HBP shows that subject to the procedure laid in the HBP, the 1995 Rules shall apply *mutatis-mutandis* to deemed exports.

26. Therefore, what we need to examine at this juncture is the following:

(i) First, does paragraph 8.5 of the FTP envisage extension of duty drawback on customs component, *vis-à-vis* deemed exports in circumstances where Cenvat credit has been availed by the claimant?

(ii) Second, where AIR of duty drawback is available, is the claimant obliged to seek fixation of brand rate?

(iii) Third, whether the claimant is required to submit duty-paid documents for fixation of brand rate? This eventuality will come into play only if the claimant is obliged to seek fixation of brand rate to claim duty drawback.

26.1. As noted above, a perusal of para 8.5 read with paragraphs 8.1, 8.2, 8.3 and 8.4. of the FTP would show that:

(i) Deemed exports referred to those transactions in which goods supplied do not leave the country and the payment for such supplies is received, either in Indian rupees or in free foreign exchange.

(ii) *Inter alia*, supplies made to EOUs are regarded as deemed exports under the FTP, provided the goods are manufactured in India.

(iii) Amongst other benefits, deemed exports are eligible for duty drawback.

(iv) Insofar as duty drawback is concerned, it comprises central excise duty, service tax and customs duties component. In cases where the cenvat

credit facility/rebate has not been availed, duty drawback is available against all three components. However, on the other hand, where cenvat credit has been availed (as in this case), the supplies made are eligible for deemed export drawback on custom duty paid on inputs/components. This aspect emerges on a perusal of the following parts of paragraph 8.5 of the FTP:

> *"... Similarly, supplies will be eligible for deemed export drawback in terms of para 8.3(b) of FTP on Central Excise paid on inputs/ components provided CENVAT credit facility/rebate has* ***not been*** *availed of such duty paid by supplier of goods..."*

[Emphasis is ours.]

26.2. This part seems logical and rational. If cenvat credit has been availed, then Central excise duty paid on inputs/components would have got compensated and if such an applicant is allowed to again claim duty drawback, it would result in granting him benefit twice over.

26.3. The last part of paragraph 8.5, which is extracted hereafter, in our view, concerns a situation where cenvat credit has been availed, as it speaks of duty drawback being granted on deemed exports *vis-à-vis* custom duty paid on inputs/components:

> *"...Such supplies shall however be eligible for deemed export drawback on customs duty paid on inputs/components."*

26.4. Therefore, in our view, the petitioner is right in contending that since its suppliers have availed of cenvat credit, it is entitled to seek duty drawback on the customs duty paid on inputs/components used in the manufacture of goods in issue.

26.4.(a) The respondents, however, contend that even if the petitioner can be

considered for grant of duty drawback *vis-à-vis* deemed exports, (insofar as customs duty component is concerned) it can only be granted by fixing a brand rate based on [actual] duty-paid documents.

26.4.(b) In this context, the respondents have relied upon the 2013 Circular. This circular, according to the respondents, lends clarity to paragraph 8.5 of the FTP.

26.4.(c) The petitioner, on the other hand, has taken the position that the circular does not align with the provisions of the FTP and HBP and other notifications issued by the DGFT. The argument is, that the requirement incorporated in the 2013 Circular for fixing the brand rate based on actual duty paid documents, is beyond the provisions of the FTP and HBP and hence, should be ignored, if not, struck down.

26.4.(d) The petitioner, thus, contends that the incorporation of such a condition in the 2013 Circular by the DGFT takes it beyond the role assigned to the DGFT, which is to implement the policy and interpret the provisions of the Foreign Trade Policy. Since the formulation of the policy i.e., Foreign Trade Policy or providing of procedures for imports and exports is a role assigned by the legislature to the Central Government, the DGFT cannot usurp that role and thus, add conditions in the garb of providing clarifications.

26.4.(e) In this context, it would be relevant to advert to the relevant part of para 8.3.3 of the HBP.

> *"Where All Industry Rate of Drawback* ***is not*** *available or same is less than 4/5th of duties actually paid on materials or components used in production or manufacture of the said goods, an application in ANF 8 along with prescribed documents may be made to RA or DC, for fixation of brand rate... "*

[Emphasis is ours.]

27. It is apparent that the AIR duty drawback schedule published by the DOR is, *inter alia*, available concerning the goods in issue i.e., Sulphamethoxazole. The relevant part of the schedule which was produced before us, *qua* which no dispute was raised, reads as follows:

SCHEDULE

			A		***B***	
Tariff Item	***Description of goods***	***Unit***	***Drawback when Cenvat facility has not been availed***		***Drawback when Cenvat facility has been availed***	
			Drawback Rate	***Drawback cap per unit in Rs. (')***	***Drawback Rate***	***Drawback cap per unit in Rs. (')***
1	*2*	*3*	*4*	*5*	*6*	*7*
xxx			*xxx*	*xxx*		
CHAPTER-29 ORGANIC CHEMICALS						
xxx			*xxx*	*xxx*		
29350011	*Sulphamethoxazole*	*Kg*	*3.3%*	*21.6*	*3.3%*	*21.6*
xxx	*xxx*	*xxx*	*xxx*	*xxx*	*xxx*	*xxx*

27.1. Clearly, what emerges is that the schedule has two columns i.e., Column A and Column B, apart from columns concerning tariff items, description of goods and unit of measure. The two columns i.e., A and B represent two eventualities.

27.2. First, the rate at which drawback is available when the cenvat facility has ***not been*** availed.

27.3. Second, the rate at which drawback is available when the cenvat facility ***has been*** availed.

27.4. Insofar the goods in issue are concerned, (i.e., Sulphamethoxazole) the rate at which the duty drawback is available in both situations i.e., when cenvat facility has not been availed and when cenvat facility has been

availed, is the same.

28. Thus, the next issue which arises for consideration is that the rate of duty drawback given in column B; which envisages a situation where cenvat credit has been availed of, concerns only the customs duty component. The answer to this conundrum is found in the notes and conditions appended to notification no.92/2012-Customs (N.T.) dated 04.10.2012 and notification no.98/2013-Customs (N.T.) dated 14.09.2013. Although the 04.10.2012 notification was superseded by the 14.09.2013 notification as the Central Government, it appears, carried out a fresh determination of rates of drawback, the notes and conditions more or less remained the same; in particular, condition no.6, which reads as follows:

> *"(6) The figures shown under the drawback rate and drawback cap appearing below the column "Drawback when Cenvat facility has not been availed" refer to the total drawback (customs, central excise and service tax component put together) allowable and those appearing under the column "Drawback when Cenvat facility has been availed" refer to the drawback allowable under the customs component. The difference between the two columns refers to the central excise and service tax component of drawback.* ***If the rate indicated is the same in both the columns, it shall mean that the same pertains to only customs component and is available irrespective of whether the exporter has availed of Cenvat or not.****"*
>
> [Emphasis is ours.]

28.1. A perusal of condition no.6 would show that "…if the rate indicated is the same in both the columns, it shall mean that the same pertains to only customs component and is available irrespective of whether the exporter has availed of cenvat or not."

28.2. It must be stated here that the aforementioned notifications i.e., notifications dated 04.10.2012 and 14.09.2013 have been, *inter alia,* issued

by the Government of India in the exercise of powers under Section 75(2) of the Customs Act, 1962 and Rules 3 and 4 of the 1995 Rules and hence, in terms of para 8.3.6 of the HBP, they would have to be made applicable *mutatis-mutandis* to deemed exports. Rule 8.3.6. reads as follows:

> *"**8.3.6.** Subject to procedure laid down in HBP, Customs and Central Excise Duty Drawback Rules, 1995 shall apply mutatis mutandis to deemed exports."*

28.3. Therefore, it is quite evident, since AIR for duty drawback in respect of the goods in issue is available and the rate stipulated in columns A and B of the schedule is the same, the condition stipulated in the 2013 Circular, that duty drawback on customs duty would be available only upon fixation of brand rate, which, in turn, is based on actual duty- paid documents, cannot apply to the petitioner. The said condition contained in the 2013 Circular is otiose insofar as the petitioner is concerned.

28.4. In this context, it is important to bear in mind that duty drawback on customs duty component is calculated based on the industry average of customs duty suffered on several inputs like High-Speed diesel (HSD), furnace oil, packing material and other inputs. Therefore, it is practically not feasible to obtain documents to show the quantum of customs duty suffered by these inputs, as some of these inputs i.e., HSD and furnace oil are charged with duty at the point in time when the import is made by the oil companies. The entire purpose of providing AIR for duty drawbacks is to do away with this cumbersome process.

28.5. The argument advanced on behalf of the respondents that brand rate of duty drawback has to be fixed and for that purpose, documents have to be filed by the petitioner, is a submission which is in the teeth of paragraph

8.3.3. of HBP. Therefore, to that extent, in our view, the 2013 Circular needs to be read down.

28.6. It needs to be noted that the impugned order dated 26.04.2016 is founded on the 2013 Circular and thus, the logical sequitur would be that it cannot sustain the challenge laid to it, by the petitioner. Consequentially, we are inclined to strike down the impugned order dated 26.04.2016, as well.

29. Before we conclude, it must be noted that the petitioner, insofar as its first application dated 08.04.2013 is concerned, has taken the position that the approach adopted by the office of the Assistant DC in its reply dated 10.05.2013, was not in consonance with the provisions of the HBP.

29.1. A perusal of the communication dated 10.05.2013 shows that the claim made in the first application [immediately upon conversion of the petitioner's unit from DTU to 100% EOU], was rejected by the office of the Assistant DC by adopting the following rationale:

> "*…We did not find any provision to consider the claim of DBK/deemed Export benefits prior to bonding of premises as EOU. The goods on which you have claimed DBK were received in the unit prior to declare[sic: declaring] it as EOU…*"

29.2. The petitioner has assailed this approach adopted by the respondents of denying deemed export drawback on raw materials/inputs which remained unutilized with the then-existing DTA unit at the time of its conversion into a 100% EOU, by contending that if this approach was in order, then a specific provision, in that behalf, would have been made in the FTP and/or HBP.

29.2.(a) The petitioner seeks to buttress this plea, by relying on paragraph 6.36.1 of the HBP. The petitioner contends that a perusal of the said

paragraph of HBP would disclose that the Government of India chose to deny benefits, only in respect of plant, machinery and equipment that had already been installed in the existing DTA, *qua* which, no claim had been lodged.

29.3. Furthermore, the petitioner seeks to contend that the clue, as to whether or not the claim for drawback made under the first application concerning unutilized goods which were available at the time of conversion of its DTA unit into a 100% EOU unit, is found in para 6.36.1 of the HBP. In this regard, our attention has been drawn to that part of the said para, which reads as follows:

> *"...In case there is an outstanding export commitment under EPCG scheme/Advance Authorization Scheme, it will follow the procedure laid down in Appendix 14-I-O HBP v1."*

29.4. In the context of the aforesaid, it was submitted that the outstanding export commitment under the advance authorization scheme *qua* the existing DTA unit was carried forward and fulfilled by the converted unit i.e., 100% EOU. The petitioner has taken a definitive stand that under the Advance Authorization Scheme, it had procured 500kg of sulpiride powder (i.e., raw material/input). According to the petitioner, permission was given for the said purpose under Advance Authorization No.3310023511 dated 26.07.2012. The petitioner avers that at the time of conversion, out of 500kg of sulpiride powder imported, 206.520kg had been consumed and thus, the balance quantity i.e., 293.480 kg was transferred/supplied to its converted unit i.e., 100% EOU in terms of Appendix 14-I-O of the FTP. It is further averred that the office of Joint DGFT, Panipat has redeemed the aforementioned advance authorization *via* communication dated 17.06.2015.

Besides this, the petitioner submits that the Government of India had even allowed the transfer of the outstanding export commitment under the Advance Authorization Scheme, at the time of conversion of the existing DTA into 100% EOU.

29.5. Thus, based on the aforesaid, it is argued on behalf of the petitioner that it ought to be allowed duty drawback in respect of unutilized goods which were available with the existing DTA unit and were transferred to the 100% EOU, upon conversion. Apart from the letter dated 10.05.2013, there is no response to the petitioner, regarding this stand, by the respondents.

29.6. Having regard to the language of para 6.36.1 of HBP, we are of the view that the petitioner is right, that the restriction against the claim of concession in duties and taxes applied only *vis-à-vis* plant, machinery and equipment that had already been installed. Thus, the fact that the petitioner was allowed to carry forward the advance authorization to the converted unit i.e., 100% EOU and thereafter fulfil the outstanding export commitment would, in our view, as correctly argued on behalf of the petitioner, furnish a clue that duty drawback for such goods should extend *qua* unutilized goods, which were available at the time of conversion of the DTA unit into a 100% EOU.

30. We also note that insofar as 17.11.2016 is concerned, it proceeds on the basis that no appeal would lie under Section 15(1) of the FTDR Act, as the order of the Deputy DC dated 26.04.2016 was not an order passed by adjudicating authority. Having said that, the order dated 17.11.2016 takes a position similar to that, which Deputy DC has adopted in his communication/order dated 26.06.2016 [sic: 26.04.2016]. Since we have held that the order dated 26.04.2016 is not sustainable in law, the order

dated 17.11.2016 will suffer the same fate.

Conclusion:

31. Therefore, for the foregoing reasons, we are inclined to hold that:

(i) The petitioner is not required to have a brand rate of duty drawback fixed, based on actual duty-paid documents for the return of basic customs duty. To that extent, the 2013 Circular is read down.

(ii) Since the impugned order dated 26.04.2016 is based on the 2013 Circular, in particular, the part which we have read down, the same cannot be sustained and is, hence, set aside.

(iii) Consequentially, the order dated 17.11.2016 will also stand quashed.

32. The writ petition is disposed of, in the aforesaid terms.

33. Parties shall, however, bear their respective costs.

(RAJIV SHAKDHER)
JUDGE

(TARA VITASTA GANJU)
JUDGE

SEPTEMBER 2, 2022/pmc

Click here to check corrigendum, if any