

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.11.2017

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P. Nos.4473 to 4478 of 2017

and

W.M.P. Nos.4710 to 4714 of 2017

M/s.Enterprise International Ltd.,

Represented by its Director

Mr.Aditya Sarda

CK 23/25, Rani Kuan Chowk

Varanasi - 221 001.

... Petitioner in all WPs

Vs.

1.The Commissioner of Customs (Appeals-II)

Customs House, No.60, Rajaji Salai

Chennai - 600 001.

2.The Assistant Commissioner of Customs (Group-7H)

Customs House, No.60, Rajaji Salai

Chennai - 600 001.

3.The Assistant Commissioner of Customs (Refunds)

Customs House, No.60, Rajaji Salai

Chennai - 600 001.

... Respondents in all WPs

Prayer in W.P.No.4473/2017: Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, calling for the records of the first respondent culminating in the Order in Appeal C.Cus.II Nos. 825/2016 dated 31.08.2016 issued from Appeal File No.C3-II/662/O/2016-Sea.

Prayer in W.P.No.4474/2017: Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, calling for the records of the first respondent culminating in the Order in Appeal C.Cus.II Nos. 826/2016 dated 31.08.2016 issued from Appeal File No.C3-II/663/O/2016-Sea.

Prayer in W.P.No.4475/2017: Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, calling for the records of the first respondent culminating in the Order in Appeal C.Cus.II Nos. 827/2016 dated 31.08.2016 issued from Appeal File No.C3-II/664/O/2016-Sea.

Prayer in W.P.No.4476/2017: Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, calling for the records of the first respondent culminating in the Order in Appeal C.Cus.II Nos. 828/2016 dated 31.08.2016 issued from Appeal File No.C3-II/665/O/2016-Sea.

Prayer in W.P.No.4477/2017: Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, calling for the records of the first respondent culminating in the Order in Appeal C.Cus.II Nos. 829/2016 dated 31.08.2016 issued from Appeal File No.C3-II/666/O/2016-Sea.

Prayer in W.P.No.4478/2017: Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, calling for the records of the first respondent culminating in the Order in Appeal C.Cus.II Nos. 830/2016 dated 31.08.2016 issued from Appeal File No.C3-II/667/O/2016-Sea.

For Petitioner
[in all WPs] .. Mr.S.Murugappan

For Respondents
[in all WPs] .. Mr.A.P.Srinivas
Standing Panel Counsel

C O M M O N O R D E R

Heard Mr.S.Murugappan, learned counsel for the petitioner and Mr.A.P.Srinivas, learned Senior Panel Counsel for the respondents. With consent of the learned counsel for both sides, the writ petition itself is taken up for final disposal.

2.The petitioner is an importer of textile goods and at the time of import, they claimed exemption from payment of additional duty in terms of Section 3 of the Customs Tariff Act, 1975, by relying upon notification No.30/2004-CE dated 09.07.2004. However, this claim for exemption was not accepted by the Customs Authority and hence, the petitioner paid additional duties and then filed appeals before the first respondent. The said appeals have been dismissed as not maintainable on the ground that the assessments were self-assessment and the petitioner has to only file refund claims before the third respondent.

3.Since the petitioner's case is that they have filed appeals before the first respondent, it may not be necessary for this Court to make a thorough factual exercise to examine the correctness of the order, in the light of the decision of the Hon'ble Supreme Court in the case of Priya Blue Industries Ltd.

Vs. Commissioner of Customs (Preventive) reported in 2004 (172) E.L.T. 145 (S.C.).

4.The said decision is to the effect that a refund claim contrary to the assessment order is not maintainable, without the order of assessment having been modified in the appeal or reviewed under Section 28 of the Customs Act, 1962 [in short "the Act"]. The officer, who assesses the Bills of Entry and the officer, who considers the refund claim being in the same cadre, it was pointed out that the officer considering the refund application cannot sit in judgment over the correctness of the assessment order.

5.It is important to note that the appeals were filed and it is not disputed by the Revenue that the appeals were filed by the petitioner before the first respondent during the year 2012.

6.Assuming the decision in the case of M/s.Priya Blue Industries Ltd. Vs. Commissioner of Customs (Preventive) was not available at the relevant time, the petitioner would have obviously filed an application for refund before the third respondent and if that had been done, then such applications would be well within the time prescribed under Section 27 of the Act.

7.It is not known as to why the first respondent did not dispose of the appeal petitions immediately, but kept the matters pending for four long years and passed the impugned order referring to a decision of the CESTAT, Mumbai, in the case of M/s.Suryalaxmi Cotton Mills Ltd. Vs. CCE, Nagpur reported in 2014-TIOL-3015-CESTAT-Mum. By referring to the said decision, the first respondent has stated in the impugned order that under Section 128 of the Act, an appeal can be filed before this Forum by any person who is aggrieved by any decision or order passed under the Act by an officer in the rank lower than the Commissioner of Customs and in the petitioner's case, as there is no decision or order by the assessment group contrary to the self-assessment made by the appellant themselves, the appeals are not maintainable.

8.If a Court or Quasi Judicial authority comes to a conclusion that a petition or an appeal is not maintainable, then the concerned Court or Quasi Judicial Authority has to safeguard the interest of the applicant by not foreclosing the remedy available to the applicant.

9.The situation would have been different, if the Commissioner had declined to entertain the appeal in the year 2012 itself for the reason now assigned in the impugned order. This could have very well been done, since the Commissioner is referring to the decision of M/s.Suryalaxmi Cotton Mills Ltd.

Vs. CCE, Nagpur, prior to which the amended Section 27 came into force, i.e., on 08.04.2011. Thus, the Commissioner having entertained the appeals and kept the appeals pending for four long years, cannot dismiss by holding that the appeals are not maintainable, but should have protected the petitioner by issuing appropriate consequential direction. This is more so because a party who comes to Court or before Quasi-Judicial Authority cannot be left without a remedy. It would be an unacceptable proposition to state that the impugned order should be confirmed as it is and no liberty and further direction should be issued in favour of the petitioner and it is open to the petitioner to file an application for refund before the third respondent. If such a plea is to be entertained and the petitioner is left to fend themselves by approaching the third respondent, the result of such application can be very well be perceived even at this juncture, as the third respondent would reject the application for refund as being time barred under Section 27 of the Act.

10. Therefore, this is a fit case where this Court should issue appropriate direction so that the petitioner is not left without any remedy. It is made clear this direction is proposed to be issued considering the peculiar facts and circumstances of the case and more particularly, when the appellate authority kept the appeals pending for four long years. Therefore, while confirming the order passed by the first respondent, there will be a direction to the petitioner to file applications for refund before the third respondent within a period of 30 days from the date of receipt of a copy of this order and if such applications are filed, the third respondent shall process the applications on merits and in accordance with law and not to reject the same on the ground of limitation, as this Court has observed that had the petitioner filed the refund applications instead of filing the appeals before the first respondent in the year 2012, those applications would have been well within the time.

11. Therefore, for all purposes, though the refund applications are being directed to be presented within a period of 30 days from the date of receipt of a copy of this Order, the notional date of such application shall be the date on which the petitioner preferred the appeals before the first respondent against the self-assessment made on the Bills of Entry filed by the petitioner.

12. The third respondent shall afford an opportunity of personal hearing to the authorised representative of the petitioner and process the refund applications in accordance with law.

13. It is noteworthy to mention that the Bills of Entry filed by the petitioner are dated 04.10.2012, 01.11.2012, 29.10.2012,

30.10.2012, 04.10.2012, and 29.10.2012 and the appeals were filed before the first respondent on 19.11.2012, 22.11.2012 and 26.12.2012. Thus, if these dates are taken as presentive dates for filing the refund claim, obviously the refund applications are well within limitation. In other words, the period during which the appeals were pending before the first respondent has to be necessarily excluded, because the first respondent has held the appeals to be not maintainable and in other words, the petitioner was prosecuting the claim before a wrong forum. This is all the more reason to issue appropriate directions to enable the petitioner to file a refund claim, which is required to be processed in accordance with law.

14. With the above direction, the writ petitions are disposed of. No costs. Consequently, connected miscellaneous petitions are closed.

-s/d-
Deputy Registrar

True Copy

Sub-Assistant Registrar

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To

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

+1 Cc to Mr., S. Murugappan, advocate sr 79038.
+1 CC to Mr. A. P. Srinivas, Advocate sr 79656.

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SP(22/11/2017)