IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.11.2016

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No.296 of 2014

and M.P.No.1 of 2014

M/s.Raagam Exports,
A Partnership concern,
Ref.bu its partner P.Murugesan
S.F.No.252, Kangayam Main Road,
Nallur Post,
Tirupur - 641 606. ... Petitioner

vs.

The Assistant Commissioner of Customs,
Inland Container Depot,
Rakkiapalayam,
Tirupur - 641 654. ... Respondent

Petition filed under Article 226 of The Constitution of India praying to issue a writ of Mandamus, forbearing the respondent and Officers of the Customs and Central Excise Department from recovering alleged Government dues of Rs.20,69,545/- from the petitioner and to accept the Bank Realization Certificates (BRC) submitted vide letter dated 23.11.2006 and 27.07.2007 as proof of export and realization of export proceeds of shipment covered by shipping bills covered vide Order-in-Original No.77/2008/BRC dated 15.11.2008 of the respondent.

For Petitioner : Mr.R.Anish Kumar

For Respondent : Mr.Raj Kumar Jhabakh
Junior Panel Counsel

ORDER

Heard Mr.R.Anish Kumar, learned counsel appearing for the petitioner and Mr.Raj Kumar Jhabakh, learned Junior Panel Counsel appearing for the respondent. By consent, the writ petition is taken up for final disposal.

2.The petitioner in this writ petition seeks for an issuance of a writ of Mandamus to forbear the respondent from recovering a sum of Rs.20,69,545/- from the petitioner and to accept the Bank Realization Certificate (BRC) submitted by the petitioner vide letter dated 23.11.2006 and 27.07.2007 as proof of export and realization of export proceeds of the shipment covered by shipping bills covered vide Order-in-Original No.77/2008/BRC dated 15.11.2008.

3.The petitioner had availed the benefit of Duty Drawback Scheme for the exports made by them. The show cause notices dated 07.11.2006 and 15.06.2007 were issued calling upon the petitioner to state as to why the amount of Rs.30,69,545/- received by them as drawback be not recovered as the petitioner failed to produce evidences for having realized the sale proceeds in foreign exchange exports made within the stipulated period of six months in the form of BRC. There was also a proposal for imposition of penalty under Section 117 of the Customs Act, 1962 (hereinafter referred to as "the Act"). It appears that though show cause notices were received, the petitioner did not respond to the show cause notices resulting an order of recovery of drawback in Order-in-Original No.77/2008/BRC dated 15.11.2008. Challenging the said order, the petitioner preferred an appeal before the Commissioner (Appeals) and in the memorandum of grounds of appeal, the petitioner specifically contended that they had submitted all the original BRC to the Deputy Comm (Customs), ICD, Tirupur vide letters dated 23.11.2006 and 27.07.2007 and therefore the entire demand is not sustainable.

4.The learned counsel for the petitioner brought to the attention of this Court that the copies of those letters which were filed in the typed set of papers shows that there is an acknowledgment given by the Department. So far as the penalty is concerned, the Original Authority did not impose any penalty and the Department filed an appeal as against that and both the appeals were heard together by the Commissioner (Appeals). However, on consideration of the appeal, it was found that it was filed beyond the period of limitation as stipulated under Section 128 of the Act. Therefore, the Commissioner (Appeals) after referring to the various decisions came to the conclusion that the appeal filed by the petitioner is time barred and the appeal filed by the Department was allowed and a penalty of Rs.5,000/- was imposed on the petitioner which the petitioner has remitted. When proceedings were initiated for recovery of the amount of drawback availed by the petitioner, the petitioner submitted a representation 12.05.2011 and since the same was not considered, they have filed this writ petition. The learned counsel for the petitioner submitted that the original BRC having been submitted within the time permitted in terms of Sub-rule (4) of Rule 16A of the Customs and Central Excise Duties Drawback Rules, 1955, they are entitled for the drawback as evidence of BRC has been produced by the petitioner. The Department on the other hand would contend that the petitioner have not preferred any appeal against the Order-in-Original and the same had attained finality.

The net result being the order of the Original Authority having been confirmed, the petitioner is not entitled to the relief sought for.

5.The two issues arise for consideration are as to whether the dismissal of the petitioner's appeal as not maintainable by the Commissioner (Appeals) would disentitle the petitioner to the relief sought for. Secondly, whether the Department could refuse to consider the petitioner's case when admittedly the Original Authority did not examined as to whether the BRC were submitted within the time permitted. So far as the first question is concerned, on perusal of the order passed by the Commissioner (Appeals) it is seen that the appeal filed by the petitioner was rejected as time barred. If that is so, the findings rendered by the Commissioner (Appeals) in paragraph 8.3 commenting upon the non-submission/belated submission of the BRC should be held to be without jurisdiction since the Commissioner (Appeals) could not have rendered the findings on merits when the appeal itself is held to be not maintainable. Therefore, the findings rendered in paragraph 8.3 of the order passed by the Commissioner (Appeals) has to be necessarily eschewed. So the first question is decided in favour of the petitioner.

6.So far as the second question is concerned, since the petitioner failed to respond to the notices issued by the authorities on 07.11.2006 and 15.06.2007, the Original Authority proceeded exparte and concluded that the petitioner has not produced the BRC. Therefore, they have to pay a sum of Rs.20,69,545/- which they have availed as duty drawback. Thus, it is clear that at no point of time, the petitioner's case was adjudicated by the authority to ascertain as to whether the BRC produced by the petitioner along with their letters dated 23.11.2006 and 27.07.2007 to the Assistant Commissioner, ICD, Tirupur merits consideration. Therefore, merely because the Original Authority has decided exparte cannot operate as estoppel and the Department cannot refuse to consider the factual position, especially when the petitioner has prima facie established before this Court that they have produced the BRC before the concerned authority at Tirupur. Therefore, de hors the finding rendered by the Commissioner (Appeal) as well as the respondent, the petitioner's request for considering their drawback claim should be independently adjudicated by the authority.

7.Accordingly, the writ petition is disposed of by directing the respondent to adjudicate the correctness of the claim made by the petitioner pursuant to their letters dated 23.11.2006 and 27.07.2007 and after issuing show cause notice to the petitioner, the proceedings shall be finalized on merits and in accordance with law as expeditiously as possible preferably within a period of three months from the date of receipt of a copy of this order. While adjudicating the matter, the respondent shall be not be in any manner influenced by the findings rendered by the Commissioner (Appeals) which have been directed to be enhanced and the order passed by the respondent dated 15.11.2008 as that being an exparte proceedings. No costs. Consequently, connected miscellaneous petition is closed.

-sd/-
Assistant Registrar

/ TRUE COPY /

Sub-Assistant Registrar

cse

To

The Assistant Commissioner of Customs,
Inland Container Depot,
Rakkiapalayam,
Tirupur - 641 654.

W.P.No.296 of 2014
and
M.P.No.1 of 2014

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RD 26/12/2016