

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**SPECIAL CIVIL APPLICATION NO. 1836 of 2016**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE MS.JUSTICE HARSHA DEVANI**

**and**

**HONOURABLE MR.JUSTICE A.S. SUPEHIA**

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| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ?  | Yes |
| 2 | To be referred to the Reporter or not ?   | Yes |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ?   |     |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ? |     |

M/S NEW PENSLA INDUSTRIES....Petitioner(s)

Versus

UNION OF INDIA & 2....Respondent(s)

Appearance:

MR DIPEN DESAI, ADVOCATE for the Petitioner

MS AVANI S MEHTA, ADVOCATE for the Respondents

**CORAM: HONOURABLE MS.JUSTICE HARSHA DEVANI**  
**and**  
**HONOURABLE MR.JUSTICE A.S. SUPEHIA**

**Date : 10/02/2017**

**ORAL JUDGMENT****(PER : HONOURABLE MS.JUSTICE HARSHA DEVANI)**

1. Being aggrieved by the deficiency memo issued by the third respondent – Deputy Commissioner of Customs (Drawback), Mundra, the petitioner has presented this petition under Article 226 of the Constitution of India.

2. The petitioner, a proprietary concern, manufactures engineering goods, viz., nuts, bolts, hand tools etc. and is also engaged in the activity of export of such manufactured goods. In the usual course of its business, the petitioner exported fully threaded rods, pickaxes, hoes, nut bolts, washers and steel clamps, etc. during the period from September 2012 to 31.12.2014, whereby approximately 150 transactions of exports have been undertaken and the said goods have been exported to various places, such as, Saudi Arabia, UAE, Kuwait, Jordan etc. It is the case of the petitioner that under the provisions of the Customs Act, 1962 (hereinafter referred to as “the Act”), an exporter who seeks clearance for export of goods has to file shipping bill in terms of the provisions of section 50 of the Act before the Customs Officer. The Customs Officer permits clearance and loading of goods for exportation after being satisfied that the goods entered for export are not prohibited goods and the exporter has paid the duty, if any, assessed thereon as per section 51 of the Act. It is the case of the petitioner that the said goods have been cleared and the export transaction has been completed, that is, the goods have also been received by the importer. It is further the case of the petitioner that the goods have been cleared by issuing

Let Export Order under section 51 of the Act after the Proper Officer has assessed the goods under different chapter headings on which the goods have been classified and the classification made by the petitioner has been accepted by the Proper Officer and the goods have been cleared after an appropriate order under section 51 of the Act has been passed. Moreover, even an export promotion copy has been issued by the customs authorities, which according to the petitioner is the final and conclusive proof to show that the assessment under section 17 of the Act has been undertaken and the Let Export Order has been issued under section 51 by the Proper Officer. According to the petitioner, it is only on production of export promotion copy that the exporter would be entitled to the benefits of incentives of export, such as, duty drawback and such other incentives, such as, Focus Product Scheme (FPS), which is under the Foreign Trade Policy of the Union of India.

3. The petitioner submitted claims for drawback for the respective export transactions within the prescribed time, however, the same were not cleared or processed. It appears that various queries were raised in that regard, which according to the petitioner were baseless queries just to delay the drawback claims for extraneous considerations. Since its requests were being ignored, it appears that the petitioner made a complaint dated 29.09.2015 to the Chairman, Central Board of Excise and Customs, whereby the petitioner had complained that it was only because their illegal demands were not met by the petitioner, that the drawback had been withheld. Copies of the said complaints were also marked to the Director General of Vigilance, Customs and Central Excise,

New Delhi and to the Chief Commissioner of Customs, Mundra. It is further the case of the petitioner that it had made a specific complaint to Vigilance Department with regard to one drawback claim bearing shipping bill No.6263162 dated 25.11.2014 and that immediately upon receipt of the complaint, the said drawback was processed and the principal amount of drawback was released. However, in respect of other export transactions bearing shipping bills No.6405445 dated 11.07.2013, No.6404623 dated 11.07.2013, No.3797176 dated 10.07.2014, No.5224360 dated 26.09.2014, No.5584613 dated 11.10.2014, No.6117017 dated 18.11.2014 and No.6263664 dated 25.11.2014, wherein similar queries were raised, i.e. with regard to wrong classification of goods, after the petitioner lodged the complaint, the drawback came to be released by the department on 09.11.2015 and 20.11.2015, but, without interest, by accepting the classification of the goods as made by the petitioner. It is the case of the petitioner that in respect of similar type of goods and similar queries, the department had accepted the classification of the petitioner and had released the drawback, however, with regard to other export transactions, the drawback claims have not been processed and are not released. Subsequently, the impugned deficiency memo has been issued stating that the department does not agree with the classification and self-assessment of the exported goods as made by the petitioner and that the items exported by the petitioner as detailed therein are nothing but part of main products of scaffolding, that is, temporary structure used to support people and material in construction and repair or building and other structure and more appropriately classifiable under Chapter 73084000, and calling upon the petitioner to show cause as to why the

exported goods referred to therein should not be classified under CTH and sub-heading thereof and drawback be restricted accordingly, which has given rise to the present petition.

4. During the pendency of the present petition, the third respondent, Deputy Commissioner has unilaterally changed the classification and has released the drawback on 23.02.2016 calculating the drawback as per Chapter Heading 7308. Moreover, what has been released is only the principal amount of drawback and not the interest thereon as payable under section 75A of the Customs Act. It appears that out of 27 shipping bills, deficiency memo has been issued in respect of 22 bills only, however, drawback has been withheld in respect of the remaining 5 bills.

5. In response to the averments made in the petition, an affidavit-in-reply has been filed on behalf of the respondents No.2 and 3 stating that the petitioner had filed drawback claim on the basis of shipping bills declaring export goods as threaded bar, bar clamp, clamp, base square washer, joint nut, w. nut, clip etc. On scrutiny of the said claim, the classification and self-assessment of the exported goods was *prima facie* found to be incorrect and therefore, for the purpose of verifying the correctness of the claim for drawback, the impugned deficiency memo has been issued to the petitioner. According to the respondents, the deficiency memo is issued so as to give opportunity to the claimant to rebut the doubt expressed in such memo by submitting relevant and necessary documents in support of the drawback claim. If the claimant fails to clarify, the next course of action would be to issue show

cause notice requiring the claimant to explain as to why the drawback claim be not rejected on the ground which was conveyed to the claimant in the deficiency memo. It is further averred in the affidavit-in-reply that investigation came to be carried out by the Directorate General of Revenue Intelligence (DRI), Ahmedabad Zonal Unit and it was found that various Jalandhar, Ludhiana and Delhi based exporters had been making exports from Mundra Port and claiming more drawback and export incentives under the Focus Product Scheme (FPS) than what they were entitled to. In view of the ongoing investigation in the matter of drawback claim by the exporters on the basis of shipping bills declaring the export goods to be nut/bolt made of non-alloy steel/nut threaded/steel clamps/washer, etc., classifying them under CTH 73181600 under claim of drawback, the drawback claims of such exporters were also kept on hold. This was done with intention to see that pending investigation by DRI, no wrongful claim be permitted to any of the exporters on the basis of shipping bill declaring and classifying the export goods under CTH 73181600, instead of correctly classifying under CTH 7308 4000, irrespective of the fact as to whether the export of the goods is completed or not. It is further averred that in cases where the Director of Revenue Intelligence completed investigation, show cause notice for misclassification of export goods and for taking consequential actions including that of redetermination of value of the goods, recovery of differential duty, recovery of excess duty drawback with interest and imposition of penalty was issued to the exporters. In cases of 29 similarly situated exporters, including the petitioner herein, to whom so far show cause notice is not issued by the DRI, deficiency memos have been issued by the respondents

requiring them to explain as to why exported goods as referred to in the deficiency memos should not be classified under CTH 7308 and sub-heading thereof and drawback be restricted accordingly. It is further averred that the petitioner was expected to submit its response to the impugned deficiency memo within a period of 30 days from the date of receipt of the said memo; however, the petitioner failed to do so even after the expiry of the time allowed in the memo. Under the circumstances, the answering respondents considered it proper to sanction drawback claim to the extent allowable to the petitioner and on 08.02.2016, sanctioned drawback for an amount of Rs.6,36,108.84, whereas for the remaining claim, it was considered proper to issue show cause notice and decide the same after following due process of law, including that of giving opportunity of hearing to the petitioner. It is also clarified that hearing was not given to the petitioner for sanctioning the part of the drawback claim in favour of the petitioner, whereas the petitioner will be given hearing before rejecting part of the drawback claim submitted by it. It is further averred that deficiency memo dated 30.12.2015 has been correctly issued to the exporter to clarify its classification of the exported goods.

6. Mr. Dipen Desai, learned advocate for the petitioner submitted that under section 75A of the Act, the drawback claim has to be processed and payment has to be made within a period of one month, failing which, interest shall have to be paid to the exporter. Therefore, there is a legislative mandate that the drawback claim has to be cleared and payment has to be made within a period of one month from the date of making such claim. It was submitted that despite the aforesaid

statutory position, the drawback claims were not cleared or processed and though no inquiry was pending or has been ordered and no samples have been drawn of any of the exported goods, without any basis, baseless queries have been raised in the system just to delay the drawback claims for extraneous considerations. It was submitted that as on date, the principal amount of drawback payable to the petitioner by the respondents is about Rs.70,00,000/-, which is due from September, 2012 and the interest quotient under section 75A of the Act is mounting. It was pointed out that the petitioner had made a complaint dated 29.09.2015 to the Chairman, Central Board of Excise and Customs, copies whereof were also marked to the Director General of Vigilance, Customs and Central Excise, New Delhi and to the Chief Commissioner of Customs, Mundra, whereby the petitioner had complained that only because their illegal demands were not met by the petitioner, the drawback had been withheld. It was further pointed out that the petitioner had made specific complaint to Vigilance Department with regard to one drawback claim bearing shipping bill No.6263162 dated 25.11.2014 and that immediately on receipt of such complaint, the said drawback was processed and the principal amount of drawback was released, which is indicative of the fact that it was absolutely illegally withheld without any reason and that the moment the petitioner complained, the drawback came to be released immediately. It was further submitted that in respect of the other export transactions as detailed in paragraph 2.17 of the memorandum of petition, wherein similar query was raised with regard to wrong classification of goods, after the complaint was lodged by the petitioner, the drawback came to be released by the Department, however, without interest, by

accepting the classification of the goods made by the petitioner. It was submitted that therefore, in respect of similar type of goods in respect of which similar queries were made, the Department has accepted the classification made by the petitioner and has released the drawback, however, with regard to the other export transactions, the drawback claims have not been processed and are not released.

6.1 It was submitted that the impugned deficiency memo has been issued with a view to make a show that some inquiry has been initiated with regard to the drawback claims and can, therefore, be taken as a reason to further withhold the drawback claims. It was contended that once final assessment is made and classification of goods has already been made and approved by the proper officer, no officer can reopen such assessment, except as provided under law. The attention of the court was invited to sub-rule (3) of rule 13 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 (hereinafter referred to as "the rules"), which provides that if the drawback claim is incomplete in any material particulars or is without the documents specified in sub-rule (2), it shall be returned to the claimant with a deficiency memo in the form prescribed and that too, within 10 days and shall be deemed not to have been filed for the purpose of section 75A. It was submitted that in view of the provisions of sub-rule (3) of rule 13 of the rules, the deficiency memo can be issued only when the drawback claim is incomplete in any material particulars and that too, only within 10 days. It was submitted that not only is the deficiency memo required to be issued within 10 days, it can only be issued for the reasons provided in sub-rule (3) of rule 13 of the rules, whereas, in the facts of the present

case, the deficiency memo has been issued to change the classification under which the goods have been assessed, which is clearly impermissible in law, as the same would amount to review after assessment or cancelling the assessment already done under section 17 of the Act.

6.2 It was further contended that from the notice dated 19.01.2016, it is apparent that under the guise of deficiency memo, the third respondent is conducting personal hearing which would mean that the third respondent is initiating proceedings for a change in the classification which is beyond the powers vested in him and is clearly illegal and without authority of law. It was, accordingly, urged that the impugned deficiency memo dated 30.12.2015 deserves to be quashed and set aside and the respondents be directed to forthwith release the drawback amount with interest as provided under section 75A of the Act.

7 Opposing the petition, Ms. Avni Mehta, learned Senior Standing Counsel for the respondents, reiterated the contents of the affidavits-in-reply filed on behalf of the respondents and contended that the petitioner has submitted a wrong classification of the goods in question and hence, since the Department does not agree with the classification and self-assessment of the exported goods made by the petitioner, the impugned deficiency memo has been issued. It was submitted that since the goods have been exported under self-assessment, the respondent authorities have not examined the classification claims made by the petitioner and in a large number of cases, it has been found that similar goods have been exported under wrong classification and it is pursuant to

investigation carried out by the DRI, that the impugned deficiency memo has been issued calling upon the petitioner to explain with regard to the classification of the goods exported by it. It was further submitted that insofar as the limitation of 10 days for issuance of deficiency memo as contained in sub-rule (3) of rule 13 of the rules is concerned, the same is merely directory and not mandatory. It was submitted that the deficiency memo has been correctly issued to the petitioner to clarify its classification of exported goods and that the petition being devoid of merit, deserves to be dismissed.

8 In the light of the facts and submissions noted hereinabove, it may be germane to refer to rule 13 of the rules, which bears the heading “Manner and time for claiming drawback on goods exported other than by post”. Sub-rule (1) thereof provides that triplicate copy of the Shipping Bill for export of goods under a claim for drawback shall be deemed to be a claim for drawback filed on the date on which the proper officer of customs makes an order permitting clearance and loading of goods for exportation under section 51 and said claim for drawback shall be retained by the proper officer making such order. Sub-rule (2) of rule 13 provides that the claim for drawback should be accompanied by the documents specified thereunder. Sub-rule (3) of rule 13 provides that if the claim for drawback is incomplete in any material particulars or is without the documents specified in sub-rule (2), it shall be returned to the claimant with a deficiency memo in the form prescribed by the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, within 10 days and shall be deemed not to have been filed for the purpose of

section 75A.

9 Thus, a deficiency memo is required to be issued in case of two eventualities. Firstly, where the claim for drawback is incomplete in any material particulars, and secondly where the drawback claim is not accompanied by the documents specified in sub-rule (2) of rule 13 of the rules. The rule further provides that in case where the above two eventualities are not satisfied, the claim for drawback has to be returned to the claimant together with the deficiency memo and such claim shall be deemed to not having been filed for the purpose of section 75A of the Act, viz., for the purpose of payment of interest. Therefore, the rule contemplates returning of the claim for drawback when a deficiency memo is issued.

10 The facts of the present case are required to be examined in the light of the above statutory scheme.

11 As noticed hereinabove, a deficiency memo can be issued only in case of the two eventualities mentioned in sub-rule (3) of rule 13 of the rules, viz., (i) if the claim is incomplete in any material particulars, or (ii) if the documents specified in sub-rule (2) are not furnished. There is no third eventuality in which case a deficiency memo can be issued. On a plain reading of the above provision, it is clear that a deficiency memo can be issued only to point out the deficiencies in the prescribed form and it cannot be in the nature of a show cause notice to the claimant calling upon him to explain anything. This is clear from the very nature of the provision which provides for return of the claim for drawback together with deficiency memo. Therefore, once the claim for drawback is returned with the

deficiency memo, it can only be considered after it is submitted after removal of the deficiency. The deficiency memo is, therefore, not in the nature of a show cause notice, but is in the nature of an information to the party stating the deficiency in the claim for drawback and calling upon it to remove such deficiency and thereafter, submit the claim.

12 In the facts of the present case, on a reading of the contents of the deficiency memo, it is evident that the same does not relate to either of the two eventualities mentioned in sub-rule (3) of rule 13 of the rules, viz., that the claim is incomplete in any material particulars or any of the documents specified in sub-rule (2) of rule 13 are not furnished. The deficiency memo has been issued on the ground that the Department does not agree to the classification and self-assessment of the exported goods made by the petitioner. From the very nature of the deficiency memo, it is evident that the question of raising a dispute with regard to classification and self-assessment would not arise, inasmuch as, a deficiency memo can only be issued pointing out the deficiencies specified in sub-rule (3) of rule 13 of the rules. Evidently therefore, the deficiency memo travels much beyond the scope of sub-rule (3) of rule 13 of the rules.

13. Another notable aspect of the matter is that a perusal of the affidavit-in-reply filed by the respondents shows that the drawback claim of the petitioner has been partly allowed and in respect of the remaining part, the deficiency memo has been issued. As noted hereinabove, sub-rule (3) of rule 13 of the rules contemplates returning of the claim when a deficiency memo is issued. As a necessary corollary therefore,

there can be no question of the respondents partly processing the claim and allowing it to the extent they do not dispute it. If the claim for drawback is deficient, it is required to be returned together with the deficiency memo calling upon the party to remove such deficiency. The approach adopted by the respondents in the present case, therefore, is clearly not in consonance with the provisions of rule 13 of the rules. The impugned deficiency memo being contrary to the provisions of sub-rule (3) of rule 13 of the rules, cannot be sustained.

14. For the foregoing reasons, the petition succeeds and is, accordingly, allowed. The impugned deficiency memo dated 30<sup>th</sup> December, 2015 (Annexure "A" to the petition) is hereby quashed and set aside and the respondents are directed to forthwith process the drawback claims of the petitioner and release the drawback amount with interest as provided under section 75A of the Act, as expeditiously as possible. Rule is made absolute accordingly with no order as to costs.

**(HARSHA DEVANI, J.)**

**(A. S. SUPEHIA, J.)**

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