IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.12.2016

CORAM:

THE HONOURABLE MR. JUSTICE HULUVADI G. RAMESH
AND
THE HONOURABLE DR. JUSTICE ANITA SUMANTH

Writ Appeal No.64 of 2016

M/s. Vamadev Exports
Represented by its Partner
Mr.V.Manikandan
531- Kamaraj Road
Tirupur – 641 604 .. Appellant

Vs.

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

Writ Appeal under Clause 15 of the Letters Patent against the order dated 22-07-2015 in W.P.No.15669 of 2014 Writ Peootition 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 appellant :: Mr. Vignesh Venkat

For respondent :: Mr. V. Sundareswaran,
Standing Counsel

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JUDGMENT

(Dr. ANITA SUMANTH,J.)

This writ appeal is filed at the instance of the assessee challenging an order of the learned Single Judge dated 22.07.2015, in W.P.No.15669 of 2014.

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2. The brief facts of the case are as follows:

The assessee is an exporter, claiming benefit in terms of the Zero duty Concessional Scheme notified by the Government of India. A license dated 9.3.1997 was issued by the Director General of Foreign Trade (DGFT), the Licensing Authority under the Scheme, as per which the assessee had to undertake a specified export obligation being USD 7,39,969 as a pre-condition to avail of the benefit under the scheme. A Bank Guarantee bearing Number 97/44 of the duty benefit of an amount of Rs.7,57,105/- was furnished to the customs authorities for the period from 01.121997 to 01.12.2002.

(ii) In the intervening period, the Department issued a letter dated 26.12.2000 to the Bankers stating that the petitioner had failed to fulfil pro-rata export obligation as per the relevant Customs Notification. An amount of Rs.4,07,245/-(Rupees Four lakhs Seven thousand two hundred and forty five only) was thus recovered towards duty and interest from out of the total amount of Rs.7,58,000/-(Rupees Seven lakhs fifty eight thousand only). The export obligation was duly discharged on 26.05.2003, and communicated to the Commissioner of Customs by the Assessee. Consequent upon the fulfilment of the obligation, the petitioner requested, vide letter dated 28.5.2003 that the bank guarantee be discharged. However, it was only on 22.03.2007 that the Assistant Commissioner of Customs intimated the Manager, M/s. Indusind Bank Limited, that the export obligation had been duly discharged and that the bank guarantee may be treated as cancelled. Thereafter, the assessee sought refund of the amount of Rs.4,07,245/-(Rupees Four lakhs Seven thousand two hundred and forty five only) realised from the Bank Guarantee.

(iii) On 20.08.2007, it appears that due to non-representation of the assessee, the Deputy Commissioner of Customs rejected the Appellant's request for refund, holding that the application for refund was filed beyond the period of six months, as stipulated in terms of Section 27 of the Customs Act. An appeal was duly filed against the aforesaid order before the Commissioner (Appeals). During the pendency of the appeal, it was brought to the notice of the appellate authority that there had been a change of address of the assessee and that notice of hearing may be issued to the new address.

(iv) It is also relevant to note that in the interregnum, the issue as to whether a Bank Guarantee may be held as security in lieu of duty, even after enforcing and appropriating the same partly towards duty, was settled in favour of the Assessee by this Court in The Commissioner of Customs Vs. M/s. Jraj Exports (P) Ltd., (C.M.A.No.1541 of 2007 dated 21-07-2007).

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(v) The appeal filed by the assessee challenging order dated 20.08.2007 came to be dismissed vide order dated 04.11.2009. The assessee was set ex-parte yet again in the matter notwithstanding the position that the change in its address was brought to the notice of the first respondent as early as on 12.12.2007, under acknowledgement. This request appears to have been ignored by the appellate authority insofar as the order dated 4.11.2009 indicates service upon the old address of the assessee.

(vi) In the aforesaid circumstances, the assessee was awaiting the appellate order and since it was not forthcoming for a long time, filed an application under the Right to Information Act, 2005, in May 2014 seeking information about the status of the appeal. Pursuant thereto, the order of the Appellate Authority dated 04.11.2009 was made available to the appellant, on 21.05.2014. The order, while setting the assessee ex-parte, merely confirms the order of the Assessing Authority on merits holding that the claim had been filed beyond the expiry of a period of six months' stipulated in terms of Section 27 of the Customs Act, 1962.

3. It is strange that the Appellate Authority does not take into consideration the order of this Court in the case of M/s. Jraj Exports (P) Ltd., (cited supra), when the same was passed as early in July 2007 itself and was very much within the domain of knowledge of the Customs Department. In fact, the decision in the case of Jraj Exports was noticed and applied on 14.01.2008 by an assessing Officer, while processing the refund application of the same assessee, in another transaction of export stating as follows:

> 'The refund application was submitted on 29.3.2007 and the B/Gs and Bond were cancelled on 3.3.2007. Since it is a case of refund of enforced B/G amount, the conditions of Section 27 of Customs Act, 1962 is not applicable. The Hon'ble High Court of Madras in the case of Commissioner of Customs (Exports), Chennai Vs. M/s. Jraj Export P Ltd [Order dated 21.7.2007 in C.M.A.No.1541 of 2007] has held that the Bank Guarantee furnished can not be considered as duty paid and it is only security to safeguard the interest of revenue. This order of the Hon'ble High Court has been accepted by the department. As such this refund claim merits sanction.'

4. The rationale of this Court in the decision of M/s.Jraj Export P Ltd(cited supra) has been consistently followed in subsequent matters as well including The Commissioner of

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Customs Vs. M/s. Aristo Spinners Ltd.,(C.M.A.No.213 of 2008, dated 25th January 2008).

5. Insofar as the order of the Commissioner (Appeals) was received only on 21-05-2014, a writ petition was immediately filed by the assessee before this Court seeking refund along with interest. The writ petition was partly allowed by the learned Single Judge holding that in view of the settled legal position, the assessee would be entitled for refund of bank guarantee. The claim of interest was rejected thus:-

> '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(Commissioner of Customs and another Vs. M/s. Areva T & D India Limited"(passed in W.A.No.299 of 2013 dated 21-04-2014).'

It is against this conclusion that the assessee is before us in this appeal.

6. Heard the submissions of the learned counsel for the appellant and the learned counsel appearing for the Revenue.

7. The Revenue would rely on the decision of the Division Bench of this Court in the case of The Commissioner of Customs Vs. M/s. Areva T & D India Limited (W.A.No.299 of 2013 dated 21-04-2014) whereas the petitioner would place reliance on a judgment of the Supreme Court in the matter of Sandvik Asia Ltd Vs. CIT.

8. A Full Bench of the Supreme Court in Commissioner of Income Tax, Gujarat Vs. Gujarat Fluoro Chemicals (2014 (1) SCC 126(FB)), explaining the judgment of the Division Bench in Sandvik Asia Ltd., Vs. Commissioner of Income Tax(2006 (2) SCC 508) states as follows:

> '5. In our considered view, the aforesaid judgment (in re. Sandvik Asia Ltd.,) has been misquoted and misinterpreted by the assessees and also by the Revenue. They are of the view that in Sandvik case (supra) this Court had directed the Revenue to pay interest on the statutory interest in case of delay in the payment. In other words, the interpretation placed is that the Revenue is obliged to pay an interest on interest in the event of its failure to refund the interest payable within the statutory period.
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> 6. As we have already noticed, in Sandvik case (supra) this Court was considering the issue whether

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an assessee who is made to wait for refund of interest for decades be compensated for the great prejudice caused to it due to the delay in its payment after the lapse of statutory period. In the facts of that case, this Court had come to the conclusion that there was an inordinate delay on the part of the Revenue in refunding certain amount which included the statutory interest and therefore, directed the Revenue to pay compensation for the same not an interest on interest.

7. Further it is brought to our notice that the Legislature by the Act No. 4 of 1988 (w.e.f. 01.04.1989) has inserted Section 244A to the Act which provides for interest on refunds under various contingencies. We clarify that it is only that interest provided for under the statute which may be claimed by an assessee from the Revenue and no other interest on such statutory interest.'

The Supreme Court has made out a distinction between a claim of interest and the grant of compensation for inordinate delay in issuance of refund, concluding that while no interest is payable on interest, a claim of compensation for undue delay in effecting refund may be considered, if found justified on the facts and circumstances of a particular case.

9. We are of the view that the claim preferred by the assessee is really not one of the interest, but, in the nature of compensation for the inordinate delay in the grant of refund. We set out the sequence of events leading to and triggering the claim for compensation.

Date	Description of Events
26-05-2003	Issue of Export Obligation Discharge Certificate
28-05-2003	First request from the appellant to the Department for release of Bank Guarantee
22-03-2007	Discharge of Bank Guarantee (The delay of nearly four years from the date of request by the appellant to the actual discharge of Bank Guarantee by the Department is unexplained.)
10.4.2007	Application for refund filed by the petitioner

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20.08.2007	Exparte rejection of refund application
09.10.2007	Appeal filed challenging order of rejection before the Commissioner (Appeals)
12.12.2007	Intimation regarding change of address to the Respondent.
14.01.2008	Grant of refund by the Customs Authority in an identical transaction of the same appellant
04.11.2009	Exparte rejection of appeal by the Respondent confirming the non-grant of refund

In the aforesaid circumstances, the question that arises is whether there is inordinate delay in grant of Bank Guarantee justifying the grant of compensation.

10. The sequence of dates and events detailed above would show that the assessee had made a request for release of Bank Guarantee as early as in 2003 after obtaining the Export Obligation Discharge Certificate, confirming the position that the export obligation has been duly complied with. However, it is only on 22.3.2007 that the Bank Guarantee was discharged by the Department, for reasons best known to them. The claim for refund was rejected by both the original authority as well as appellate authorities on the ground that the application was barred by time. This was in clear contravention of the law laid down by this Court to the contrary in the case of Jraj Exports (P) Ltd., a decision that the Department was well aware of and has accepted. No other explanation is offered by the Revenue as to what were the circumstances that occasioned the delay of more than eight years. The Appellant has been unfairly deprived of the amount of Rs.4,07,245/- from 2007 onwards till the order of the learned Single Judge on 22.7.2015 directing the grant of refund. The Appellant has been constrained to avail of various remedies for a relief that it was entitled to at the threshold as can be seen from the acceptance of another claim on 14.1.2008 by the Revenue under identical circumstances. This has certainly caused prejudice to it deserving the grant of compensation.

11. In the above circumstances, we believe that the delay in granting refund was inordinate, unjustified and wholly unacceptable. The respondent is directed to pay a sum of Rs.2,00,000/-(Rupees Two lakhs only) as compensation for the inordinate delay in grant of refund to the appellant, within a period of three months from the date of receipt of a copy of this order.

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12. The writ appeal is allowed to the extent indicated above. No costs.

Sd/-

Asst.Registrar

/true copy/

Sub Asst. Registrar

To

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

+2cc to M/S. Vignesh Venkat, Advocate Sr. 73599
+1cc to M/S. Sundareswaran, Advocate Sr. 74503

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