

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :08.06.2016

Coram

The Hon'ble Mr.Justice T.S.Sivagnanam

Writ Petition No.18071 of 2015

M/s. Amicus Communications,
rep. by its Managing Partner,
Mr.Rajeev K.Jayapal,
37/2711, 1st Floor, RV Buildings,
Deshabhimani Junction Kaloor,
Ernakulam, Kerala - 682 107.

...Petitioner

Vs.

1.The Commissioner of Customs (Appeals)
Customs House, No.60, Rajaji Salai,
Chennai - 600 001.

2.The Deputy Commissioner of Customs (Refunds)
Customs House, No.60, Rajaji Salai,
Chennai - 600 001.

.Respondents

Writ Petition filed under Article 226 of the Constitution of India, for issuance of Writ of Certiorari to call for records of the impugned order in Appeal C.Cus.II/No.240/2015, dated 27.02.2015, passed by the first respondent in C3-II/110/R/2015-Sea, in confirming the order in original No.31306/14, dated 17.11.2014, passed by the second respondent to refund the claim amount in case.

For Petitioner : Mr.Hari Radhakrishnan

For Respondents : Mr.K.Mohana Murali
Senior Panel Counsel

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O R D E R

Heard Mr.Hari Radhakrishnan, the learned counsel appearing for the petitioner, and Mr.K.Mohana Murali, Senior Panel Counsel appearing for respondents, and with consent on either side, the Writ Petition is taken up for final disposal.

2. I have heard the submissions on either side, and perused the materials placed on record, including the counter affidavit filed by respondents.

3. The issue, which falls for consideration in this Writ Petition is as to whether the petitioner is entitled to refund of the amount, claimed by them, in cash, as the reward scheme scrips has been withdrawn.

4. The petitioner filed Bills of Entry for import of the products, viz., Panasonic Facsimile Machines, and filed five Bills of Entry, and paid 4% additional duty of Rs.8,59,470.92/-, by availing the benefit of the Notification No.102 of 2007 Customs, dated 14.09.2007. The goods were cleared, and subsequently, on 13.01.2010, the petitioner filed five applications before the second respondent/Deputy Commissioner of Customs (Refunds), claiming refund of additional duty of customs paid by them for import of the said products under those five Bills of Entry. The claim for refund was in terms of Notification No.102 of 2007 Customs, dated 14.09.2007, as amended by Notification No.93 of 2008, dated 01.08.2008 read with Board's circulars No.6 of 2008-Customs, dated 28.04.2008 and 16 of 2008- Customs, dated 13.10.2008, and 18 of 2010-Customs, dated 08.07.2010.

5. It appears that the second respondent did not afford opportunity of personal hearing to the petitioner, and in fact, such a plea has been raised in this Writ Petition, and it is stated by the learned counsel appearing for the petitioner that, in the memorandum of grounds of appeal before the Commissioner of Customs (Appeals), the petitioner has raised such a plea of violation of principles of natural justice, inasmuch as an opportunity of personal hearing was not granted to them.

6. The second respondent, on scrutiny of the documents, held that the petitioner has availed the benefit of the notification No.41 of 2005, and in terms of para No.4 of the said notification, the petitioner shall be entitled to avail of the drawback, or CENVAT Credit of additional duty, leviable under Section 3 of the Customs Tariff Act 1975 as against the amount debited in the said certificate, and that, since the reward scheme scrips has been withdrawn, the crediting of the same in the scrips are not possible at this stage, and insofar as two of the refund applications out of five are concerned, which pertain to Bills of Entry, dated 11.12.2008 and 21.11.2008, the same were rejected as time barred.

7. Against the aforesaid order passed by the second respondent, the petitioner preferred an Appeal before the first respondent/Commissioner of Customs (Appeals). In the memorandum of grounds of Appeal, it is specifically contended by the petitioner that they had not availed the benefit of the notification No.C.N.41 of 2005, which allow the importers to avail the drawback or CENVAT Credit of additional duty, leviable under Section 3 of the Customs Tariff Act, as they are only the trader of the goods. Further, it was stated that the applications for refund in respect of three Bills of Entry, dated 06.03.2009, 11.02.2009 and 07.01.2009 are well within the time, and merely because, the Authority had taken their own time to take decision in the matter, and kept the applications pending for nearly four years, that cannot be a ground to reject the petitioner's case. Further, the petitioner relied on the circular issued by the Board, dated 29.03.2012, in Circular No.10 of 2012, and contended that the time limit for using the re-credited DEPB scrips/reward scheme scrips in case of 4 % CVD (SAD) is extended till 30.06.2012.

8. Therefore, it is the case of the petitioner that they having filed the applications for refund, as early as on 13.01.2010, the Authority ought to have taken decision in the matter in terms of circular issued by the Board, and passed orders on or before 30.06.2012. Further, the petitioner pointed out that, in another Circular No.18 of 2013, dated 29.04.2013, the Board directed all the Chief Commissioner of Customs to ensure that all pending applications for refund of 4% SAD paid through DEPB/reward scheme scrips are disposed of by 30.06.2013.

9. Therefore, it is the case of the petitioner that had the second respondent adhered to the Circulars, referred above, the petitioner would not have been put in a disadvantageous position. The first respondent, viz., the Commissioner of Appeals held that the petitioner cannot avail the benefit of two notifications, (viz., the notifications, bearing Nos.41 of 2005 and 102 of 2007) and therefore, the claim for refund has been rightly rejected. With regard to the decision of this Court passed in W.P.No.17012 of 2001, dated 03.08.2010, it was pointed out that the said case is distinguishable.

10. During the course of arguments, the learned counsel appearing for the petitioner submitted that though notification No.41 of 2005 contains a clause, stating that the importer shall be entitled to avail of the drawback, or CENVAT Credit of additional duty, leviable under Section 3 of the Customs Tariff Act as against the amount debited in the said certificate, the petitioner, as a matter of fact, has not availed any drawback or

CENVAT Credit, as they are not manufacturers, but only traders. That apart, the petitioner pointed out that the Board has issued another circular, vide Notification No.102 of 2007, dated 14.09.2007, wherein, certain conditions were imposed on the importers while issuing the invoice for sale of the such goods.

11. Therefore, it is the submission of the learned counsel appearing for the petitioner that the petitioner is not attempting to make any double benefit, and the petitioner is legally entitled to refund of the additional duty paid by them, and if the scheme had been scrapped, then, the petitioner is entitled for cash refund, and therefore, they have filed this Writ Petition, without availing the alternate remedy of filing Appeal before Customs, Excise Service Tax Appellate Tribunal (CESTAT). Though such arguments are advanced before this Court, it appears that these contentions were not raised before the first respondent/Commissioner of Appeals, nor, were placed before the second respondent, the original authority, since the Original Authority did not afford opportunity of hearing to the petitioner.

12. It is not in dispute that the refund applications, which were filed on 13.1.2010, were not taken for disposal for nearly four years, when the Board had issued circular, directing all the Chief Commissioner of Customs to ensure that all pending applications for refund of 4% SAD paid through DEPB/rewards scrips should be disposed of by 30.06.2013, and report should be sent by the Chief Commissioner of Customs to the Board by 04.07.2013.

13. Thus, in the light of the above facts, this Court is of the view that the petitioner is entitled to one more opportunity to place all contentions before the second respondent, viz., the Original Authority, with regard to three Bills of Entry, dated 06.03.2009, 11.02.2009 and 07.01.2009, for which, refund applications were filed on 13.01.2010. Insofar as other two applications in respect of Bills of Entry, dated 11.12.2008 and 21.11.2008 are concerned, which were rejected as time barred, the learned counsel appearing for the petitioner submits that the petitioner is not pressing the same. This submission is placed on record.

14. In the result, the Writ Petition is allowed, and the impugned orders are set aside, and the matter is remanded to the second respondent for fresh consideration, who shall afford an opportunity of personal hearing to the petitioner, hear the petitioner, and pass a reasoned orders on merits and in accordance with law, with regard to Refund Applications, pertaining to three Bills of Entry, dated 06.03.2009, 11.02.2009

and 07.01.2009, within a period of three months from the date of receipt of a copy of this order. No costs.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

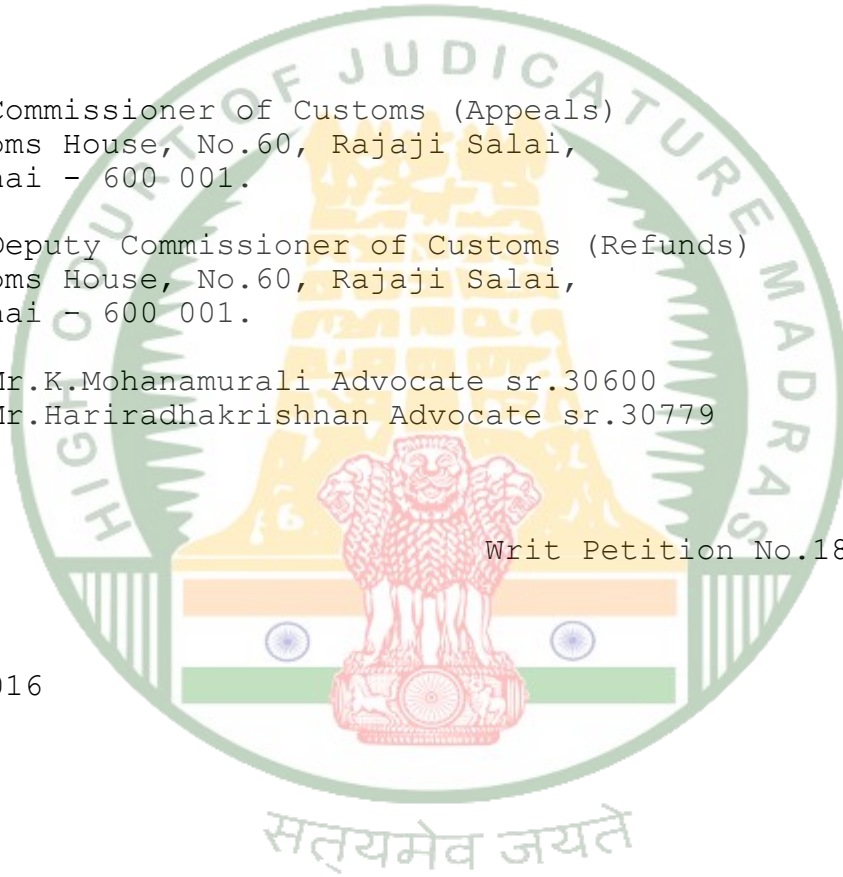
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+1 cc to Mr.K.Mohanamurali Advocate sr.30600

+1 cc to Mr.Hariradhakrishnan Advocate sr.30779

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