

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.07.2015

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

W.P.No.15669 of 2014

M/s.Vamadev Exports,
Rep. By its Partner,
Mr.v.Manikandan
531-Kamaraj Road,
Tirupur - 641 604.

... Petitioner

Vs.

The Commissioner (Appeals),
Office of the Commissioner of Customs,
60, Rajaji Salai,
Custom House,
Chennai - 600 001.

... Respondent

PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying to issue writ of certiorarified mandamus to call for the records of the respondent in Appeal file No.C3/661/0/2007/Air and thereby quash the Order-in-Appeal reference C.Cus.No.1315/2009, dated 04.11.2009; and further direct the respondent herein to refund the sum of Rs.4,07,245/- along with applicable interest for the delay in refund within a time frame.

For Petitioner : Mr.P.J.Rishikesh

For Respondent : Mr.V.Sundareswaran,
Standing Counsel

ORDER

It is the claim of the petitioner that the petitioner Company, being 100% export oriented unit, had imported 6 auto striper knitting machines for a sum of Rs.51,48,414/- under the Export Promotion Capital Goods (EPCG) Scheme, which has been notified by the Government of India vide its Customs Notification No.28/97. It

is stated that the said scheme provided for Zero duty / Concessional duty for capital goods imported into the country with the object of promoting export trade from India, therefore, the petitioner, in order to avail such duty, had obtained a license bearing number P/CG/2141847/C/X//45/MC/97, dated 03.09.1997, from the Director General of Foreign Trade (DGFT), which is Regional Authority / Licensing Authority under the Scheme. As per the procedure under the Scheme, the Regional Authority / Licensing Authority issues a license with certain conditions wherein the exporter is required to undertake export obligation. Likewise, in the present case, the petitioner was stipulated to fulfil an export obligation of USD 7,39,969/-. Based on the said scheme, the total duty saved for the import of the aforesaid machines came to be Rs.7,57,105/-, therefore, as per the said scheme, the petitioner importer is required to furnish a Bank guarantee in favour of the Commissioner of Customs, Chennai, totalling 100% value of the duty saved portion. Accordingly, the petitioner had also furnished a Bank Guarantee bearing Number 97/44 in favour of the respondent for a sum of Rs.7,58,000/- pertaining to the duty saved portion under the license and that the said Bank guarantee was issued by M/s.Indusind Bank Limited, Avinashi Branch, for the period from 01.12.1997 to 01.12.2002. However, the respondent, vide its letter dated 26.12.2000, to M/s.Indusind Bank Limited, invoked a partial sum of Rs.4,07,245/- towards duty and interest from the bond / guarantee stating that the petitioner had failed to fulfil pro-rata export obligation in the customs notification. Thereafter, the said Bank by letter dated 05.01.2001 paid the said amount demanded by way of demand draft in favour of the Commissioner of Customs (Airport) Chennai. However, since the petitioner had fulfilled its total export obligations and obtained the necessary export obligation discharge certificate (EODC) which was issued by the DGFT on 26.05.2003, wherein a sum of USD 8,14,639 had been fulfilled by the petitioner, which is over and above the stipulated sum as per the said license, on receipt of such details, the petitioner had immediately, vide their letter dated 28.05.2003, requested the Commissioner of Customs, Rajaji Salai, Chennai, to release the original bank guarantee in their custody. Thereupon, the said original bank guarantee was released by the Customs department with the 'cancelled endorsement' much later by its letter dated 22.03.2007. On receipt of original bank guarantee, though the petitioner had made an application for refund of duty on 10.04.2007 for return of the enforced sum of Rs.4,07,245/, that has been paid by the petitioner's bankers M/s.Indusind Bank on 05.01.2001, the Deputy Commissioner of Customs, without providing an opportunity of personal hearing to the petitioner, dismissed the appeal in his Order-in-Original No.304/2007 DC (Acc), dated 20.08.2007 stating that the

refund application has been filed beyond the limited period of six months as stipulated in Section 27 of the Customs Act. As against that, though the petitioner filed an appeal before the respondent on 09.10.2007, they did not get any information from the respondent, therefore, the petitioner was constrained to file an application under the RTI Act to know the status of his appeal pending before the respondent. Thereafter, the RTI department of the Customs House, vide its letter dated 21.05.2014, replied stating that the appeal had been disposed of vide Order-in-Appeal in C.Cus No.1315/2009, dated 04.11.2009, and only thereafter, on receipt of such information, the petitioner came to know the status of his appeal preferred before the respondent.

2. It is further submitted that the respondent ought to have seen that Section 27 of the Customs Act, 1962 and the provision of six months limitation contained thereon is not at all applicable to a case of an enforced Bank guarantee, for, the said sum of Rs.4,07,245/- had not been paid by the petitioner, but, the same was taken by the department under enforcement of the submitted Bank guarantee, which was given as a security, therefore, had the respondent provided an opportunity of personal hearing, the petitioner would have appeared in person and would have explained everything, but, since such procedure was not followed, the present impugned order is liable to be set aside.

3. In support of his submissions, he has relied upon a judgment of the Apex Court in the case of Oswal Agro Mills Limited v. Assistant Collector of Central Excise (1994 (2) SCC 546) for a proposition that furnishing of bank guarantee cannot be regarded as payment of duty by the importer to the revenue. Further, a Division Bench of this Court in the case of Commissioner of Customs v. M/s.Aristo Spinners Private Limited (passed in C.M.A.No.213 of 2008, dated 25.01.2008) held that the stand of the review that the claim made by the respondent is barred by Section 27 of the Act cannot be legally sustained, as the same cannot be made applicable.

4. Per contra, learned counsel appearing for the respondent urged this Court to dismiss the writ petition, as they cannot come to this Court by filing writ petition when they have got an appeal remedy before the CESTAT as per Section 129-A of the Customs Act. It is further submitted that when the petitioner got the export obligation discharge certificate issued by the DGFT on 26.05.2003, the petitioner, with a huge delay of four years, moved an application for refund of Rs.4,07,245/- only on 10.04.2007, therefore, the original authority, vide its order dated 20.08.2007, rejected the

claim for refund on the ground that the application filed by the petitioner was beyond six months period stipulated. As against that, when appeal was filed, the appellate authority also rejected the claim of the petitioner. It is further submitted that the agreed amount of target by the petitioner was not achieved by them in the second block year, hence, a sum of Rs.4,07,245/- was encashed on 10.01.2001 in terms of the condition of the contract. It is further stated that although the petitioner obtained Export Obligation Discharge Certificate (EODC) and the same was submitted on 26.05.2003, pursuant to the filing of EODC, the petitioner sought for refund of encashed bank guarantee, therefore, it was rejected by the authority in the light of Section 27 of the Customs Act, hence, he sought for no interference to the order passed by the respondent.

5. Again, placing on reliance on the judgment of this Court in the case of Commissioner of Customs and another v. M/s.Areva T&D India Limited (passed in W.A.No.299 of 2013, dated 21.04.2014), it is submitted that when the Statute does not empower the authorities to collect the interest on the delayed payment of Central Excise Duty, the petitioner cannot be clothed with the liability of interest on the ground that they have asked for instalments for payment of Central Excise Duty, therefore, he pleaded, the question of awarding interest on the belated refund of bank guarantee is wholly unsustainable.

6. Heard both sides.

7. It is an admitted fact that the petitioner was issued with the Export Obligation Discharge Certificate (EODC) against EPCG Licence by the office of the Joint Director General of Foreign Trade, Ministry of Commerce, Government of India, on 26.05.2003. Relevant portion of the said Certificate is extracted hereunder:

"Reference your letter dated 23.05.2003 enclosing therewith the export statement in Appx.10c/A of Hand Book of procedures.

You have utilized the licence to the extent of 100% and the export obligation is fixed at US\$7,39,960/- and annual average is fixed US\$ NIL.

It is seen that you have produced Original Shipping Bills for the export obligation against the Licence as below:-

	PERIOD	E.O.FULFILLED	EXCESS (+) SHORT FALLS (-)
1 st year/block	03.09.1997 to 02.09.1998	US\$ 41,253/-	(+)
2 nd year/block	03.09.1998 to 02.09.1999	US\$ 44,759/-	US\$ 29,237/- (-)
3 rd year/block	03.09.1999 to 02.09.2000	US\$ 3,89,332/-	US\$ 1,67,344/- (+)
4 th year/block	03.09.2000 to 02.09.2001	US\$ 3,39,295/-	US\$ 1,17,307/- (+)
5 th year/block	05.02.2002 to 05.02.2003	NIL	NIL
		Total E.O. Fulfilled	US\$ 8,14,639/-

The original shipping bills are returned herewith.

(Y.Packiyaraj)

Asst. Director General of Foreign Trade
For Joint Director General of Foreign

Trade

Copy to:- The Commissioner of Customs, Chennai, for information and necessary action with a request to release the Bank Guarantee subject to his satisfaction."

From the above said proceedings of the Ministry of Commerce, it is clear that the petitioner Company had fulfilled their export obligation and thereafter, they have also issued with Export Obligation Discharge Certificate on 26.05.2003, wherein a sum of USD 8,14,639/- has been fulfilled by the petitioner towards export obligation, which is over and above the sum stipulated as per the licence. Therefore, when the Export Obligation Discharge Certificate has been rightly issued by the DGFT, the petitioner, vide his letter dated 28.05.2003, requested the Commissioner of Customs, Chennai, to release the original bank guarantee, however, the Deputy Commissioner of Customs has wrongly rejected, vide his order dated 20.08.2007, stating that the refund application has been filed beyond the limitation period of six months as stipulated in Section 27 of the Customs Act. Aggrieved by the same, when appeal was preferred, the appellate authority vide order dated 04.11.2009, confirmed the order passed by the Deputy Commissioner of Customs, by repeating the same

reasons. Therefore, such reasons assigned by the original authority and appellate authority in their orders, in my view, are totally running contrary to the ratio laid down by Hon'ble Apex Court and this Court.

8. In this regard, it is more appropriate to refer to a judgment of the Hon'ble Apex Court in the case of Oswal Agro Mills Limited (cited supra). Relevant portion of the said judgment is extracted hereunder:

"10. The question, therefore, is whether it can be said that the furnishing of a bank guarantee for all or part of the disputed excise duty pursuant to an order of the court is equivalent to payment of the amount of the excise duty. In our view, the answer is in the negative. For the purposes of securing the revenue in the event of the revenue succeeding in proceedings before a court, the court, as a condition of staying the demand for the disputed tax or duty, imposes a condition that the assessee shall provide a bank guarantee for the full amount of such tax or duty or part thereof. The bank guarantee is required to be given either in favour of the principal administrative officer of the court or in favour of the revenue authority concerned. In the event that the revenue fails in the proceedings before the court the question of payment of the tax or duty, the amount of which is covered by the bank guarantee, does not arise and, ordinarily, the court, at the conclusion of its order, directs that the bank guarantee shall stand discharged. Where the revenue succeeds the amount of the tax or duty becomes payable by the assessee to the revenue and it is open to the revenue to invoke the bank guarantee and demand payment thereon. The bank guarantee is security for the revenue, that in the event the revenue succeeds its dues will be recoverable, being backed by the guarantee of a bank. In the event, however unlikely, of the bank refusing, to honour its guarantee it would be necessary for the revenue or, where the bank guarantee is in favour of the principal administrative officer of the court, that officer to file a suit against the bank for the amount due upon the bank guarantee. The amount

of the disputed tax or duty that is secured by a bank guarantee cannot, therefore, be held to be paid to the revenue. There is no question of its refund and [Section 11-B](#) is not attracted."

9. Following the above said judgment, Hon'ble Division Bench of this Court in *M/s. Jraj Exports (Pr) Limited's case* (cited supra) held thus:

"4. From the facts narrated above, it is a case where the appellant's request for refund of the bank guarantee wrongly encashed was rejected on the ground that the claim is time barred. The case of the appellant has to be rejected on two grounds, firstly on facts. It is evident from the records that the bank guarantee was invoked and the amount was credited to the Customs Treasury on 1.4.2004. The first respondent produced the Export Obligation discharge certificate obtained from the Director General of Foreign Trade on 16.4.2004, based on which the appellant duly cancelled the bond and the Bank guarantee during the month of August 2004. When the department accepted the fulfillment of export obligation and the export obligation discharge certificate issued by the Director General of Foreign Trade, there is no need either to invoke the bank guarantee or retain the amount, which has already been credited in the department account on invocation of the bank guarantee and the technical plea that the refund of the amount cannot be granted as the claim made is barred by limitation under [Section 27\(1\)\(b\)](#) of the Customs Act also cannot be legally sustainable. The furnishing of bank guarantee in order to fulfill the export obligation cannot be regarded as "payment of duty" which the first respondent is liable to pay....."

From the above said judgments, it is crystal clear that the bank guarantee cannot be regarded as equivalent to payment of duty and it is only furnished to safeguard the interest of the revenue in case of non fulfillment of export obligation.

10. Therefore, by following the above said judgments, the impugned order is liable to be set aside and accordingly, the same is set aside. Consequently, the respondent is directed to refund the

amount of Rs.4,07,245/- within one week from the date of receipt of a copy of this order. It is made clear that as rightly contended by the learned counsel for the respondent, the petitioner is not entitled to claim the interest in the light of M/s.Areva T&D India Limited's case (cited supra).

11. In fine, the writ petition stands allowed to the extent mentioned above. No Costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

rkm

To

The Commissioner (Appeals),
Office of the Commissioner of Customs,
60, Rajaji Salai,
Custom House,
Chennai - 600 001.

+1cc to Mr.P.J.Rishikesh, Advocate, S.R.No.37249

+1cc to Mr.V.Sundareswaran, Advocate, S.R.No.37606

W.P.No.15669 of 2014

TS(CO)
CA(26/08/2015)

सत्यमेव जयते

WEB COPY