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

% **Judgment reserved on: 05 September 2023**
**Judgment pronounced on: 15 September 2023**

\+ W.P.(C) 5986/2023

AJ GOLD AND SILVER REFINERY ..... Petitioner

Through: Mr. Kishore Kunal and
Ms. Ankita Prakash, Advs.

versus

ASSISTANT COMMISSIONER OF CUSTOMS, (DRAWBACK) & ORS. ..... Respondents

Through: Mr. R. Ramachandran,
Standing Counsel.

**CORAM:**
**HON'BLE MR. JUSTICE YASHWANT VARMA**
**HON'BLE MR. JUSTICE DHARMESH SHARMA**

**J U D G M E N T**

**YASHWANT VARMA, J.**

1. The petitioner has approached this Court seeking the issuance of an appropriate writ commanding the respondents to attend to the pending drawback claim amounting to Rs. 2,15,48,344/- and for the aforesaid amount being released along with applicable interest. The respondents have neither passed a formal order rejecting the claim as laid before us nor have they released the same in terms of the application dated 06 May 2015 made in terms of Rule 12(1) of the **Customs, Central Excise Duties Drawback Rules, 1995**[1]. However, it was their stand before us that since the petitioner did not pay any

[1] Drawback Rules, 1995

**Basic Customs Duty**[2] on the imported articles and merely paid the additional duty as imposed in terms of Section 3 of the **Customs Tariff Act, 1975**[3], it would not be entitled to the drawback benefits as claimed.

2. For the purposes of adjudging the validity of the aforesaid objection, it would be apposite to notice the following facts. The petitioner asserts itself to be a precious metal refining firm and in connection with which it imports gold dore bars. During the Financial Year 2013-2014 it is stated to have imported 5,23,533 grams of gold dore bars for refining, further manufacturing and sale. It is further its case that the **Central Board of Excise and Customs**[4] had issued a Circular No. 36/2010 permitting conversion of free shipping bills from one scheme to another subject to conditions stipulated therein being complied with. The petitioner in compliance of the Reserve Bank of India Circular No. 25 dated 14 August 2013, exported 20% of the gold dore bars which had been imported in the form of gold jewellery.

3. It is further disclosed that it had during the course of such export inadvertently failed to submit duty drawback shipping bills which was required in order to claim drawback benefits and had to the contrary submitted free shipping bills. It appears to have approached the respondents for appropriate amendments being made to the aforesaid free shipping bills in terms of Section 149 of the **Customs**

[2] BCD
[3] Tariff Act
[4] CBEC

**Act, 1962**[5]. The said permission ultimately came to be granted on 27 February 2015 with the office of the Commissioner of Customs acceding to the request of the 15 shipping bills in question being duly amended and being treated as duty drawback shipping bills. It is thereafter that the petitioner submitted the relevant documents for disbursal of drawback claims.

4. The record would further bear out that although various representations in this respect were made, the aforesaid requests were not acceded to. In the meanwhile, and more particularly on 04 November 2019, the respondent no. 2 issued a Memorandum asserting that the petitioner would not be entitled to drawback benefits since the import of gold dore bars had been undertaken without payment of BCD. It was further asserted by the respondents that the petitioner had also contravened Condition No. 23 of **Notification No. 98/2013 dated 14 September 2013**[6]. The petitioner responded to the aforesaid Memorandum and also participated in a personal hearing which was granted. However, and since no further action was taken by the respondents thereafter, it was ultimately constrained to institute the instant writ petition.

5. Mr. Kunal, learned counsel for the petitioner has contended that although the gold dore bars had been imported free of BCD in terms of the relevant scheme which applied, the petitioner had at the time of import paid additional duty as mandated in terms of Section 3 of the Tariff Act. The submission was that the payment of such duty which

[5] Customs Act
[6] Drawback Notification

is akin to a customs duty would clearly be sufficient to hold the petitioner eligible to drawback benefits.

6. Mr. Kunal submitted that the respondents have clearly erred in construing the right of the petitioner to claim drawback being dependent upon payment of BCD. Learned counsel drew our attention to the definition of "*drawback*" as appearing in the Drawback Rules, 1995 to submit that Rule 2(a) clearly and in unambiguous terms refers to "*duty*" or "*tax*". It was submitted that the additional duty that is paid in terms of the Tariff Act would clearly fall within the ambit of Rule 2(a) and consequently the stand as taken by the respondents is clearly rendered untenable.

7. It was further submitted that the Drawback Notification had provided for an **All-Industry Rate**[7] insofar as drawback is concerned and made no distinction between cases where Central Value Added Tax had either been claimed or otherwise. According to learned counsel, since the AI Rate applied, the petitioner stood absolved of establishing the payment of any additional duties. It was then contended that the objection as taken by the respondents, namely, of a violation of Condition No. 23 of the Drawback Notification is also clearly misconceived since the drawback rates as prescribed for tariff items 711301, 711302 and 711401 would become inapplicable only in a situation where the goods manufactured or exported in discharge of an export obligation was in terms of a scheme which provided for "*duty free import*". It was his submission that since the additional

[7] AI Rate

duty as contemplated under Section 3 of the Tariff Act had been duly paid, there was no justification for the respondents taking the position that the imports affected by the petitioner were "*duty free*".

8. Learned counsel further submitted that the nature of an additional duty which is paid in terms of Section 3 of the Tariff Act was lucidly explained by the Supreme Court in **Hyderabad Industries Ltd. v. Union of India**[8] where the following observations came to be made: -

> **"12.** Section 12 of the Customs Act levies duty on goods imported into India at such rates as may be specified in the Customs Tariff Act, 1975. When we turn to the Customs Tariff Act, 1975, it is Section 2 which states that the rates at which duties of customs are to be levied under the Customs Act, 1962 are those which are specified in the First and Second Schedules of the Customs Tariff Act, 1975. In Section 12 of the Customs Act there is no reference to any specific provision of the Customs Tariff Act, 1975. In other words, for the purpose of determining the levy of customs duty on goods imported into India what is relevant is Section 12 of the Customs Act read with Section 2.
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> **13.** On the other hand levy of additional duty under Section 3 is equal to the excise duty for the time being leviable on the like article which is imported into India if produced or manufactured in India. The rate of additional duty under Section 3(1) on an article imported into India is not relatable to the First and the Second Schedules of the Customs Act but the additional duty if leviable has to be equal to the excise duty which is leviable under the Excise Act. This itself shows that the charging section for the levy of additional duty is not Section 12 of the Customs Act but is Section 3 of the Customs Tariff Act, 1975. This apart sub-sections (3), (5) and (6) of Section 3 refer to additional duty as being leviable under sub-section (1). In sub-section (5), for instance, it is clearly stated that the duty chargeable under Section 3 shall be in addition to any other duty imposed under this Act or under any other law for the time being in force.

[8] (1999) 5 SCC 15

**14**. There are different types of customs duties levied under different Acts or rules. Some of them are:

> (a) a duty of customs chargeable under Section 12 of the Customs Act, 1962;
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> (b) the duty in question, namely, under Section 3(1) of the Customs Tariff Act;
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> (c) additional duty levied on raw materials, components and ingredients under Section 3(3) of the Customs Tariff Act; and
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> (d) duty chargeable under Section 9-A of the Customs Tariff Act, 1975.

The Customs Act, 1962 and the Customs Tariff Act, 1975 are two separate independent statutes. Merely because the incidence of tax under Section 3 of the Customs Tariff Act, 1975 arises on the import of the articles into India it does not necessarily mean that the Customs Tariff Act cannot provide for the charging of a duty which is independent of the customs duty leviable under the Customs Act.

**15.** The Customs Tariff Act, 1975 was preceded by the Indian Tariff Act, 1934. Section 2-A of the Tariff Act, 1934 provided for levy of countervailing duty. This section stipulated that any article which was imported into India shall be liable to customs duty equal to the excise duty for the time being leviable on a like article if produced or manufactured in India. In the notes to the clauses to the Customs Tariff Bill, 1975 with regard to clause 3 it was stated that

> "clause 3 provides for the levy of additional duty on an imported article to counterbalance the excise duty leviable on the like article made indigenously, or on the indigenous raw materials, components or ingredients which go into the making of the like indigenous article. This provision corresponds to Section 2-A of the existing Act, and is necessary to safeguard the interests of the manufacturers in India".

Apart from the plain language of the Customs Tariff Act, 1975 even the notes to the clauses show the legislative intent of providing for a charging section in the Tariff Act, 1975 for enabling the levy of additional duty to be equal to the amount of excise duty leviable on a like article if produced or manufactured in India was with a view to safeguard the interests of the manufacturers in India. Even though the impost under Section 3 is not called a countervailing duty there can be little doubt that this

> levy under Section 3 is with a view to levy additional duty on an imported article so as to counterbalance the excise duty leviable on the like article indigenously made. In other words Section 3 of the Customs Tariff Act has been enacted to provide for a level playing field to the present or future manufacturers of the like articles in India."

9. According to Mr. Kunal, *Hyderabad Industries* is a binding authority for the proposition of additional duty paid in terms of Section 3 of the Tariff Act falling within the broad category of customs duty. Learned counsel also drew our attention to the decision rendered by a Division Bench of the Court in **Combitic Global Caplet Pvt. Ltd. v. Union of India and Others**[9] in support of his submission that once an AI Rate for drawback comes to be specified, the assessee stands absolved of establishing an actual sufferance of duty in order to sustain its claim for drawback benefits. Learned counsel referred to the following passages from that decision: -

> **"73.** 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:
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> > *"(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*

[9] 2022 SCC OnLine Del 2719

*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.]

**74.** 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."

**75.** 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."*

**76.** 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.

**77.** 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."

10. Controverting the aforesaid submissions, Mr. Ramachandran contended that the Drawback Rules, 1995 would clearly indicate and establish that it is only when a duty as prescribed by the Customs Act has been paid that drawback benefits can be claimed. The submission in essence was that unless BCD is paid at the time of import, it would be impermissible for the petitioner to claim drawback benefits. Mr. Ramachandran laid stress upon the fact that undisputedly, the petitioner as per its own case, had imported gold dore bars without paying any duty. In view of the above, it was contended that the claim as raised in the writ petition was clearly without merit.

11. In order to underline the perceived necessity of a BCD being paid at the time of import, learned counsel also referred to the Drawback Notification and more particularly to Condition Nos. 6 and 23 which according to Mr. Ramachandran, would reinforce the stand of the Department that unless a customs, central excise duty or service tax liability is borne, no drawback can be granted.

12. Having noticed the rival contentions as addressed, we proceed to evaluate the claim as laid by the writ petitioner hereinafter. The Customs Act specifies the duties payable on the import of goods in Section 12 which constitutes the charging section of that enactment and reads as follows:-

> **"12. Dutiable goods**.—(1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, on goods imported into, or exported from India.

(2) The provisions of sub-section (1) shall apply in respect of all goods belonging to Government as they apply in respect of goods not belonging to Government."

13. Section 3 of the Tariff Act makes the following provisions: -

**"3. Levy of additional duty equal to excise duty, sales tax, local taxes and other charges**.— (1) Any article which is imported into India shall, in addition, be liable to a duty (hereafter in this section referred to as the additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India and if such excise duty on a like article is leviable at any percentage of its value, the additional duty to which the imported article shall be so liable shall be calculated at that percentage of the value of the imported article:

Provided that in case of any alcoholic liquor for human consumption imported into India, the Central Government may, by notification in the Official Gazette, specify the rate of additional duty having regard to the excise duty for the time being leviable on a like alcoholic liquor produced or manufactured in different States or, if a like alcoholic liquor is not produced or manufactured in any State, then, having regard to the excise duty which would be leviable for the time being in different States on the class or description of alcoholic liquor to which such imported alcoholic liquor belongs.

*Explanation*.—In this sub-section, the expression "the excise duty for the time being leviable on a like article if produced or manufactured in India" means the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India or, if a like article is not so produced or manufactured, which would be leviable on the class or description of articles to which the imported article belongs, and where such duty is leviable at different rates, the highest duty."

14. As would be manifest from the above, the provision obliges an importer to pay an additional duty equivalent to the excise duty for the time being leviable on a like article if produced or manufactured in India. It becomes pertinent to note that while the additional duty

which comes to be levied in terms of Section 3 of the Tariff Act is to be computed bearing in mind the excise duty which would be leviable on a like article, it remains a duty which gets attracted at the time of import. The mere fact that the said additional duty is equated to a duty of excise which is leviable does not essentially change the character of that duty as being one other than that which is imposed on import of articles into India. This position would also clearly flow from the pertinent observations rendered by the Supreme Court in *Hyderabad Industries* where their Lordships significantly observed that while Section 3 of the Tariff Act may constitute a charging section distinct and separate from Section 12 of the Customs Act, it continues to remain in the genre of a customs duty. It was further pertinently observed that while the two statutes are independent, merely because the tax under Section 3 of the Tariff Act is imposed on the import of articles into India, it would not mean that the Tariff Act could not provide for a levy of duty independent of customs duty.

15. We thus find ourselves unable to sustain the contention of Mr. Ramachandran who had argued that the levy of an additional duty would not qualify as a duty. More importantly, we note that Rule 2(a) of the Drawback Rules, 1995 while defining "*drawback*" provides that the same would be relatable to goods manufactured in India and exported and the concept of "*drawback*" being the rebate of "*duty*" or "*tax*" chargeable on any imported material or excisable materials in the manufacture of such goods. It is not possible to view the levy under Section 3 of the Tariff Act as not falling within the ambit of "*duty*" or "*tax*".

16. In terms of Rule 3 of the Drawback Rules, 1995, an exporter is entitled to claim a drawback on the export of goods at such amount or rates as may be determined by the Union Government. The Drawback Rules, 1995 thus employ the words "*duty*" and "*tax*" without confining the same either to the Customs Act or the Central Excise Act, 1944. This would inevitably lead us to conclude that as long as goods have suffered a "*tax*" or "*duty*" at the time of import, the claim for drawback at the stage of export would be available.

17. We further find that Condition No. 6 of the Drawback Notification would also not detract from the claim of the petitioner for drawback benefits. Condition No. 6 is extracted hereinbelow: -

> "(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."

18. As we read Condition No. 6, we find that since in the present case, an AI Rate had been prescribed, there was no corresponding obligation placed upon the petitioner to independently prove the payment of customs or central excise duty or for that matter service tax. In any case, the scope of Condition No. 6 has been duly explained in *Combitic Global* and since undisputedly, it was the AI Rate which applied, the submissions urged by the respondents on this score are clearly rendered untenable. We may in this connection also

note that Condition No. 6 speaks of "*customs component*" which expression also would have to be understood in the light of what the Supreme Court had held in *Hyderabad Industries*.

19. We also find ourselves unable to sustain the submission of the respondents addressed in the backdrop of Condition No. 23 of the Drawback Notification for reasons which follow. Condition No. 23 reads thus: -

> "(23) The drawback rates specified in the said Schedule against tariff items 711301, 711302 and 711401 shall not be applicable to goods manufactured or exported in discharge of export obligation against any Scheme of the relevant Export and Import Policy or the Foreign Trade Policy of the Government of India which provides for duty free import or replenishment or procurement from local sources of gold or silver."

20. We find that the said condition would not deprive the petitioner of the right to seek drawback benefits since the same stands restricted to goods exported in discharge of an export obligation in terms of the Export and Import Policy or the Foreign Trade Policy which provides for "*duty free import"*. Once the petitioner had paid the duties as contemplated under Section 3 of the Tariff Act, it could not be possibly contended that the goods were imported *"duty free"*. Accordingly, and for the aforesaid reasons, we find ourselves unable to sustain the objections as raised.

21. That only leaves us to consider the issue of interest as raised. Undisputedly, the free shipping bills were duly amended on 27 February 2015 whereafter the petitioner applied for release of drawback benefits on 06 May 2015. In terms of Section 75A of the Customs Act, interest becomes payable upon the expiry of a period of

one month from the date of making of an application seeking drawback till such time as the payment is ultimately affected. In the facts of the present case, therefore, the respondents are also liable to pay interest which would commence upon the expiry of the period of one month from 06 May 2015 and would run till such time as the amount is ultimately paid.

22. The writ petition shall consequently stand allowed. The respondents are hereby commanded to attend to the claim of the petitioner for disbursement of drawback benefits as claimed and release the same with due expedition. The respondents are also held liable to pay interest thereon to be computed in accordance with Section 75A of the Customs Act and bearing in mind the observations made hereinabove.

**YASHWANT VARMA, J.**

**DHARMESH SHARMA, J.**

**SEPTEMBER 15, 2023**
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