

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date of Reserving the Order	Date of Pronouncing the Order
05.09.2017	06.10.2017

Coram:

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

W.P.Nos. 22770 & 22771 of 2017

and

W.M.P.No.23898 of 2017

M/s. Huawei Telecommunications (India)
Company Private Limited,
Plot No. K-24,
SIPCOT Industrial Park,
Chennai - 602 105
Represented by its Authorized Signatory
Mr. Gaurav Arora

...Petitioner in both the W.Ps

Versus

1. The Principal Commissioner of Customs,
Chennai VII, Commissionerate (Air Cargo)
New Customs House, Meenambakkam,
Chennai - 600 027.
2. The Development Commissioner,
Office of the Development Commissioner,
MEPZ - Special Economic Zone,
NH 45, Administrative Office Building,
Tambaram, Chennai - 600 045, India.
3. The Specified Officer,
Flextronics SEZ Unit,
Plot No.3, SIPCOT Industrial Park,
Sandavellur Village,
Sriperumbudur Taluk,
Kanchipuram District - 602 106.
4. The Authorized Officer,
Flextronics SEZ Unit,
Plot No.3, SIPCOT Industrial Park,
Sandavellur village,
Sriperumbudur Taluk,
Kanchipuram District - 602 106.

...Respondents in both the W.Ps

Prayer in W.P.No.22770 of 2017

Writ Petition filed under 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus calling for the records of the Impugned show cause notice bearing number F.No.S.MISC 01/2017 - (SEZ-ACC) dated 15.07.2017 issued by the first respondent and quash the same insofar as it seeks to levy Anti-Dumping Duty (ADD) for the period from 01.09.2015 to 07.12.2015, and to forbear to the first respondent from charging any ADD in terms of Notification No.125/2010 - ADD for the period from 08.12.2014 to 26.04.2016 post the lapse of such Notification with effect from 07.12.2014.

Prayer in W.P.No.22771 of 2017:

Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Mandamus directing the respondents 2 to 4 to forthwith grant refund of amounts representing ADD collected in terms of Notification No.125/2010 - ADD and also return the bank guarantees and personal bonds, collected during the period from 08.12.2014 to 26.04.2016 - post lapse of Notification No.125/2010 - ADD with effect from 07.12.2014.

For Petitioner

in both the W.Ps :Mr. Sathish Parasaran,
Senior Counsel for
Mr. Karthik Sundaram

For Respondent-1

in both the W.Ps :Mr. A. P. Srinivas,
Senior Panel Counsel

For Respondents 2-4 Mr. G. Rajagopalan,
Addl. Solicitor General

C O M M O N O R D E R

Since the parties in both the Writ Petitions are one and the same, and the relief sought for are interconnected, both the Writ Petitions were heard together and disposed of by this common order.

2. The petitioner, in both the Writ Petitions is M/s. Huawei Telecommunications (India) Company Private Limited, primarily engaged in the manufacture and sale of telecom related equipments in India to various telecom service providers in India. The petitioner's Factory is situate in a Special Economic Zone, over which, the respondents 2 to 4 have control/jurisdiction.

3. In W.P.No.22770 of 2017, the petitioner seeks for issuance of a writ of certiorarified mandamus to quash the show

cause notice, dated 15.07.2017 issued by the first respondent, the Principal Commissioner of Customs, Chennai VII, Commissioner (Air Cargo), insofar as it proposes to levy Anti-Dumping Duty (hereinafter referred as "ADD") for the period from 01.09.2015 to 07.12.2015 and to forbear the first respondent from charging any ADD for the period from 08.12.2014 to 26.04.2016, i.e., the period after the lapse of the Notification No.125/2010 - ADD with effect from 07.12.2014.

4. In W.P.No.22771 of 2017, the petitioner seeks for a direction upon the respondents 2 to 4 to grant refund of amounts, representing ADD, collected in terms of the Notification No.125/2010 - ADD, and to return the Bank Guarantees and personal bonds collected during the period from 08.12.2014 to 26.04.2016 post lapse of Notification No.125/2010 ADD with effect from 07.12.2014.

5. When the Writ Petitions were heard for admission on 24.08.2017, Mr. Sathish Parasaran, the learned Senior Counsel for the petitioner submitted that, no ADD can be levied on the petitioner, in the light of the decision of the Honourable Supreme Court, in the case of (Union of India & Others Vs. Kumho Petrochemicals Private Limited) reported in [(2017) 351 ELT 65 (SC)]. Mr. A. P. Srinivas, the learned Senior Panel Counsel for the Revenue accepted notice on behalf of the first respondent and was directed to get instructions on the contention put forth by the learned Senior Counsel for the petitioner, i.e., with regard to the applicability of the decision in the case of Kumho Petrochemicals Pvt. Ltd. (supra) to the petitioner's case. The understanding was, the Court will not embark upon the fact finding exercise, as the challenge is to the show cause notice, and it will test the merits of the case based on the decision in the case of Kumho Petrochemicals Pvt. Ltd. (supra).

6. A short prelude of what happened in the past, may be necessary to be referred, before I venture into the present controversy, as the same would lend support for resolving the issue involved herein.

7. The petitioner had earlier filed two Writ Petitions, viz., W.P.No.27873 of 2014 and W.P.No.33904 of 2014. In W.P.No.27873 of 2014, they sought for issuance of a writ of mandamus to forbear the respondents from charging ADD on the clearances by the petitioner of Populated Circuit Board Assemblies (PCBAs) from the Flextronics Special Economic Zone (FSEZ Unit) into Domestic Tariff Area (DTA Unit) of the petitioner. In W.P.No.33904 of 2014, the petitioner sought for issuance of writ of certiorari mandamus to quash the show cause notice issued by the first respondent/Development Commissioner, MEPZ-Special Economic Zone, Chennai, dated 01.12.2014, and to forbear the respondents from charging ADD on

clearances of PCBAs from the petitioner Unit. An Interim Order was granted by this Court, in W.P.No.27873 of 2014, on 17.11.2014, by directing the petitioner to remit 30% of ADD on the Chinese components and to furnish the Bank Guarantee for 20% for the clearances into DTA Unit of the components imported from China and for the remaining 50%, the petitioner was directed to furnish a bond to the satisfaction of the second respondent/Authorized Officer, FSEZ Unit. The conditional Stay Order was complied with by the petitioner, and the Writ Petitions were finally disposed of, by a common order on 02.12.2016.

8. The sum and substance of the direction issued in W.P.No.27873 of 2014 and W.P.No.33904 of 2014 was that, the Development Commissioner shall transfer all the files related to the petitioner to the Jurisdictional Customs Officer, who shall take up the case for adjudication as a regular case based on merits and in accordance with law. There were other directions, which were incidental and ancillary to the directions, transferring the files to the Customs Officer for adjudication. After the Writ Petitions were disposed of, the petitioner is stated to have given a reply to the Jurisdictional Customs Officer, presently, the first respondent, and the adjudication process is going on. Whiles, the first respondent has issued the impugned show cause notice, dated 15.07.2017, seeking to levy ADD on the clearances from FSEZ Unit into DTA Unit for the period 01.09.2015 to 07.12.2015 and 26.04.2016 to 02.12.2016.

9. Mr. Sathish Parasaran, the learned Senior Counsel for the petitioner submitted that, this Court may take note of the following three Notifications, which are ADD Notifications relevant to the case on hand:-

1. Notification 125/2010 - Cus. dated 16.12.2010;
2. Notification No.1/2015 - Cus. (ADD) dated 05.01.2015;
and
3. Notification No.15/2016 - Cus. (ADD) dated 26.04.2016.

10. The first Notification, dated 16.12.2010 was in vogue for a period of 5 years, i.e. from 08.12.2009 to 07.12.2014. The second Notification, dated 05.01.2015, was to amend Notification dated 16.12.2010, to operate till 07.12.2015. It is stated that the Notification dated 05.01.2015 was issued after the Notification dated 16.12.2010 had lapsed. The third Notification dated 26.04.2016, was issued post sunset review, levying ADD for a period of 5 years, i.e. from 26.04.2016 to 25.04.2021.

11. The case of the petitioner rests on a slender, but firm point with regard to the effect of amendment to Notification No.125 of 2010, which was brought about, by Notification dated 15.01.2015, after a lapse of first Notification, i.e., with effect from 07.12.2014. The petitioner moved the High Court of Delhi, by filing a Writ Petition in W.P. (C) 9407 of 2014. The dispute pertains to the extension of duty upon initiation of sunset review under second proviso to Section 9A(5) of Customs Tariff Act, 1975.

12. The petitioner herein, who was one among the other petitioners in W.P. (C) Nos.4633, 4885, 4969, 5228, 5265 and 9407 of 2014, moved the Delhi High Court, by contending that the issue is covered by intra Court's judgment rendered in the case of Kumho Petrochemicals Pvt. Ltd. Vs. Union of India. The High Court of Delhi, in the afore mentioned Writ Petitions observed that, in the light of the said decision, the writ petitioners have to succeed, however, at the same time, it was conscious of the fact that the said judgment is pending in Appeal before the Honourable Supreme Court. Therefore, the Writ Petitions were disposed of with the direction that the final outcome of Special Leave Petition (SLP) would govern the proceedings. In case, the Hon'ble Supreme Court upholds the decision of the High Court of Delhi, then, the petitioner shall be entitled to the same relief. In the other eventuality, the petitioner shall not be entitled to anything. One of the questions framed for consideration by the Honourable Supreme Court, in the case of Kumho Petrochemicals Pvt. Ltd., (supra) was whether the amendment Notification dated 23.01.2014, amending Notification dated 02.01.2009, by allowing it to remain in force till 01.01.2015 was issued after the original Notification had expired on 01.01.2014, and whether such notification is without legal authority and therefore, null and void. It was held that, duty, during the period of review has to be imposed before the expiry of the period of five years, which is the life of the Notification imposing ADD, and in this context, it would be beneficial to refer to relevant portion of the said order, which is as follows:-

" 40. Two things which follow from the reading of the Section 9A(5) of the Act are that not only the continuation of duty is not automatic, such a duty during the period of review has to be imposed before the expiry of the period of five years, which is the life of the Notification imposing anti-dumping duty. Even otherwise, Notification dated January 23, 2014 amends the earlier Notification dated January 2, 2009, which is clear from its language, and has been reproduced above. However, when Notification

dated January 2, 2009 itself had lapsed on the expiry of five years, i.e., on January 1, 2014, and was not in existence on January 23, 2014 question of amending a non-existing Notification does not arise at all. As a sequitur, amendment was to be carried out during the lifetime of the Notification dated January 2, 2009. The High Court, thus, rightly remarked that Notification dated January 2, 2009 was in the nature of temporary legislation and could not be amended after it lapsed."

13. Armed with the decision of the Hon'ble Supreme Court, in Kumho Petrochemicals Pvt. Ltd., case (supra) and the decision of the High Court of Delhi in W.P.No.9407 of 2014, having gone in favour of the petitioner, the present petitioner submitted a reply, dated 08.08.2017 to the show cause notice, dated 28.10.2015 and also filed an Application for refund of the amounts collected as ADD for the period from 08.12.2014 to 26.04.2016, i.e., after the expiry of the said notification. At that juncture, the present Writ Petitions have been filed.

14. The learned Senior Counsel for the petitioner submitted that, the petitioner, apart from challenging the show cause notices 15.07.2017 and 28.10.2015, also raised other issues. However, it is submitted that, with regard to the other issues, the petitioner will agitate the same before the Adjudicating Authority, and the prayer is confined with regard to the levy of ADD based on the amendment Notification, which was issued after the lapse of principal Notification.

15. The learned Senior Panel Counsel for the first respondent would submit that the Writ Petition against a show cause notice is not maintainable in the light of the decisions of the Hon'ble Supreme Court i) in the case of (Special Director and another Vs. Mohd. Ghulam Ghouse and another) reported in (2004) 3 S.C.C. 440 and ii) (Union of India and another Vs. Kunisetty Satyanarayana) reported in (2006) 12 S.C.C. 28. The learned Senior Panel placed reliance on the decision of the learned Single Bench of this Court, in the case of (Hyundai Motors India Ltd., Vs. Union of India) reported in (2015) 318 E.L.T. 83 (Mad) to support his contention that the Notification extending the period for levying ADD is not required to be issued before the expiry of the period of the principal Notification.

16. Heard Mr. Sathish Parasaran, the learned Senior Counsel appearing for Mr. Karthik Sundaram, the learned counsel for the petitioner Mr. A.P. Srinivas, the learned Senior Panel Counsel appearing on behalf of the first respondent, and Mr. G. Rajagopalan, the learned Additional Solicitor General appearing

on behalf of the respondents 2 to 4, and perused the material placed on record.

17. The issues, that arises for consideration in these Writ Petitions are i) Whether the Writ Petition is maintainable against a show cause notice? and ii If so, whether the impugned show cause notice, insofar it relates to the levy of ADD based on the amendment Notification, which was issued after the lapse of principal Notification is valid and proper ?

18. With regard to the first issue that the Writ Petition is not maintainable against the show cause notice, there can be no quarrel over the said proposition, but the Courts have carved out certain exceptions to this Ruling. In the considered view of this Court, the case on hand would fall within one such exceptions, in the light of the law being settled by the Hon'ble Supreme Court. Therefore, the first issue is answered in favour of the petitioner.

19. So far as the second issue is concerned, whether the impugned show cause notice, insofar it relates to the levy of ADD based on the amendment Notification, dated 05.01.2015, after the lapse of Notification No.125 of 2010, dated 16.12.2010 is valid and proper, the only conclusion, that can be arrived at, is to hold that the amendment Notification, dated 05.01.2015, having been issued after the lapse of principal Notification No.125 of 2010, dated 16.12.2010, the show cause notice is not sustainable. The reasons for holding so are being discussed hereinbelow.

20. As noticed above, the prayer sought for by the petitioner before the High Court of Delhi is to restrain the respondents therein from charging any ADD. The Writ Petition along with the other connected matters were disposed of by the High Court of Delhi, by order dated 01.03.2017, with the direction that the final outcome of SLP filed against it's judgment in the case of Kumho Petrochemicals Pvt. Ltd., would govern the proceedings. It was specifically observed that, in case, the Hon'ble Supreme Court upholds the decision of the Delhi High Court, in Kumho Petrochemicals Pvt. Ltd., case (supra), the writ petitioners shall be entitled to the same relief. Consequently, the Writ Petition filed by the petitioner before the High Court of Delhi was disposed of in terms of the decision of the Hon'ble Supreme Court, in the case of Kumho Petrochemicals Pvt. Ltd. (supra).

21. The Honourable Supreme Court, in the case of Kumho Petrochemicals Pvt. Ltd. (supra) upheld the decision of the Delhi High Court and held that, collection of ADD after the life of the Notification, imposing ADD is not sustainable. The essence of the said decision is i) ADD Notifications are in the nature of

temporary legislation and could not be amended after it lapsed; ii) Continuation of duty under Section 9A(5) of the Customs Tariff Act, 1975 is not automatic; such a duty during the period of review has to be imposed before the expiry of the period of five years, which is the life of the Notification imposing anti-dumping duty.

22. In the Writ Petition filed by the petitioner before the Delhi High Court, the first respondent herein was not a party, however, the respondents 2 to 4 were arrayed as respondents 3, 5 and 4 therein. The first respondent before High Court of Delhi was Union of India, represented through the Secretary, Ministry of Finance, Department of Revenue. The judgment of the High Court of Delhi binds the respondents 2 to 4 herein, as they were parties to the litigation. It equally binds the first respondent, as the first respondent functions under the Ministry of Finance, Department of Revenue of the Union of India. Therefore, the first respondent cannot take a stand, which is contrary to the relief granted by the Delhi High Court.

23. Further, the demand of ADD during the period of review is not automatic, but, has to be imposed before the expiry of five years, which is life of the Notification, imposing ADD. As noticed above, the Notification imposing ADD, dated 16.12.2010 had lapsed on 07.12.2014. Therefore, the extension Notification, dated 05.01.2015, issued after the lapse of the said period is not sustainable, and no ADD can be demanded from the petitioner, based on such extension Notification. Hence, reliance placed by the learned Senior Panel Counsel for the Revenue on the decision of the learned Single Bench of this Court in Hyundai Motors India Ltd. (supra), in support of his contention that Notification extending the period for levy of ADD is not required to be passed before the expiry of the period of the principal Notification does not lend support to the case of the Revenue, as the law has since been settled by the Hon'ble Supreme Court, in Kumho Petrochemicals Pvt. Ltd. (supra).

24. Thus, by applying the above referred decision, i.e., the order, dated 01.03.2017 in the Writ Petition filed by the petitioner before the High Court of Delhi, and the decision of the Hon'ble Supreme Court, in Kumho Petrochemicals Pvt. Ltd. (supra), the respondents 2 to 4 should be restrained from charging any ADD for the period from 08.12.2014 to 26.04.2016, after the life of the Notification dated 16.12.2010.

25. In W.P.No.22770 of 2017, the petitioner has challenged the show cause notice, dated 15.07.2017, and as a consequential relief, the petitioner seeks to forbear the first respondent from charging ADD from the petitioner during the period from 08.12.2014 to 26.04.2016 on the very same grounds. However, the

demand of ADD for the said period is not part of the impugned show cause notice, but part of the show cause notice, dated 28.10.2015, for which, the petitioner has submitted their reply. However, as already stated above, the legal issue having been settled by the Hon'ble Supreme Court, in Kumho Petrochemicals Pvt. Ltd. (supra), the petitioner should not have been denied the relief on technicalities.

26. Therefore, the demand of ADD under the show cause notice dated 28.10.2015, for the period from 08.12.2014 to 26.04.2016, i.e. after the lapse of the Notification No.125 of 2010 is not sustainable. The said show cause notice has been issued seeking ADD payable on PCBAs for the period from 14.11.2014 to 31.08.2015. The Notification No.125 of 2010 was in vogue till 07.12.2014. In the light of the decision of the Hon'ble Supreme Court, in Kumho Petrochemicals Pvt. Ltd. (supra), such Notification cannot be extended after it had lapsed. Consequently, the demand of ADD for the period from 08.12.2014 to 26.04.2016 is not sustainable. Therefore, the ADD demanded in the show cause notice dated 28.10.2015, for the period from 08.12.2014 to 31.08.2015 has to be held to be without jurisdiction. Hence, the second issue is also answered in favour of the petitioner.

27. In W.P.No.22771 of 2017, the petitioner has sought for a direction upon the respondents 2 to 4 to forthwith grant refund of amounts representing ADD, collected in terms of the Notification No.125/2010 - ADD, and also to return the Bank Guarantees and personal bonds collected during the period from 08.12.2014 to 26.04.2016 post lapse of Notification No.125/2010 ADD with effect from 07.12.2014. The Application for refund has been made by the petitioner on 08.08.2017, when the show cause notices were pending adjudication. It is only now by way of this order, the petitioner has been granted relief with regard to the levy of ADD based on the amendment Notification issued after lapse of principal Notification. Therefore, it would be too early for this Court to call upon the respondents to take a decision on the Application for refund. Hence, the petitioner has to pursue their Application for refund before the Authority, who is required to take a decision in accordance with law.

28. In the result, W.P.22770 of 2017 is allowed and the impugned show cause notice insofar it relates to levy of ADD for the period from 01.09.2015 to 07.12.2015 is set aside.

29. The demand for ADD in the show cause notice, dated 28.10.2015 for the period from 08.12.2014 to 26.04.2016 is also set aside. With regard to the other issues, which are subject matter of show cause notice, dated 15.07.2017, the petitioner is directed to participate in the adjudication process and extend full cooperation to the Adjudicating Authority to finalize the

proceedings. However, since the issue relating to demand of ADD has been settled by the Hon'ble Supreme Court, in Kumho Petrochemicals Pvt. Ltd. (supra), it would be an empty formality for the petitioner to go before the Adjudicating Authority, who issued the show cause notice, dated 28.10.2015, to raise such contentions when the decision of the Hon'ble Supreme Court binds the respondents.

30. Insofar as W.P.No.22771 of 2017 is concerned, the same is disposed of, giving liberty to the petitioner to pursue the Application for refund before the Authority, who is required to take a decision in accordance with law as expeditiously as possible.

31. In fine, W.P.No.22770 of 2017 is allowed and W.P.No.22771 of 2017 is disposed of. No costs. Consequently, connected Writ Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

mrr/sd

To

1. The Principal Commissioner of Customs,
Chennai VII, Commissionerate (Air Cargo)
New Customs House, Meenambakkam,
Chennai - 600 027.
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Office of the Development Commissioner,
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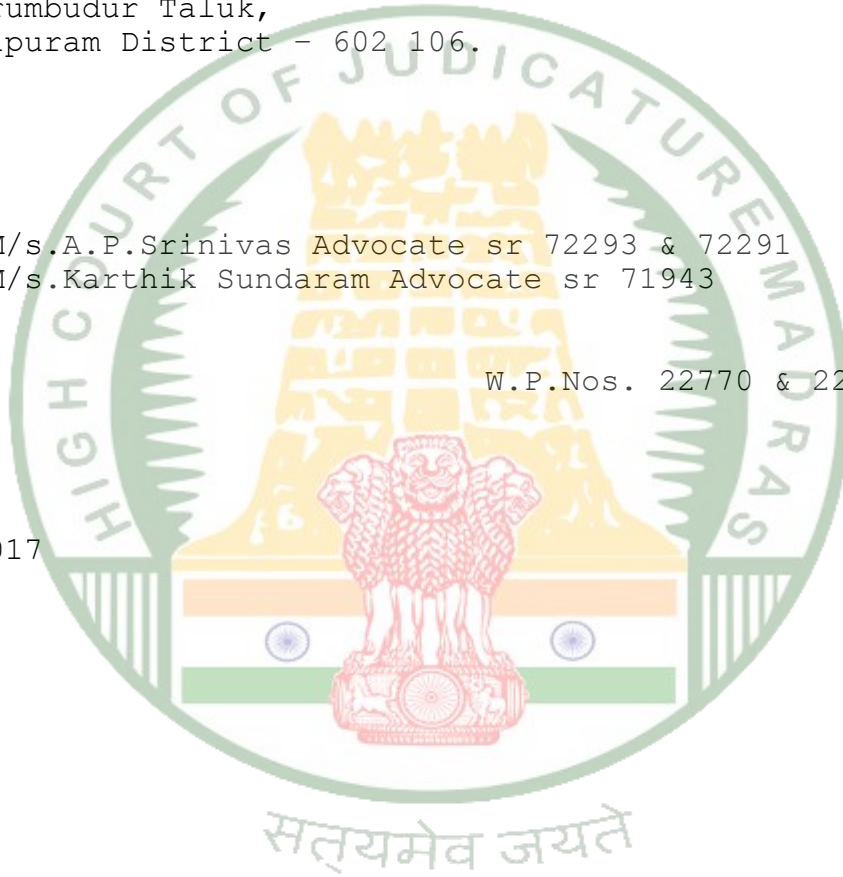
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+2 cc to M/s.A.P.Srinivas Advocate sr 72293 & 72291
+1 cc to M/s.Karthik Sundaram Advocate sr 71943

W.P.Nos. 22770 & 22771 of 2017

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