

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7772 OF 2006

Expotec International Ltd.,)
a Public Limited company having Regd.)
Office at No.3, 2nd Floor, DD-36, Nehru)
Enclave, Kalkaji, New Delhi – 110 019)Petitioner

V/s.

1. The Union of India)
Aayakar Bhavan, M.K. Road, Churchgate,)
Mumbai – 400 020)
2. The Joint Secretary)
Revision Applications Unit, Government of)
India, Ministry of Finance, Department of)
Revenue, Hudco Vishala Building, Bhikaji)
Cama Place, New Delhi – 110 066)
3. The Commissioner of Customs)
(Exports and Drawback), New Customs)
House, Ballard Estate, Mumbai – 400 038)
4. The Assistant Commissioner of Customs)
Drawback Recovery Cell, New Customs)
House, Ballard Estate, Mumbai – 400 038)Respondents

Mr. Sriram Sridharan for petitioner.

Mr. Swapnil Bangur a/w. Mr. Siddharth Chandrashekhar for respondents.

CORAM : K.R.SHRIRAM, &
MILIND N. JADHAV, JJ
DATED : 7th JULY 2022

ORAL JUDGMENT : (PER K.R. SHRIRAM, J.)

1 The petition was admitted on 7th June 2007 and certain reliefs were granted. As against demand of Rs.41,60,403/- made by the department, petitioner has paid a sum of Rs.17,33,415/-. There is a balance amount of Rs.24,26,988/- which according to respondents, as stated in the

affidavit in reply, payable with interest is still outstanding. There is no rejoinder filed denying this.

2 Petitioner is a public limited company engaged in the import and export of goods and services and is a recognized export house. Status of petitioner, we are informed, as on date is unchanged. Petitioner was awarded a contract by Gas Authority of India Limited (GAIL) for the purpose of laying a pipeline for their project titled “Dahej-Vijapur Gas Pipeline”. For undertaking the above project, petitioner imported various capital goods required for laying of the pipeline and these capital goods were imported through Mumbai/Nhava Sheva Ports during the period July 2003, November 2003 and January 2004. These capital goods were imported by petitioner on lease from one M/s. Matts European Pipeline Rental, BV, Holland and JSC Krasnodargazstroy, Russia. At the time of importation, petitioner had paid customs duty of Rs.57,17,488.20 after availing benefit of Notification No.27/02-Cus dated 1st March 2002 (hereinafter referred to as Notification 27/02).

3 Upon completion of the project/contract awarded by GAIL, petitioner re-exported the capital goods under various shipping bills during the period February and April 2004. The fact that petitioner had imported availing benefit of Notification 27/02 or has re-exported these capital goods is not disputed. Upon re-exporting these goods, petitioner claimed drawback under Section 74(2) of the Customs Act 1962 (the said Act) read with

Notification No.19/1965 dated 6th February 1965 as amended by Notification No.154/1969-Cus dated 8th November 1969 and Notification No.45/1970-Cus dated 2nd May 1970 (hereinafter referred to as Notification 19/1965). The drawback claimed was the customs duty that petitioner had paid on importation. All requisite documents mentioned in the Re-Export of Imported Goods (Drawback of Customs Duties) Rules 1985 (hereinafter referred to as Drawback Rules) was submitted to claim the drawback. Petitioner, by a letter dated 28th December 2004, also gave detailed written submission justifying the claim for drawback under Section 74 of the said Act. After considering the submission of petitioner, respondent no.3 passed a speaking order dated 11th January 2005 granting a drawback of Rs.9,04,190/- of customs duty paid on the capital goods re-exported under cover of the shipping bills dated 23rd March 2004 and 5th April 2004. In respect of duty paid at the time of importation on goods covered under other shipping bills, no speaking order was passed before granting the drawback. In total, petitioner was given a drawback of Rs.41,60,403/- with or without a speaking order. The worksheet that was provided to petitioner while calculating the drawback shows that the drawback was sanctioned considering the period of usage as more than six months but less than one year and, therefore, drawback at the rate of 70% of the duty paid at the time of importation was sanctioned.

4 About seven months later, petitioner received from respondent no.3 four separate demand notices, all dated 11th July 2005, proposing to recover the drawback granted to petitioner on the following ground :

“Your Attention is invited to the fact that Notification No.27/02-Cus has been issued for the purposes of allowing temporary imports of leased machinery, equipments and tools for execution of a contract and re-export within 6 months (extendable upto one year) on payment of retainable customs duty, i.e., the customs duty minus the amount of drawback. This means the customs duty paid by you at the time of import has already provided you the benefit of drawback and as such the drawback payment made to you become erroneous.”

5 Petitioner replied and advised respondent no.3 that this was not the way they could claim return of drawback and if they were prejudiced or not happy with the drawback being allowed, the only recourse available to the department is to file an appeal before the Commissioner (Appeals) against the order granting drawback. Petitioner also submitted that the demand notices are not maintainable in law. Respondent thereafter, filed an appeal before the Commissioner of Customs (Appeals) under Section 129D(4) of the said Act. Department's appeal was allowed by an order dated 20th October 2005. According to Commissioner of Customs (Appeals), granting of drawback under Section 74 of the said Act at the time of re-export was contrary to the exemption notification and, therefore, the department was justified in calling upon petitioner to return the drawback amount claimed by and paid to petitioner.

6 Impugning this order dated 20th October 2005, petitioner filed a revision application under Section 129DD of the said Act. The revision application came to be rejected by an order dated 5th September 2006.

7 There were lot of things that happened in between, that petitioner's goods were detained and petitioner approached this Court by way of a separate writ etc., which we need not go into at this stage. The short question that is required to be decided by this Court is whether petitioner was entitled to any drawback on the customs duty that they had paid, under Section 74 of the said Act read with Notification 27/02 read with Notification 19/1965 read with Notification No.27/2008-Cus dated 1st March 2008 (hereinafter referred to as Notification 27/2008) amending Notification 27/02.

8 Mr. Sridharan submitted as under :

(a) the object of the Government of India is to reimburse all the duties, levies and taxes paid on the export goods as also on the inputs. This is achieved by many export incentive schemes. One of the schemes is duty drawback;

(b) Section 74 of the said Act provides for grant of drawback of customs duties paid on the imported goods, when exported, either as such or after use;

(c) while Section 74(1) deals with re-export of imported goods without use, Section 74(2) deals with re-export of goods after the imported

goods are put to use. The drawback under Section 74(2) is granted as per the rates specified in the Notification 19/1965 issued by the Central Government under Section 74(2) of the said Act;

(d) the Drawback Rules provides the manner of claiming the drawback on the goods re-exported after their importation;

(e) the reason given in the appeals is that Notification 27/02 prescribes retainable customs duty, i.e., the customs duty minus the amount of drawback. Hence, the customs duty paid at the time of importation has taken into account the benefit of drawback available at the time of re-export;

there is no dispute that other requirements of Section 74(2), 76 and the 1995 Rules have been satisfied by respondents;

hence, the reasoning given in the appeal is untenable and not sustainable in law;

(f) the department has also stated that the intention is also not to grant drawback in such a situation. Intention of the legislature does not play any role in interpretation of the taxing statutes when the language of the statute is plain and clear;

(g) the effective rate of duty prescribed by Notification 27/02 does not bar the importer from claiming the drawback upon re-exportation. The said notification prescribes the re-export of goods as the condition for prescribing the effective rate of duty;

(h) section 74 or the Drawback Rules also does not bar the exporter from claiming the drawback on the ground that upon importation, lower customs duty under Notification 27/02 has been paid;

(i) in other words, there is no bar contained in Notification 27/02 from claiming the drawback on re-export of goods. Similarly, no restriction has been imposed under the Drawback Rules or in Section 74 of the said Act that no drawback is available to petitioner as the goods were imported availing the benefit of Notification 27/02. Further, there is also no bar contained in Section 74 or in the Drawback Rules barring petitioner from claiming the benefit of Notification 27/02 on the goods imported, which were re-exported under claim for drawback. Hence, in the absence of any bar or restriction contained in the Notification 27/02 or in the Drawback Rules, the action of the department is totally not sustainable;

(j) the above submission is also supported by the conditions imposed by the Government in Notification Nos.241/82-Cus, 72/94-Cus, 11/97-Cus (Sl. No.124) and 21/02-Cus (Sl. Nos.261 and 280). These notifications grant concessional rate of customs duty on goods exported and re-imported on the condition that at the time of export no drawback should be availed. No such conditions has been prescribed in Notification 27/02 with which we are concerned.

(k) the reason advanced by the department is also ex-facie untenable if the reasoning is tested in another way. Assume that for any

reason the importer is unable to re-export the machinery within a period of one year. In such a case the concession of 15%/30% of the aggregate of the duties of customs will be denied and the normal duty applicable on the import of the machinery would be demanded. If, thereafter, the machinery is re-exported within the period specified under Section 74, then on such re-export the importer would be entitled to get the duty drawback at the rates specified in the notification issued under Section 74(2) of the said Act. The position can be no different, where the effective rate of duty paid is 15% of the aggregate duties of customs.

9 Mr. Sridharan also submitted that the contention of petitioner before the Joint Secretary and earlier before the Commissioner (Appeals) was that this issue is not an issue arising in these proceedings and a separate proceeding has been issued. The issue whether petitioner had exported the capital goods within six months was not an issue raised by the department or considered or dealt with by the impugned orders of the Assistant Commissioner of Customs which were under challenge before the Commissioner (Appeals). The orders of the Assistant Commissioner dealt with the sanction of drawback of duties paid by petitioner at the time of importation. Hence, the ground taken by the department in the appeal before the Commissioner (Appeals) that petitioner had not fulfilled the condition of Notification 27/02 is bad in law as the same does not arise out of the order passed by the Assistant Commissioner. This position has not

been properly appreciated by the Joint Secretary who has passed his impugned order upholding the order passed by the Commissioner (Appeals).

In any case, the department has issued another demand notice dated 16th September 2005 under Section 28 proposing to demand differential duty from petitioner for allegedly not re-exporting the capital goods within six months. Hence, this ground relating to non-export of capital goods within six months raised by the department in all the appeals filed before the Commissioner (Appeals) became infructuous. Therefore, the Joint Secretary was wrong in upholding the order passed by Commissioner (Appeals) in this regard.

10 The second issue, which Mr. Sridharan raised, this point is not an issue in as much as in our opinion what the department is claiming today is only return of the drawback amount paid to petitioner. Whatever amount has been paid to petitioner as drawback has to be paid back to the department in case the department succeeds. We do not wish to go into these hyper technical submissions of Mr. Sridharan.

11 Mr. Bangur submitted that Section 74 deals with drawback allowable on re-export of duty paid goods, i.e., duty that has been paid on importation. If 100% duty had been paid at the time of importation of the capital goods and within six months of its importation or between six months and one year, the goods have been re-exported, then the importer

would be entitled to a drawback of either 85% or 70% of the customs duty paid. Mr. Bangur submitted that such a situation will arise only where the party has paid the entire 100% duty. Mr. Bangur further submitted that the exemption granted under Notification 27/02 is only in cases where the party, at the time of importation had imported with an intention of re-export within six months or between six months and one year and in such a case, the Government decided not to saddle the importer by making the importer pay the 100% but only the percentage which he would not get as drawback. If the importer has availed of this Notification 27/02 and only paid the duty that would be payable if the goods were re-exported, then such a party is not entitled to any drawback. Mr. Bangur also submitted that the Notification 27/2008, in which there is a footnote that the goods imported under this concession shall not be eligible for drawback was only a clarificatory note and does not amend the provisions of law. Mr. Bangur further submitted that a provision of law cannot be modified by notifications.

12 It will be useful to reproduce Section 74 of the said Act :

74. Drawback allowable on re-export of duty-paid goods.—

(1) When any goods capable of being easily identified which have been imported into India and upon which 1[any duty has been paid on importation,—

(i) are entered for export and the proper officer makes an order permitting clearance and loading of the goods for exportation under section 51; or

(ii) are to be exported as baggage and the owner of such baggage, for the purpose of clearing it, makes a declaration

of its contents to the proper officer under section 77 (which declaration shall be deemed to be an entry for export for the purposes of this section) and such officer makes an order permitting clearance of the goods for exportation; or

(iii) are entered for export by post under section 82 and the proper officer makes an order permitting clearance of the goods for exportation, ninety-eight per cent. of such duty shall, except as otherwise hereinafter provided, be re-paid as drawback, if—]

(a) the goods are identified to the satisfaction of the [Assistant Commissioner of Customs or Deputy Commissioner of Customs] as the goods which were imported; and

(b) the goods are entered for export within two years from the date of payment of duty on the importation thereof:

Provided that in any particular case the aforesaid period of two years may, on sufficient cause being shown, be extended by the Board by such further period as it may deem fit.

(2) Notwithstanding anything contained in sub-section (1), the rate of drawback in the case of goods which have been used after the importation thereof shall be such as the Central Government, having regard to the duration of use, depreciation in value and other relevant circumstances, may, by notification in the Official Gazette, fix.

(3) The Central Government may make rules for the purpose of carrying out the provisions of this section and, in particular, such rules may—

(a) provide for the manner in which the identity of goods imported in different consignments which are ordinarily stored together in bulk, may be established;

(b) specify the goods which shall be deemed to be not capable of being easily identified; and

(c) provide for the manner and the time within which a claim for payment of drawback is to be filed.]

(4) For the purposes of this section—

(a) goods shall be deemed to have been entered for export on the date with reference to which the rate of duty is calculated under section 16;

(b) in the case of goods assessed to duty provisionally under section 18, the date of payment of the provisional duty shall be deemed to be the date of payment of duty.

13 Notification 27/02 reads as under :

Notification : 27/2002-Cus. dated 01-Mar-2002

Leased machinery, temporary import of — Scheme of exemption

In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts goods of the description specified in column (1) of the Table annexed hereto, from the payment of so much of the customs duty leviable thereon as is specified in column (3) of the said Table, subject to the limitations and conditions specified in column (2) thereof, namely: -

TABLE

<i>Description of goods</i>	<i>Limitations and conditions</i>	<i>Extent of exemption</i>
<i>(1)</i>	<i>(2)</i>	<i>(3)</i>
<i>Machinery, equipment or tools, falling under Chapters 84, 85, 90 or any other Chapter of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975).</i>	<p><i>(1) the goods have been taken on lease by the importer for use after importation;</i></p> <p><i>(2) the importer makes a declaration at the time of import that the goods are being imported temporarily for execution of a contract;</i></p> <p><i>(3) the said goods are reexported within six months of the date of importation or within such extended period not exceeding one year from the date of importation, as the Assistant Commissioner of Customs or Deputy Commissioner of Customs, as the case may be, may allow;</i></p> <p><i>(4) where the Assistant Commissioner of Customs or Deputy Commissioner of Customs, as the case may be, grants extension of the aforesaid period for re-</i></p>	<p><i>(i) in the case of goods which are re-exported within six months of the date of importation, so much of the duty of customs as is in excess of the amount calculated at the rate of fifteen per cent. of the aggregate of the duties of customs, which would be leviable under the said Customs Act, 1962 or under any other law for the time being in force, read with any notification for the time being in force in respect of the duty so chargeable;</i></p> <p><i>(ii) in the case of goods which are re-exported after six months, but within one year, of the date of importation, so much of the duty of customs as is in excess of the amount calculated at the rate of thirty per cent. of</i></p>

export, the importer shall pay the difference between the duty payable under clause (ii) in column (3) and the duty already paid at the time of importation; and (5) the importer executes a bond, with a bank guarantee, undertaking –

(a) to re-export the said goods within six months of the date of importation or within the aforesaid extended period;

(b) to produce the goods before the Assistant Commissioner of Customs or Deputy Commissioner of Customs for identification before reexport;

(c) to pay the balance of duty, along with interest, at the rate fixed by notification issued under section 28AB of the said Customs Act, 1962, for the period starting from the date of importation of the said goods and ending with the date on which the duty is paid in full, if the re-export does not take place within the stipulated period.

the aggregate of the duties of customs, which would be leviable under the said Customs Act, 1962 or under any other law for the time being in force, read with any notification for the time being in force in respect of the duty so chargeable.

[Notification No. 27/2002-Cus., dated 1-3-2002]

14 Notification 19/1965 issued pursuant to and in exercise of the powers conferred by sub-section 2 of Section 74 of the said Act reads as under :

NOTIFICATIONS UNDER SECTION 74
GOODS NOT EASILY IDENTIFIABLE

Gum Arabic, Gum Benjamin etc. not easily identifiable. — *In exercise of the powers conferred by section 49, clause (a), of the Sea Customs Act, 1878 (8 of 1878), the Governor General-in-Council is pleased to declare that Gum Arabic, Gum Benjamin, Gum Olibannum or Frankincense shall not, for the purpose of Chapter VI of the said Act, be deemed capable of being easily identified.*

[G. of I. Notification No. 1117, dated 10th June, 1881.]

Drawback rates in respect of goods taken into use after importation. —

In exercise of the powers conferred by sub-section (2) of section 74 of the Customs Act, 1962 (52 of 1962), and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 48- Customs, dated the 1st February, 1963, the Central Government hereby fixes the rates mentioned in column (2) of the Table below as the rates at which drawback of import duty shall be allowed in respect of goods used after their importation, which have been out of Customs control for the period specified in the corresponding entry in column (1) of the said Table :

TABLE

<i>Length of period between the date of clearance for home consumption and the date when the goods are placed under customs control for export.</i>	<i>Percentage of import duty to be paid as drawback</i>
<i>(1)</i>	<i>(2)</i>
<i>Not more than 6 months</i>	<i>85%</i>
<i>More than 6 months but not more than 12 months</i>	<i>70%</i>
<i>More than 12 months but not more than 18 months</i>	<i>60%</i>
<i>More than 18 months but not more than 24 months</i>	<i>50%</i>
<i>More than 24 months but not more than 30 months</i>	<i>40%</i>
<i>More than 30 months but not more than 36 months</i>	<i>30%</i>
<i>More than 36 months</i>	<i>Nil:</i>

Provided that where the period referred to in column (1) is more than 24 months, drawback shall be allowed, only, if the ¹ [Commissioner of Customs] concerned on sufficient cause being shown, has in that particular case extended the period beyond 24 months :

Provided further that when any of the goods specified below have been used after their importation into India, drawback of import duty paid thereon shall not be allowed when they are exported out of India.

(i) Wearing apparel.

(ii) Tea-chests.

(iii) Exposed cinematograph films passed by the Board of Film Censors in India.

(iv) Unexposed photographic films, paper and plates, and X-ray films.

(2) Notwithstanding anything contained in paragraph 1, in respect of a motor car or goods (other than the goods specified in the second proviso to that paragraph), imported by a person for his personal and private use, drawback of duty shall be calculated by reducing the import duty paid in respect of such motor car or goods by 4%, 3%, 2¹/₁₀% and 2% for use for each quarter or part thereof during the period of first year, second year, third year and fourth year respectively :

Provided that where the period aforesaid is more than 2 years, drawback shall be allowed, only if the Board, on sufficient cause being shown, has in that particular case extended the period beyond 2 years :

Provided further that no drawback shall be allowed if such motor car or goods has or have been used for more than 4 years.

[M.F. (D.R.) Notification No. 19-Cus., dated 6th February, 1965 as amended by Notifications No. 154-Cus., dated 8th November, 1969 and No. 45-Cus., dated 2nd May, 1970.]

15 Notification 27/2008 reads as under :

Notification : 27/2008-Cus. dated 01-Mar-2008

Machinery, equipment and tools — Exemption to temporary import of leased goods —

1. Designation changed vide s. 50 of the Finance Act, 1995 (22 of 1995).

Amendment to Notification No. 27/2002-Cus.

In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby makes the following amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 27/2002-Customs, dated the 1st March, 2002 which was published in the Gazette of India, Extraordinary, vide number G.S.R. 124(E) of the same date, namely :-

In the said notification, for the TABLE, the following TABLE shall be substituted, namely :-

TABLE

<i>Description of Goods</i>	<i>Limitations and conditions</i>	<i>Extent of exemption</i>
<i>(1)</i>	<i>(2)</i>	<i>(3)</i>
<i>Machinery, equipment or tools, falling under Chapters 84, 85, 90 or any other Chapter of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975).</i>	<p><i>1) the goods have been taken on lease by the importer for use after import;</i></p> <p><i>(2) the importer makes a declaration at the time of import that the goods are being imported temporarily for execution of a contract;</i></p> <p><i>(3) the said goods are re-exported within three months of the date of such import or within such extended period not exceeding 18 months from the date of said import, as the Assistant Commissioner of Customs of the Deputy Commissioner of Customs, as the case may be, may allow;</i></p> <p><i>(4) where the Assistant Commissioner of Customs or the Deputy Commissioner of Customs, as the case may be, grants extension of the aforesaid period for re-export, the importer</i></p>	<p><i>In the case of -</i></p> <p><i>(i) goods which are re-exported within three months of the date of import, so much of the duty of customs as is in excess of the amount calculated at the rate of five per cent.;</i></p> <p><i>(ii) goods which are re-exported after three months, but within six months, of the date of import, so much of the duty of customs as is in excess of the amount calculated at the rate of fifteen per cent.;</i></p> <p><i>(iii) goods which are re-exported after six months, but within nine months, of the date of import, so much of the duty of customs as is in excess of the amount calculated at the rate of twenty-five per cent.;</i></p> <p><i>(iv) goods which are re-exported after nine months, but within</i></p>

	<p><i>shall pay the difference between the duty payable under the relevant clause in column (3) and the duty already paid at the time of their import; and</i></p> <p><i>(5) the importer executes a bond, with a bank guarantee, undertaking –</i></p> <p><i>(a) to re-export the said goods within three months of the date of import or within the aforesaid extended period;</i></p> <p><i>(b) to produce the goods before the Assistant Commissioner of Customs or the Deputy Commissioner of Customs for identification before re-export;</i></p> <p><i>(c) to pay the balance of duty, along with interest, at the rate fixed by notification issued under section 28AB of the Customs Act, 1962, for the period starting from the date of import of the said goods and ending with the date on which the d in full, if the re-export does not take place within the stipulated period</i></p>	<p><i>twelve months, of the date of import, so much of the duty of customs as is in excess of the amount calculated at the rate of thirty per cent.;</i></p> <p><i>(v) goods which are re-exported after twelve months, but within fifteen months, of the date of import, so much of the duty of customs as is in excess of the amount calculated at the rate of thirty-five per cent.;</i></p> <p><i>(vi) goods which are re-exported after fifteen months, but within eighteen months, of the date of import, so much of the duty of customs as is in excess of the amount calculated at the rate of forty per cent., of the aggregate of the duties of customs, which would be leviable under the Customs Act, 1962 or under any other law, read with any notification for the time being in force in respect of the duty so chargeable</i></p>
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Note : The goods imported under this concession shall not be eligible for drawback under subsection (2) of section 74 of the Customs Act, 1962.”

[Notification No. 27/2008-Cus., dated 1-3-2008]

16 The Drawback Rules which came into force with effect from 26th May 1995 defines drawback. These rules have been issued in exercise of powers conferred under Section 74 of the said Act. In these rules, drawback

is defined as under :

(a) “drawback”, in relation to any goods exported out of India, means the refund of duty paid on importation of such goods in terms of Section 74 of the Customs Act.”

(emphasis supplied)

17 Rule 7 of Drawback Rules also provides for repayment of erroneous or excess payment of drawback and interest and it reads as under :

7. Repayment of erroneous or excess payment of drawback and interest – Where an amount of drawback and interest, if any, has been paid erroneously or the amount so paid is in excess of what the claimant is entitled to, the claimant shall, on demand by an officer of customs repay the amount so paid erroneously or in excess, as the case may be, and where the claimant fails to repay the amount it shall be recovered in the manner laid down in sub-section (1) or section 142 of the Customs Act, 1962 (52 of 1962).

This Rule also takes care of the specious submissions of Mr. Sridharan noted in paragraph (5) and (9) above.

18 Therefore, a drawback in relation to any goods exported out of India means the refund of duty paid on importation of such goods in terms of Section 74 of the said Act. Under Section 74, therefore, the expression “any duty that has been paid on importation” would mean 100% of the duty that was payable. We say 100% because Section 74 does not provide for any concessional rate of duty. Sub-section (15) of Section 2 defines “duty” means a duty of customs leviable under this Act. Sub-section (1) of Section 74 applies to all goods imported and which are re-exported. To claim the

drawback, there are only three conditions that are required to be complied with, viz., (a) the goods which have been imported into India should be capable of being easily identified; (b) any duty has been paid on such importation; and (c) such goods are entered for export and the proper officer permits clearance and loading of the goods for exportation under Section 51 (we are not concerned with clause (ii) and clause (iii) of sub-section (1) of Section 74 in the case at hand) and in such cases, 98% of “such duty” shall be repaid as drawback except as otherwise in the section provided. “Such duty” indicates the duty leviable under the Act. If the goods are identified to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs as the goods that were imported and the goods are entered for export within two years from the date of payment of duty on the importation thereof, drawback on such duty can be obtained.

19 Sub-section 2 of Section 74 determines the rate of drawback in the case of goods which have been used after the importation but those goods also have to comply with the conditions mentioned in sub-section (1) of Section 74. What is the percentage of import duty to be paid as drawback can be found in Notification 19/1965. The table provides the percentage and the length of period between the date of clearance for home consumption and the date when the goods are placed under customs control for export. If it is not more than six months from the date of clearance for home consumption, then 85% and if it is more than six months but not

more than 12 months, it is 70%. We are not going into the other rates as they are not applicable to the case at hand. The key words in the table are “from the date of clearance for home consumption”. We say these are the key words because Section 74(2) provides for a situation where, a person imports goods for his home consumption and later decides to re-export within six months or within the period prescribed in the table, then he would get refund of the customs duty paid at rate prescribed in sub-section (1) of Section 74. If the goods are used before they are re-exported, then under sub-section (2) of Section 74 the percentage can be found in Notification 19/1965.

20 Notification 27/02 was a concession that was granted to people like petitioner who had no intention of importing the goods for home consumption but who would bring it on lease with an intention to re-export the goods within a period of six months or within a period of six months to one year. Notification 27/02 says “*the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts goods of the description specified in column (1) of the Table annexed hereto, from the payment of so much of the customs duty leviable thereon as is specified in column (3) of the said table, subject to the limitations and conditions specified in column (2) thereof*”. Column (1) provides for goods like machinery, equipment, tools etc. Column (2) provides limitations and conditions such as where the goods have been taken on lease by the

importer for use after importation, the importer has to file a declaration at the time of import that the goods are being imported temporarily for execution of a contract (as against home consumption where drawback is given under Notification 19/1965) and the goods are re-exported within six months of the date of importation or within such extended period not exceeding one year from the date of importation. The extent of exemption is so much of the duty of customs as in excess of 15% (incase re-exported within six months) and if beyond six months but under one year then so much of the duty of customs as in excess of 30%. In these cases, there is no importation for home consumption envisaged under Section 74. This is a separate class of importers and the Notification 27/02 has been issued under Section 25(1) of the said Act and not under Section 74. Section 25 provides for power to grant exemption from duty and sub-section (1) of Section 25 reads as under :

25. Power to grant exemption from duty. —

(1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification goods of any specified description from the whole or any part of duty of customs leviable thereon.

There is a duty exemption as provided in Notification 27/02 for those who import machinery or tools for execution of a contract and re-export the same within the prescribed period. This concession was given because the Central Government was satisfied that it was necessary in the

public interest so to do, where the importer has taken the goods on lease for use after importation and at the time of importation makes a declaration that the goods are being imported temporarily for execution of a contract. Such conclusions are not prescribed under Section 74 or notification issued under Section 74(2).

Therefore, the concession given to such importer was that he need not pay the entire 100% of the customs duty payable under the said Act but would pay only 15% or 30%, as the case may be, They do not have to pay the entire 100% and then claim a drawback of 85% or 70%, as the case may be.

Hence, those who fall under Notification 27/02 are not entitled to any drawback under Section 74.

21 Therefore, we are unable to accept the stand of petitioner that drawback has to be given even where a concession has been availed of under Notification 27/02. The submissions of petitioner that the note given in Notification 27/2008 amends the earlier notification and, therefore, the position that no drawback can be claimed should come into force only from 1st March 2008 and for the period in question also is not acceptable. As noted above, Notification 27/02 is issued under Section 25(1) of the said Act and not under Section 74 of the said Act. Further, the conditions prescribed under Notification 27/02 are not prescribed under Notification 19/1965 issued under sub-section (2) of Section 74. Further, we agree with

Mr. Bangur that the note in Notification 27/2008 is also clarificatory. We have to also note that Notification 27/2008 is not the same as Notification 27/02 as it is an amendment to the said notification and lays down further limitations and conditions and extent of exemption.

22 In our view, petitioner would have been entitled to a drawback of either 85% or 70% depending on when the goods were re-exported, if they had paid 100% customs duty and not filed declarations under Notification 27/02. Since petitioner had not paid 100% duty availing of Notification 27/02 and had already availed of concession as per Notification 27/02, petitioner is not entitled to any drawback. By paying the concessional rate of customs duty at the time of import, petitioner has already availed of the benefit of drawback and as such the drawback payment made was erroneous.

23 In the circumstances, petition stands dismissed with costs in the sum of Rs.1 lakh. This amount to be paid to respondent no.4 alongwith the outstanding amounts of drawback re-payable. These amounts are payable within four weeks of receiving a demand from respondent no.4. Respondent no.4 to raise a demand within four weeks.

(MILIND N. JADHAV, J.)

(K.R. SHRIRAM, J.)