2012 (281) E.L.T. 486 (Kar.)

IN THE HIGH COURT OF KARNATAKA AT BANGALORE
N. Kumar and Ravi Malimath, JJ.

KARLE INTERNATIONAL
Versus
COMMISSIONER OF CUSTOMS, BANGALORE

Writ Appeal Nos. 1809 of 2009 and 160 of 2010 (T-TAR), decided on 23-8-2011

Drawback - Claim of - DTA exporter of ready-made garments, getting them manufactured by 100% EOU Unit by supplying to them duty paid raw materials - After manufacturing, garments directly taken from EOU to Port of export - *HELD :* DTA unit was entitled to Duty Drawback - Under Section 75 of Customs Act, 1962, to be eligible for Duty Drawback, exporter has to only satisfy that goods have been manufactured, processed or any operation has been carried out on them in India; it is immaterial where those processing take place : it may be in Unit of exporter or in another EOU Unit - Notification No. 67/98-Cus. (N.T.), prescribing in its Clause 2(c) of General Notes that rates of Drawback prescribed therein are not available if finished products are exported by EOU/EPZ Units, was counter to Section 75 ibid and could not take away right conferred therein - All that has to be seen in such cases is, whether exporter/manufacturer has paid duty on raw material for producing finished product, manufacturing activity took place in India, goods so manufactured were exported and consequent foreign exchange was earned - Denying benefit of Duty Drawback to such DTA Units was counter to scheme of Customs Act, 1962, Rules ibid and Government Policies. *[paras 10, 14, 15]*

Drawback - Claim of - C.B.E. & C. Circular No. 31/2000-Cus., dated 20-4-2000 prescribing that DTA exporter, getting goods manufactured by EOU on job work basis to utilize their idle capacity, were not entitled to All Industry Rate of Drawback - *HELD :* This was counter to Customs Act, 1962 and Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 - Making it obligatory for such DTA units to approach authorities for fixation of Brand Rate Drawback rate, was arbitrary, absurd and unreasonable - As Brand Rate Drawback rate is higher than All Industry rate, choice is of exporter; if he is satisfied with the All Industry rate, he cannot be denied benefit of same. *[paras 10, 14, 15]*

Drawback - Export by EOU/EPZ Units - Notification No. 67/98-Cus. (N.T.), stipulating in Clause 2(c) of General Notes that rates of Drawback prescribed therein are not available if finished products are exported by EOU/EPZ Units - *HELD :* This was counter to Section 75 of Customs Act, 1962 and could not take away right conferred therein to claim Duty Drawback. *[paras 10, 14, 15]*

Drawback - Nature of - It is incentive to exporter so that country earns foreign exchange, their products remain competitive in global market, and that there is a demand, which results in earning foreign exchange - Section 75 of Customs Act, 1962. *[para 15]*

Precedent - Identical issue between same parties - Order of High Court against Department in one State becoming final - *HELD :* Such order binds the parties - With change of authorities from State to State, law cannot vary - It was more so as Department having not challenged the order against it, could not take contrary stand. *[para 16]*

Interpretation of statutes - Right vested by statutory provision - It cannot be taken away by Circulars issued from time to time. *[para 14]*

Appeal allowed

CASES CITED

Commissioner v. L.T. Karle and Co. — 2007 (207) E.L.T. 358 (Mad.) — *Relied on*..... [Paras 7, 16]
Leela Scottish Lace Limited v. Commissioner — 2003 (159) E.L.T. 477 (Tribunal) — *Referred* [Para 5]

DEPARTMENTAL CLARIFICATIONS CITED

C.B.E. & C. Circular No. 67/98-Cus, dated 14-9-1998..... [Paras 3, 14]

C.B.E. & C. Circular No. 74/99, dated 5-11-1999..... [Paras 13, 14]
C.B.E. & C. Circular No. 31/2000, dated 20-4-2000..... [Paras 13, 14]

REPRESENTED BY : S/Shri Naresh Thacker for N.C. Mohan, Advocates, for the Appellant.
Shri Y. Hariprasad, CGSC, for the Respondent.

[Judgment per : N. Kumar, J.]. - These appeals are preferred against the order passed by the learned single Judge [2009 (243) E.L.T. 658 (Kar.)] who has declined to interfere with the order passed by the Revisional authority, who has held that the appellants are not entitled to the benefit of Duty Drawback in respect of goods which are manufactured in a 100% Export Oriented Unit.

2. The case of the appellants is that the first appellant is a manufacturer-exporter of ready-made garments. He is entitled to Duty Drawback at the All Industry rate prescribed by the Central Government in exercise of its powers under Section 75 of the Customs Act, 1962 (for short hereinafter referred to as 'the Act') and also in accordance with the Customs and Central Excise Duties Drawback Rules, 1995 (for short hereinafter referred to as 'the Rules'). The second appellant is a 100% EOU.

3. By Circular No. 67/1998-Cus., dated 14-9-1998 to utilize the idle capacity of EOU/EPZ units, the EOU/EPZ units in textile, ready-made garments, agro-processing and granite sectors were permitted to undertake job work from the DTA units, provided the finished products produced by such EOU/EPZ units were exported directly from EOU/EPZ unit itself and these goods are not sent back to the DTA units. The Central Government in exercise of the power conferred by Rule 3 read with Rule 4 of the Rules in supersession of Notification No. 22/1997, dated 30-5-1997 issued Customs Notification No. 67/1998, dated 1-9-1998 determining the rates of drawback as specified in the table annexed thereto. The Drawback was to be paid subject to the conditions specified in the General Notes thereto.

4. The first appellant approached and engaged the second appellant, a licenced and registered 100% EOU Unit for manufacture of ready-made garments. The first appellant supplied raw materials and all other inputs to the second appellant for manufacture of ready-made garments. The second appellant manufactured the said goods on job work basis from and out of the inputs including the fabrics supplied by the first appellant. Permission from the Customs Department was obtained by the first appellant in July 1999 for sending the raw materials to the second appellant for conversion as aforesaid. The second appellant also maintained separate records and registers to show receipts and consumption/utilization of the inputs sent by the first appellant and the removal of the said goods to them. At the time of clearance, shipping bills were prepared in the name of the first appellant as exporters and presented along with the other export documents including the invoices and packing lists to the jurisdictional officers in-charge of the second appellant who in turn forwarded a sealed cover containing invoice, shipping bill, packing list and letter for removal to the jurisdictional officer at the Port of export. The invoices were also attested by the jurisdictional officer in charge of the second appellant and the said goods moved directly from the said units to the Port of export where the same were allowed export by the proper officer under Section 51 of the Act. After such export the first appellant applied for Duty Drawback. Duty Drawback to the extent of Rs. 8,56,754/- was allowed. However, the further claim of Rs. 19,04,348/- was not considered. Thereafter, the appellants were issued with a show cause notice dated 11-1-2000 asking them to show cause why Drawback ought not to be denied to them on goods that have been manufactured by the second appellant which being a 100% EOU. They cannot claim Drawback as per proviso 2(c) to Notification No. 67/98-Customs, dated 1-9-1998. There was also a demand for drawback already granted and a proposal for imposing penalty on the appellants under Section 75(2) of the Act read with Section 114(iii).

5. The appellants filed the statement of objections. Thereafter, the dispute was adjudicated by the Additional Commissioner of Customs, Bangalore, who by his Order-in-Original dated 30-6-2000 denied the Duty Drawback and imposed penalty on the appellants. In an appeal preferred by the appellants to the Commissioner (Appeals), following the judgment of the Tribunal in the case of *M/s. Leela Scottish Lace Limited* reported in 2003 (55) RLT 56 = 2003 (159) E.L.T. 477 (Tribunal), on absolutely identical issue he set aside the order-in-original by his order dated 28-1-2004. The Department preferred a revision petition in terms of Section 129DD before the Joint Secretary Government of India, Ministry of Finance, Department of Revenue, New Delhi.

6. The revisional authority by his order dated 15-12-2008 set aside the order of the Appellate Commissioner and restored the order-in-original. Aggrieved by the same, the appellants preferred Writ Petitions before this Court in W.P. Nos. 5905 & 6482/2009 [2009 (243) E.L.T. 658 (Kar.)]. The said Writ Petitions came to be rejected on the ground that under Notification No. 67/98, dated 1-9-1998, the first appellant did not fall within the category of 'exporter' who can claim the benefits under the notification and therefore the revisional authority was justified in denying the Duty Drawback and accordingly he dismissed the Writ Petition. Aggrieved by the same, the appellants are before this Court.

7. It is the case of the appellants that first appellant also claimed Duty Drawback, for exports made from Tuticorin Port. In an identical issue raised by the Department, there also the Adjudicating Authority had denied the benefit of Duty Drawback. The Tribunal set aside the said order and the appeals preferred by the Department before the Madras High Court in CMA No. 2622/05 [2007 (207) E.L.T. 358 (Mad.)] came to be dismissed and the said order has attained finality. As the said order is between the very same parties and the issues involved are identical, the appellants are entitled to the same benefit. It was also contended that the notifications on which reliance is placed to deny the Duty Drawback, runs contrary to Section 75 of the Act as well as the Rules framed thereunder. Therefore, on the basis of such notifications, the statutory right conferred on the appellants could not be denied.

8. Assailing the impugned order passed by the learned Single Judge, the learned Counsel reiterated the aforesaid grounds and submitted that when once it is admitted that the first appellant had paid duty and manufactured the goods and exported the same, under Section 75 of the Act, he is entitled to Duty Drawback at the All Industry rate and irrespective of the fact where the first appellant manufactured the goods and in whose Unit he got it manufactured or he got it manufactured in a EOU. Therefore he submits that the impugned order requires to be set aside.

9. *Per contra*, the learned Counsel for the Union of India, submitted that in the circulars issued from the

Department from time to time. It has been made very clear that the said benefit of Duty Drawback is not available to a manufacturer who manufactured the goods in a EOU Unit. Further, if such a manufacturer wants to claim Duty Drawback, he has to approach the Commissioner of Customs by way of an application for determining the Brand Rate Drawback rate and only on such determination, he would be entitled to Duty Drawback on the basis of Brand Rate Drawback rate and he is not entitled to Duty Drawback on All Industry rate. Therefore he submits that the order passed by the Revisional Authority as well as the learned Single Judge is strictly in accordance with law and no case for interference is made out.

10. From the aforesaid facts and rival contentions, it is clear that the first appellant is a manufacturer and exporter of ready-made garments. It is also not in dispute that he got the goods manufactured in the second appellant Unit, which is 100% EOU Unit by supplying duty paid raw materials to EOU Unit. After manufacturing, those goods were directly taken from the second appellant Unit to Port of export and the goods are exported and consequently foreign exchange is earned to the country. Now the question for consideration is, as the first appellant manufactured goods in EOU Unit and thus exported the goods, is he not entitled to Duty Drawback under Section 75 of the Act. If he is entitled to Duty Drawback, is it at the All Industry rate or at Brand rate Drawback rate. In this regard it is necessary to look into the statutory provisions contained in the Act. Chapter 10 of the Act deals with Duty Drawback. Section 74 deals with Duty Drawback allowable on re-export of duty-paid goods. However, Section 75 deals with Drawback on imported materials used in the manufacture of goods, which are exported. It reads as under :

> **"Section 75. Drawback on imported materials used in the manufacture of goods which are exported. —** (1) Where it appears to the Central Government that in respect of goods of any class or description manufactured, processed or on which any operation has been carried out in India, being goods which have been entered for export and in respect of which an order permitting the clearance and loading thereof for exportation has been made under section 51 by the proper officer, or being goods entered for export by post under section 82 and in respect of which an order permitting clearance for exportation has been made by the proper officer a drawback should be allowed of duties of customs chargeable under this Act on any imported materials of a class or description used in the manufacture or processing of such goods or carrying out any operation on such goods, the Central Government may, by notification in the Official Gazette, direct that drawback shall be allowed in respect of such goods in accordance, with and subject to, the rules made under sub-section (2).
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> *Provided* that no drawback shall be allowed under this sub-section in respect of any of the aforesaid goods which the Central Government may, by rules made under sub-section (2), specify, if the export value of such goods or class of goods is less than the value of the imported materials used in the manufacture or processing of such goods or carrying out any operation on such goods or class of goods, or is not more than such percentage of the value of the imported materials used in the manufacture or processing of such goods or carrying out any operation on such goods or class of goods as the Central Government may, by notification in the Official Gazette, specify in this behalf:
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> *Provided* further that where any drawback has been allowed on any goods under this sub-section and the sale proceeds in respect of such goods are not received by or on behalf of the exporter in India within the time allowed under the Foreign Exchange Management Act, 1999 (42 of 1999), such drawback shall be deemed never to have been allowed and the Central Government may, by rules made under sub-section (2), specify the procedure for the recovery or adjustment of the amount of such drawback.
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> (1A) Where it appears to the Central Government that the quantity of a particular material imported into India is more than the total quantity of like material that has been used, in the goods manufactured, processed or on which any operation has been carried out in India and exported outside India, then, the Central Government may, by notification in the Official Gazette, declare that so much of the material as is contained in the goods exported shall, for the purpose of sub-section (1), be deemed to be imported material.
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> (2) The Central Government may make rules for the purpose of carrying out the provisions of sub-section (1) and, in particular, such rules may provide -
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> (a) for the payment of drawback equal to the amount of duty actually paid on the imported materials used in the manufacture or processing of the goods or carrying out any operation on the goods or as is specified in the rules as the average amount of duty paid on the materials of that class or description used in the manufacture or processing of export goods or carrying out any operation on export goods of that class or description either by manufacturers generally or by persons processing or carrying on any operation generally or by any particular manufacturer or particular person carrying on any process or other operation, and interest if any payable thereon:
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> (aa) for specifying the goods in respect of which no drawback shall be allowed:
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> (ab) for specifying the procedure for recovery or adjustment of the amount of any drawback which had been allowed under sub-section (1) or interest chargeable thereon:
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> (b) for the production of such certificates, documents and other evidence in support of each claim of drawback as may be necessary:
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> (c) for requiring the manufacturer or the person carrying on any process or other operation to give access to every part of his manufactory to any officer of customs specially authorised in this behalf by the Assistant Commissioner of Customs or Deputy Commissioner of Customs to enable such authorised officer to inspect the processes of manufacture, process or any other operation carried out and to verify by actual check or otherwise the statements made in support of the claim for drawback.
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> (d) for the manner and the time within which the claim for payment of drawback may be filed :
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> (3) The power to make rules conferred by sub-section (2) shall include the power to give drawback with retrospective effect from a date not earlier than the date of changes in the rates of duty on inputs used in the export goods."

11. A reading of the aforesaid provisions makes it very clear that goods of any class or description manufactured, processed or on which any operation has been carried out in India. If exported, drawback should be allowed of duties of customs chargeable under this Act on any imported materials of a class or description used in the manufacture or processing of such goods. Sub-section (2) of Section 75 vests with the Central Government, the power to make Rules for the purpose of carrying out the provisions of sub-section (1). It is in pursuance of such power conferred, the Customs and Central Excise Duties Drawback Rules, 1995 has been framed, Rule 3 of the said Rules defines Drawback as under:

> **"3. Drawback.**

(1) Subject to the provisions of -

(a) the Customs Act, 1962 (52 of 1962) and the rules made thereunder.

(b) the Central Excises and Salt Act, 1944 (1 of 1944) and the rules made thereunder.

(c) these rules, a drawback may be allowed on the export of goods at such amount or at such rates as may be determined by the Central Government:

Provided that where any goods are produced or manufactured from imported materials or excisable materials or by using any taxable services as input services, on some of which only the duty or tax chargeable thereon has been paid and not on the rest, or only a part of the duty or tax chargeable has been paid; or the duty or tax paid has been rebated or refunded in whole or in part or given as credit, under any of the provisions of the Customs Act, 1962 (52 of 1962) and the rules made thereunder, or of the Central Excise Act, 1944 (1 of 1944) and the rules made thereunder, or of the Finance Act, 1994 (32 of 1994) and the rules made thereunder, the drawback admissible on the said goods shall be reduced taking into account the lesser duty or tax paid or the rebate, refund or credit obtained:

Provided further that no drawback shall be allowed -

(i) if the said goods, except tea cheats used as packing material for export of blended tea, have been taken into use after manufacture;

(ii) if the said goods are produced or manufactured, using imported materials or excisable materials or taxable services in respect of which duties or taxes have not been paid; or

(iii) on jute batching oil used in the manufacture of export goods, namely, jute (including Bimlipatam jute or mesta fibre), yarn, twist, twine, thread, cords and ropes;

(iv) if the said goods, being packing materials have been used in or in relation to the export of -

(1) jute yarn (including Bimlipatam jute or mesta fibre), twist, twine, thread and ropes in which jute yarn predominates in weight;

(2) jute fabrics (including Bimlipatam jute or mesta fibre), in which jute predominates in weight;

(3) jute manufactures not elsewhere specified (including Bimlipatam jute or mesta fibre) in which jute predominates in weight.

(2) In determining the amount or rate of drawback under this rule, the Central Government shall have regard to,

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(a) the average quantity or value of each class or description of the materials from which a particular class of goods is ordinarily produced or manufactured in India;

(b) the average quantity or value of the imported materials or excisable materials used for production or manufacture in India of a particular class of goods;

(c) the average amount of duties paid on imported materials or excisable materials used in the manufacture of semis, components and intermediate products which are used in the manufacture of goods;

(d) the average amount of duties paid on materials wasted in the process of manufacture and catalytic agents :

Provided that if any such waste or catalytic agent is re-used in any process of manufacture or is sold, the average amount of duties on the waste or catalytic agent re-used or sold shall also be deducted;

(e) the average amount of duties paid on imported materials or excisable materials used for containing or, packing the export goods;

(f) any other information which the Central Government may consider relevant or useful for the purpose."

Rule 6 deals with cases where amount or rate of drawback has not been determined. Rule 7 deals with cases where amount or rate of drawback determined is low and how the Duty Drawback is to be determined.

12. Minutes of the 100% EOU meeting held on 18-12-1998 at 3.30 pm with representatives of 100% EOU under the Chairmanship of Dr. J. Sridharan, Commissioner of Customs, Bangalore, in respect of points raised by M/s. K & M (Exports) Unit II, is recorded as under:

"**Points raised by M/s. K & M (Exports) Unit II**

Point 1. — As per Para 4 of the above circular Govt. has permitted that EOUs to utilise their idle capacity by undertaking job work of DTA unit subject to the condition that the goods so manufactured should be sent directly to the port and not to be set back to DTA.

(i) Modalities to be followed in implementing the above.

(ii) Confirmation that DTA shall be the exporter who will file regular DBK shipping bill and that the DBK should be eligible for full all industry rate of drawback for such export.

Reply (i) In case of EOU undertaking job work and such goods being exported, the existing procedure for removal of goods for export from an EOU to gateway ports shall be followed in this case also.

(ii) The owner of the goods shall file the shipping bill and not the EOU unit (job worker). The benefits, if any, of the export shall accrue to the owner of the goods."

13. In the Circular No. 74/99, dated 5-11-1999 dealing with manufacture of goods in EOU Unit as job work and Drawback, it is stated as under:

"It has been brought to the notice of the Board that there is a lack of clarity as to who will file the Shipping Bill and where the Shipping Bills of such exports will be assessed. It is clarified that the Shipping Bill in such case will be filed in the name of DTA unit and the name of EOU/EPZ unit will also be mentioned on the Shipping Bill as job worker. In case of job work by EPZ units, the Shipping Bill will be assessed by the Assistant Commissioner in charge of zone, in case of EOU, as the Shipping Bill is filed at the Gateway Port, the Shipping Bill will be assessed by Assistant Commissioner in charge of Export or any other officer as may be specified by Commissioner of Customs at Gate way Port. However, the name of exporter i.e., the DTA unit and name of job worker i.e., EOU unit shall be required to be mentioned on the invoice and AR-4. Also the AR-4 shall be signed by both the parties. It is also clarified that no drawback/DEPB benefits shall be admissible either to EOU/EPZ units or to the DTA unit for such exports."

Further in Circular No 31/2000 dated 20-4-2000, again dealing with the same subject, it has been held as under :

"Such DTA Exporters will be eligible for payment of Brand Rate of Drawback against duties suffered on inputs, on submission of proof of payment of duty. Accordingly, drawback will be payable to such exporters under Rule 6(1) of the

Customs and Central Excise Duties Drawback Rules, 1995, at the rate fixed on specific application. The procedure laid down under the said Drawback Rules will have to be followed for fixation of Brand rates of Drawback. Such exporters will have to apply to the Directorate of Drawback for fixation of Brand rates on exports under DEPB. However, under no circumstances, such exporters will be allowed to claim All-Industry Rate of Drawback."

14. Relying on these two Circulars, the Duty Drawback is denied to the first appellant. It is settled law that a right vested under a statutory provisions cannot be taken away by virtue of Circulars issued from time to time, if they are contrary to statutory provisions. Under Section 75, to be eligible for Duty Drawback, all that the exporter has to satisfy is, that the goods are manufactured, processed or on which any operation has been carried out in India. It is immaterial where the said manufacturing or processing has taken place. It may be in his Unit or it may be in EOU Unit. Guiding principle is, it should have been manufactured or processed in India and exported. The Circular 67/98 was issued only to enable EOU Units to overcome the problems which they were facing, so that, instead of keeping their machinery idle, they were permitted to accept job work so that the capacity is utilized and they are able to over come the recession in the world market. It is by virtue of the said Circular, the EOU undertook the job work. The Circular makes it very clear that if the idle capacity of EOU/EPZ Units is utilized and the textile, ready-made garments, agro-processing and granite sectors undertakes job work from the DTA Units, then the finished products produced by such EOU/EPZ Units will have to be exported directly from EOU/EPZ Unit itself and these goods will not be sent back to the DTA. The reason is obvious. The appellant's product does not belong to EOU. It belongs to DTA and in fact export is done in the name of DTA. Once DTA exports the manufactured goods and if they have paid duty on raw materials, then, under Section 75, they are eligible for Duty Drawback. The said right conferred in the statute cannot be taken away by issuing circulars, which runs counter to these statutory provisions. Similarly the Circular 31/2000 where it is stated that under no circumstances the exporter will be allowed to claim All Industry rate, also runs counter to the Act and Rules. However, that Circular makes it very clear that DTA Units are eligible for Duty Drawback. If we look into the scheme of the Rules, it becomes clear that if the Government by notification decides what is public policy known in trade terms as All Industry rate, irrespective of the duty paid on raw materials, the exporter of the finished products, would be entitled to Duty Drawback at such rates. Under the Rules, if he has paid more duty and the All Industry Rate is low, he has to approach the authorities under the Rules for enhancement of the Duty Drawback to which he is legally entitled to. If on such application, on being satisfied from the material produced by such exporter, the authority can fix a higher rate than the All Industry rate, which is known as Brand Rate Drawback rate. Therefore, the Circular making it obligatory for DTA to get the goods manufactured in a EOU to necessarily approach the authorities for fixation of Brand Rate Drawback rate. Therefore declaring that he is not entitled to All Industry rate, is arbitrary, absurd and does not stand to reason. As always brand Rate Drawback rate is higher than the All Industry rate, the choice is that of the exporter. If he is satisfied with the All Industry rate, if he is not interested in approaching the authorities, he cannot be denied the all Industry rate, fixed by the Government.

15. The orders passed by the Revisional authority fails to take note of the very object behind these provisions and the schemes introduced by the Government from time to time. The whole object behind this Duty Drawback is to encourage the exporter. It is in the nature of incentive, so that the country earns foreign exchange. His products are competitive in the global market, and that there is a demand, which results in earning foreign exchange. All that has to be seen in such cases is, whether the exporter/manufacturer has paid duty on the raw material as he utilizes the said raw material for producing the finished product and whether that manufacturing activity took place in India and after such manufacturing activity, is it exported and consequently whether the foreign exchange is earned. In the instant case, in order to save these Export Oriented Units, they were permitted to undertake job work and export the finished products. The question of denying the benefit of this Duty Drawback to these DTA Units runs counter to the scheme of the Act, the Rules and these Government Policies.

16. In fact, the undisputed material on record shows that between the same parties when such a stand was taken in respect of goods which are exported from Chennai, the Madras High Court has granted the benefit of Duty Drawback. The said order has become final and it binds the parties. With the change of authorities from State to State, the law cannot vary. At any rate, Department having not challenged the order of the Madras High Court, cannot take a stand contrary to the stand which is now finally concluded by the judgment of the Madras High Court.

17. In that view of the matter, the order passed by the learned Single Judge and the Revisional Authority, cannot be sustained. Accordingly it is hereby set aside and the order passed by the Appellate Commissioner is restored. Parties to bear their own costs.
