IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.11.2016

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No.25808 of 2016

M/s.Avenue Impex, a partnership firm
rep. by its Partner Shri R.Vimal Raj,
having its Office at "Kaveri" 9/30,
Nallan Street, First Floor, Saligramam,
Chennai-600 093. .. Petitioner

Versus

1.The Commissioner of Customs (Seaport),
Chennai-IV Commissionerate,
Custom House, No.60, Rajaji Salai,
Chennai-600 001.

2.The Assistant commissioner of Customs,
(Refunds), Custom House,
No.60, Rajaji Salai, Chennai-600 001.

3.The Assistant Commissioner of Customs,
(Bonds), Custom House,
No.60, Rajaji Salai,
Chennai-600 001. .. Respondents

Prayer: This Writ Petition is filed under Article 226 of the Constitution of India, seeking for a Writ of Mandamus to direct the respondents to remit the duty amount of Rs.3,38,353/- and cause refund of the same with interest at appropriate rates pursuant to Final Order No.879 of 2012, dated 09.08.2012, passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai and Order-in-Appeal No.C.Cus.No.670-671/2011, dated 23.09.2011 passed by the Commissioner of Customs (Appeals), Chennai.

For Petitioner : Mr.B.Satish Sundar

For Respondents : Mr.B.Rabu Manohar
Senior Panel Counsel

O R D E R

Heard Mr.B.Satish Sundar, learned Counsel appearing for the petitioner and Mr.B.Rabu Manohar, learned Senior Panel Counsel, appearing for the respondents.

2. The petitioner seeks for issuance of a Writ of Mandamus to direct the respondents to remit the duty amount of Rs.3,38,353/- and cause refund of the same with interest at appropriate rates pursuant to Final Order No.879 of 2012, dated 09.08.2012, passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai and Order-in-Appeal No.C.Cus.No.670-671/2011, dated 23.09.2011 passed by the Commissioner of Customs (Appeals), Chennai.

3. The facts which are necessary for the disposal of the Writ Petition are that the petitioner imported 1040 bags of white oats under Warehouse Bill of Entry, dated 11.09.2008, warehoused at the Public Bonded Warehouse at M/s.Universal Logistics, Chennai. Subsequently, the petitioner filed an Ex-Bond Bill of Entry, dated 07.10.2008 for clearance of the said goods. After assessment of duty of Rs.3,38,353/- and out of charge was given on 07.10.2008 by the Superintendent of Customs, Bond Section, Chennai. However, warehouse caught fire on 09.10.2008 and the petitioner, vide letter, dated 28.01.2009 informed that the goods were completely destroyed and requested the Customs Authorities to remit the duty under Section 23(1) of the Customs Act, 1962 and grant consequential refund of duty already paid. Along with the Application, the petitioner submitted the following documents:-

1. Triplicate copy of Bill of Entry
2. Custom Duty Challan
3. Commercial Invoice
4. Packing List
5. Certificate of Austrian origin
6. Purchase order
7. Custom attested ?
8. Release gate pass
9. D.D.Challan (Photo copy)
10. Statement of Universal Logistics
11. Auditor Certification
12. Authorization letter
13. Warehouse handling charges bill (photo copy)
14. Warehouse storage charged bill (photo copy)
15. F.I.R. (photo copy)
16. Fire Brigade (photo copy)

Since the refund claim was not processed, the petitioner filed Writ Petition in W.P.No.14462 of 2009, wherein, a direction was issued on 12.08.2009 to dispose of the Application within a period of eight weeks. Pursuant to such direction, personal hearing was granted and the counsel for the petitioner appeared and an Order-in-Original was passed by the Deputy Commissioner of Customs (Revision), dated 15.10.2009, rejecting the petitioner's request. The reason for rejection is that after the out of charge order, the custody of the goods are with importer and the warehouse keeper and the Customs have no role after out of charge is given by the Superintendent of Customs. Thus, on the technical ground, the refund claim was rejected, but the Customs Authority did not disbelieve the fact that the goods were totally destroyed, while at the warehouse.

4. The petitioner filed an Appeal to the Commissioner of Customs (Appeals) against the order rejecting the refund claim and the Commissioner of Customs (Appeals), by an order dated 23.09.2011, allowed the Appeal. At this juncture, it would be relevant to quote paragraph No.7 of the order, wherein, the Commissioner of Appeals has rendered a finding as to how the petitioner is entitled for remission:-

> " I find in the instant case the goods had been destroyed in fire before clearance for home consumption though after the proper officer passed an order for clearance for home consumption. Further, Section 23(1) ibid clearly states that "SECTION 23. Remission of duty on lost, destroyed or abandoned goods. - (1) [Without prejudice to the provisions of Section 13, where it is shown] to the satisfaction of the [Assistant Commissioner of Customs or Deputy Commissioner of Customs] that any imported goods have been lost [(otherwise than as a result of pilferage)] or destroyed, at any time before clearance for home consumption, the [Assistant Commissioner of Customs or Deputy Commissioner of Customs] shall remit the duty on such goods". In the instant case nowhere the Department contended that the goods were not destroyed or such destruction was not to the satisfaction of Assistant Commissioner of Customs or Deputy Commissioner of Customs. Further, it states that Assistant Commissioner of Customs or Deputy Commissioner of Customs shall remit the duty on such goods without any conditions or procedural aspects attached to it. Hence, I find force in the argument of the appellant that in such circumstances as above the lower authority is duty bound to remit the duty suo moto."

From a reading of the above paragraph, it is seen that the Commissioner of Appeals has recorded a specific finding that the Department never disputed the fact that the goods were destroyed. Therefore, the Commissioner of Appeals, directed the Assistant Commissioner of Customs / Deputy Commissioner of Customs to remit the duty on such goods without any conditions or procedural aspects attached to it. However, in the penultimate paragraph of the order, the Commissioner of Appeals directed the petitioner to produce all documents required for remission of duty before the lower authority and the lower authority was directed to act in accordance with law.

5. The Department was not inclined to accept the order passed by the Commissioner of Appeals and filed an Appeal before the CESTAT. The CESTAT, vide order dated 08.08.2012, dismissed the Appeal. The petitioner, on obtaining the copy of the order passed by the CESTAT, submitted a representation on 18.09.2012, followed by another representation, dated 01.12.2012, requesting to remit the duty as held by the Commissioner of Appeals and confirmed by the CESTAT. These representations did not evoke any response. Therefore, another representation was given on 13.06.204. Even in that representation, no action was taken. Therefore, the petitioner approached the Authorities under the Right to Information Act, for which, the petitioner received a reply on 05.09.2015 stating that the original file was mixed up with other files during the shifting of the Refunds Section and the order passed by the Commissioner of Appeals is being pursued and necessary order will be passed and communicated to the petitioner in 20 days. Not satisfied with this, the petitioner preferred an Appeal to the Appellate Authority under the Right to Information Act, who, by an order dated 28.09.2015, held that already Information Officer has given information. Thereafter, the petitioner submitted another representation on 21.01.2016 and also executed a perpetual indemnity bond. Thereafter, the second respondent, by Communication, dated 14.06.2016, called upon the petitioner to state as to whether they have submitted required documents. It is seen from the reply dated, 21.06.2016 apart from other things, the petitioner claimed interest for delayed payment. With these facts, the petitioner is before this Court.

6. It is a classical case where the Department has failed to take any action in spite of the remission claim having attained finality, pursuant to order of the CESTAT, dated 08.08.2012. The delay from 2012 to 2016 remains unexplained. None of the representation given by the petitioner evoked any response. The reply given under the RTI Act was also not an effective reply. Ultimately, the second respondent sought information from the petitioner as to whether they have produced all documents for the refund claim. Unfortunately, the second respondent has not

referred to the earlier orders, more particularly, the Order-in-Original, dated 15.10.2009, wherein, the Deputy Commissioner of Customs (Refunds), has clearly set out as to the documents (16 numbers) furnished by the petitioner. That apart, the Commissioner of Appeals, while allowing the Appeal, by the order dated 23.09.2011, has clearly held that the Department did not dispute the destruction of the goods and that the contention of the petitioner and the lower Authorities are bound to remit the duty suo-motu. This finding was not reversed or set-aside by the CESTAT in the Appeal filed by the Department. Therefore, once again to insist upon furnishing of documents by the petitioner amounts to harassment. It appears that the Communication, dated 14.06.2016 has been sent by the third respondent to the petitioner because of the fact that they do not have any papers or files in their Office. In fact, this has been candidly admitted by them, while giving a reply under the Right to Information Act, dated 05.09.2015.

7. Thus, taking note of the all above mentioned facts, which have culled out from the orders passed by the Commissioner of Appeals as well as CESTAT in favour of the petitioner, which clearly shows that there cannot be any dispute for the petitioner being entitled for remission of customs duty paid. Therefore, this Court is inclined to issue a positive direction to the respondents to grant remission of the duty and effect refund to the petitioner. The interest of the Department / Revenue has been sufficiently safeguarded as the petitioner has already executed a perpetual indemnity bond which shall be kept alive.

8. However, there is one more prayer sought for by the petitioner with regard to the payment of interest. As pointed out earlier, there is no plausible explanation on the side of the Department as to why refund was not effected from August 2012 till now. Presumably, it is because of missing of records, which has been admitted by the Department. However, for that reason, the petitioner cannot be penalized. However, the claim for interest cannot be straight away ordered by this Court by way of issuing a Writ of Mandamus as it requires adjudication and fixing of responsibility, apart from determining the rate of interest and the date from which, interest is payable and upto what date, if found payable.

9. In the light of the above, the Writ Petition is partly allowed and the respondents are directed to grant remission of duty and accordingly, remit the duty of Rs.3,38,353/- within a period of eight weeks from the date of receipt of a copy of this order and effect refund to the petitioner. So far as the claim for interest made by the petitioner, the second respondent is directed to issue a show-cause notice to the petitioner and adjudicate the matter by treating the petitioner's

representation dated 21.01.2016 as a claim for interest. The adjudication shall be completed within a period of three months from the date of receipt of a copy of this order. No costs.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

To

1.The Commissioner of Customs (Seaport),
Chennai-IV Commissionerate,
Custom House, No.60, Rajaji Salai,
Chennai-600 001.

2.The Assistant commissioner of Customs,
(Refunds), Custom House,
No.60, Rajaji Salai, Chennai-600 001.

3.The Assistant Commissioner of Customs,
(Bonds), Custom House,
No.60, Rajaji Salai,
Chennai-600 001.

+1cc to Mr.B.Satish Sundar, Advocate Sr.62100

W.P.No.25808 of 2016

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srg 30/11/2016