

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

RESERVED ON: 17.08.2012
PRONOUNCED ON: 31.08.2012

+ **WP(C) No. 744/2012, C.M. NO. 1628/2012**

M/S J.S. DESIGNER LTD. Petitioner

Through: Mr. Pradeep Jain, Advocate

versus

COMMISSIONER OF CUSTOMS Respondent

Through: Mr. Bhupesh Narula, Advocate with
Ms. Geetanjali Sharma, for CBEC.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT

%1. The petitioner seeks directions against the respondent (hereinafter called as Customs Authority) for permitting the provisional release and export of its goods pursuant to the order of Central Excise & Service Tax Appellate Tribunal (CESTAT) dated 08.12.2011.

2. The petitioner is an export house functioning for the last 11 years. They had filed three shipping bills at ICD, Patparganj, Delhi for export of fabrics valued at about Rs. 9.25 crores. The Revenue started investigation doubting the correctness of the value declared. Later, however, the three consignments were permitted

to be exported on execution of the bond with bank guarantee of Rs.2 crores which was furnished on 17.06.2011. Another shipping bill was filed by the petitioner on 15.06.2011 which too was detained for investigation. On 11.07.2011, the goods were permitted to be released provisionally on execution of bond for the value equal to 100% of the declared value with bank guarantee for 25% of the bond amount. The petitioner requested for waiver of the condition of bank guarantee and relied upon a letter dated 14.06.2011 issued by the Deputy Commissioner Export (SIIB), ICD-Tuglakabad, that letter had stated that wherever goods that were neither seized nor confiscated should be provisionally cleared, but on the condition to benefit the exporter, would not be released till finalization of the investigation. The petitioner made a further representation on 19.08.2011 requesting for wavier of the condition for bank guarantee in respect of shipment under bill dated 15.06.2011 and further requested release of bank guarantee of ₹.2 crores furnished earlier. It was stated that bank realization certificate towards export proceeds in respect of the said bills were received on 06.07.2011.

3. The petitioner's goods were not released and there were complete inaction by the Customs Authority. This impelled it to approach the Court in a previous writ petition being WP(C) No.1856/2011 which was disposed of on 16.08.2011, directing the authorities to decide the petitioner's representation within two weeks and assign reasons by a speaking order. By an order dated

08.09.2011 the Commissioner rejected the petitioner's request for release of bank guarantee (of ₹.2 crores) covering the three earlier exports under bills dated 19.05.2011, 20.05.2011 and 28.05.2011. The Commissioner also rejected the petitioner's request for waiver of the condition for furnishing bank guarantee of 25% of the bond amount in respect of the value of the goods covered by the subsequent shipping bills dated 15.06.2011.

4. The petitioner felt aggrieved and approached the CESTAT in appeal (Customs Appeal No.571/2011). The said appeal was partly allowed by an order dated 08.12.2011 and the requirement of furnishing bank guarantee to the extent of 25% of the bond amount in respect of the subsequent shipping bills dated 15.06.2011 was held to be unjustified. The Tribunal's reasoning is as follows :

“8. After considering the submissions made by both sides, we find that the appellant had already given a bank guarantee of Rs. 2 crores to cover the earlier three consignments. The exports are being made under DEPB scheme. Even if the Revenue_s case is proved the consequence of the same would be denial of said DEPB. The Revenue has already drawn samples from the present consignment, in which case provisional release of the same would not cause any adverse affect to the Revenue_s case. Even in terms of the Board_s Circular it stands observed that inordinate detention of the seized goods entered for exportation results in delays in fulfillment of export order and at times cancellation of such orders. Detention of goods also adds to congestion in ports besides payment of demurrages charges to the custodian.

9. We also note, the appellant's contention in respect of earlier exports, they have realized the full export value from their overseas buyers. Further an amount of around Rs.3 crores is pending to be given to the appellant as DEPB benefit. In these circumstances, we are of the view that directions of the adjudicating authority to further execute bank guarantee of 25% of the value of consignment is harsh and unjust. As such taking into account the overall facts and circumstances of the case, we hold that the earlier bank guarantee of Rs. 2 crores executed by the appellant should be considered as sufficient to cover present consignment also considering the quantum of reasonable fine and penalty that can be imposed in this case. Therefore, there is no need to give further bank guarantee as directed by the Commissioner. The appellant is directed to furnish a bond for an amount equal to the value of goods and letter from the bank to the effect that the bank guarantee already executed will cover the dispute about this shipment also and the same would be kept alive. Consignment in question should be released provisionally immediately thereafter. In the circumstances, appellant's prayer for refund of bank guarantee of Rs. 2 crores is rejected. Appeal is disposed in above terms."

5. The petitioner contends that after the CESTAT order various representations have been made requesting the Customs Authority to release the goods since it has furnished the requisite bond. However, the Customs Authority informed it by virtue of circular dated 22.09.2012, it is not possible to permit such export. The said circular reads as under:

"To,

M/s J.S. Designer Ltd.

190, 191, Patparganj Functional Industrial Estate

New Delhi 110 092

Dear Sir,

Subject : Request for immediate provisional release of the export consignment under DEPB Scheme having SB No.4119009 dated 15.06.2011-reg

Please refer to your letter dated 16th January 2012 addressed to the Chief Commissioner of Customs with an endorsement to the Commissioner of Customs, ICD, TKD, New Delhi with a request for immediate provisional release of the export consignment under DEPB Scheme having SB No.4119009 dated 15.06.2011.

In this regard, your kind attention is invited to Notification No.51/2011 Cus Dated 22.06.2011 vide which it has been provided that the DEPB Scheme shall be valid in respect of the DEPB scrips issued by the Licensing Authority against exports having Let Export Order up to and inclusive of the 30th day of September, 2011.

The issue was further clarified vide Para 14 of the CBEC's circular No.42/2011 Cus dated 22.09.2011 which reads as under :

“all exports under DEPB Scheme upto and including September 30, 2011 where the ‘Let Export Order (LEO)’ has been issued by the Customs officer shall be eligible for the issue of DEPB Scrips and that the export consignments with ‘Let Export Order’ after this date would no longer be eligible for benefits under the DEPB Scheme.”

As Evident from above it is not possible to permit export under the DEPB Scheme as no LEO was given in your case on/before the permitted date. Export of the goods covered under SB No.4119009

dated 15.06.2011 can be made either on a free Shipping Bill or under any other export promotion scheme of your choice which is currently valid. The export of goods shall be permitted provisionally subject to the outcome of investigation being conducted by Customs Preventive, Commissionerate on valuation and any other issue.

You are therefore requested to take necessary action at the earliest.

Yours sincerely,

*(Manish Goyal)
Additional Commissioner
(Export)”*

6. It is contended that petitioner's goods cannot be held up especially after the Customs Authorities suffered an order adverse to them by the CESTAT directing release of the goods. It is also urged that the provisional release order was made on 11.07.2011 by the Superintendent ICD – Tuglakabad and again by an order in original dated 08.09.2011 by the Commissioner of Customs. The export therefore have not been permitted, the petitioner was aggrieved by the condition imposed with regard to furnishing of bank guarantee which was ultimately set aside. In these circumstances the CBEC's circular dated 22.09.2011 is of no avail because the LET export order had been issued earlier and could not be availed on account of an illegal condition. It was not as if the order was made later. It is argued that if the CBEC's circular is understood by the impugned order of the Additional Commissioner, impugned in the present case (dated 18.01.2012)

were to be upheld. The direction of CESTAT as well as that of any court can be easily circumvented by mention of some subsequent policy or decision. In other words, CBEC's circular would apply only in the case of exports or export orders to be issued after 30.09.2011. In this case, the orders were issued as far back as on 11.07.2011 and subsequently by the Commissioner on 08.09.2011.

7. The petitioner lastly relied upon the circular dated 22.09.2011 which itself states in para 14 that benefits of the DEPB scheme could be availed of only up to 30.09.2011 and LET orders would be eligible in that regard till that date and further stated that:

“If for any valid reason, the LEO cannot be given on the EDI on the said date, then the Commissioner of Customs may allow an endorsement of the LEO on the DEPB shipping bills manually. However, this may only be allowed as an exception. Suitable Public Notices/Standing Orders may be issued in this regard.”

8. It is contended on behalf of the respondent in its counter affidavit that the condition of having to furnish bank guarantee was warranted in the circumstances of the case. The Customs Authorities had reasons to doubt that the petitioner is indulging in gross over-valuation of the goods. The conditional provision release, in the present case, ordered by the Authorities was not held to be illegal. As a consequence, the requirement of having furnishing a bank guarantee as a part of the condition could not be faulted with. The order of the Commissioner dated 08.09.2011, no doubt, confirmed provisional release but at the same time affirm the

condition of filing bond and bank guarantee. This resulted in the petitioner missing the deadline of 30.09.2011 under the DEPB Scheme; its exports could not be sent out under the LET Order. The respondents could not be found fault with in this regard as the order dated 08.09.2011 was not made in disregard of the facts of the case or without jurisdiction. It was further argued that the petitioner had sufficient time to make the export between 11.07.2011 and 30.09.2011 since no extraneous inevitable circumstances prevented it from availing the LEO before the cut-off date. The Customs Authorities also relied upon a circular dated 04.01.2011 issued by the Ministry of Finance, Central Government, which outlined the steps and conditions governing provisional release of goods for export purposes specially under the circumstances where Revenue investigations are directed. The relevant part of the said circular reads as follows:

“4. Seizure should be resorted to only when the Customs officers have a reason to believe that the goods in question are liable to confiscation under the Customs Act, 1962 and thereafter the provisions of Section 110a of the Customs Act, 1962 would come into play. However, there may be situations when the goods are to be detained for purpose of tests etc. to confirm the declaration. In such cases the endeavour should be to quickly undertake the necessary action (test/enquiry etc.) and take appropriate legal action thereafter so that the period of detention is kept to the minimum. Thus, the following course of action is prescribed in respect of goods entered for exportation.

- (a) In case the export goods are found to be mis-declared in terms of quantity, value and description and are seized for being liable to confiscation under the Customs Act, 1962, the same may be ordered to be released provisionally on execution of a Bond of an amount equivalent to the value of goods along with furnishing an appropriate security in order to cover the redemption fine and penalty.*
- (b) In case the export goods are either suspected to be prohibited or found to be prohibited in terms of the Customs Act, 1962 or ITC (HS), the same should be seized and appropriate action for confiscation and penalty initiated.*
- (c) In case the export goods are suspected of mis-declaration or where declaration is to be confirmed and further enquiry / confirmatory test or expert opinion is required (as in case of chemicals or textiles materials), the goods should be allowed exportation provisionally. The exporters in these cases are required to execute a Bond of an amount equal to the value of goods and furnish appropriate security in order to cover the redemption fine and penalty in case goods are found to be liable to confiscation. In case exports are made under any Export Promotion / Reward Schemes, the finalization of export incentives should be done only after receipt of the test report / finalization of enquiry and final decision in the matter. The Bond executed for provisional release shall contain a clause to this effect.*

(d) Export goods detained for purpose of tests etc. must be dealt with on priority and the export allowed expeditiously unless the prohibited nature of goods is confirmed. Continued detention of any export goods in excess of 3 days must be brought to the notice of the Commissioner of customs, who will safeguard the interest of the genuine exporters as well as the revenue.”

9. The preceding narrative and discussion would reveal that the Petitioner had initially sought to export consignments through three shipping bills. The Customs authorities did not permit them, and allowed provisional clearance subject to furnishing of 100% bond of the goods' value, and a bank guarantee for the sum of Rs. 2 crore. The later set of shipping bills too, were sought to be withheld and a condition to furnish 100% bond with security to the extent of 25% of the value of the goods, by way of bank guarantee was insisted upon. The petitioner was aggrieved, and sought modification of the latter condition. The Commissioner did not take any action; this necessitated filing of a writ petition, which was disposed of by this Court. Pursuant to the directions of this court, the Commissioner issued a speaking order, provisionally allowing the goods to be exported, but without, in any manner modifying the condition with regard to furnishing of bank guarantee. This was challenged in appeal to the CESTAT; the appeal was allowed on 8-12-2012. That order became final. However, the customs authorities did not permit the exports to be made under the scheme which had been applied for, i.e. DEPB Scheme, saying that the shipment

could not be completed by a cut-off date for the “Let Export Order” mentioned by the circular dated 22-9-2011, i.e 30th September, 2011.

10. It would be immediately apparent that the respondents in this case are, in effect, undermining the permission granted earlier by the customs authorities by permitting export as far back as on 11-7-2011. The petitioner could not take advantage of the clearance due to an oppressive condition imposed, i.e furnishing 25% guarantee (in relation to the declared value of the goods). The condition was held to be unjustified and unlawful by an order of the CESTAT in December, 2011. In such view of the matter, there can be no two opinions about the indefensible and utterly arbitrary position taken by the customs authorities, that the petitioner is disentitled to the benefit of the DEPB scheme by virtue of a restriction imposed on 22-9-2011, made effective nine days later. To inflict such an arbitrary condition, which is declared to be legally unsustainable, and yet insist that during the interregnum a fresh condition operates to deny the citizen the relief he is justly entitled to, is unfair and unreasonable. Furthermore the respondents are also wrong in contending that the issuance of the Tribunal’s order on 8-12-2001 does not constitute a “*valid reason*” in terms of the circular dated 22-9-2001 warranting manual endorsement on the LEO after 30-9-2011.

11. In addition to the above reasons, the Court notices that the circular dated 4-1-2011 deals with situations under which

confiscations can be resorted to. The underlying theme of the circular is that confiscation should be preceded by a speaking order, and in case of suspect goods, detained wherever the authorities wish investigation into undervaluation or overvaluation, the process must be concluded with utmost expedition. The relevant condition reads as follows:

“Export goods detained for purpose of tests etc. must be dealt with on priority and the export allowed expeditiously unless the prohibited nature of goods is confirmed. Continued detention of any export goods in excess of 3 days must be brought to the notice of the Commissioner of customs, who will safeguard the interest of the genuine exporters as well as the revenue.”

In this case, the goods were neither detained, nor were subject to proceedings which culminated in any assessment order. In the circumstances, the insistence that the petitioner continue to maintain a bank guarantee for Rs. 2 crore is unwarranted. The customs authorities did not show how this condition, in addition to the bond insisted in the case of the shipment, was essential; the samples necessary for the investigation and issuance of show cause notice, if any, had been drawn. The goods were exported and the consideration was received in respect of the earlier shipments covered by the three bills; bank realization certificate towards export proceeds in respect of the said shipping bills were received on 06.07.2011. In the circumstances, it would be unreasonable and

unfair for the respondents, to continue to insist that the Bank guarantee for the amount of Rs. 2 crores should be maintained.

12. For the above reasons, the respondents are directed to treat the export in respect of the shipping bill dated 15-6-2011 (which was the subject matter of the order in original issued by the Commissioner of Customs on 8-9-2011 and the order of the CESTAT dated 8-12-2011) as eligible to benefit of the DEPB scheme, and having been exported under it, on LEO basis. The respondents are also directed to release the bank guarantee for the sum of Rs. 2 crores for the earlier shipment, since the exports have been completed and requiring the petitioner to continue furnishing it would be arbitrary and unreasonable. The writ petition is allowed in terms of these directions.

**S. RAVINDRA BHAT
(JUDGE)**

**R.V. EASWAR
(JUDGE)**

AUGUST 31, 2012