In the High Court of Judicature at Madras

Dated : 09.11.2017

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM

Writ Petition Nos.28654 & 28655 of 2017

M/s.Kavitha Exports, rep.by its
Proprietor Shri.Ranjit Jacob ...Petitioner

Vs

The Assistant Commissioner of
Customs (EPCG), No.60, Rajaji
Salai, Custom House, Chenai-1. ...Respondent

PETITIONS under Article 226 of The Constitution of India praying for the issuance of Writs of Mandamus (i) directing the respondent to cancel the bond submitted by the petitioner concern in pursuance of EPCG Licence No. 0430000444/4/11/00 dated 24.10.2001 and return the same to the petitioner concern (WP.No.28654 of 2017); and (ii) directing the respondent to sanction the refund of Rs.83,000/- within a reasonable time (WP.No.28655 of 2017).

For Petitioner : Mr.Hari Radhakrishnan
For Respondent : Mr.B.Rabu Manohar, SPC

COMMON ORDER

Mr.B.Rabu Manohar, learned Senior Panel Counsel accepts notice for the respondent. Heard both. By consent, the writ petitions are taken up for joint disposal.

2. The petitioner in these writ petitions is one M/s.Kavitha Exports,

which is engaged in the manufacture and export of textiles. During the course of business transactions, the petitioner imported certain capital goods on payment of concessional customs duty under the Export Promotion Capital Goods Scheme issued by the Joint Director General of Foreign Trade vide EPCG license No.0430000444 dated 24.10.2001. The validity of the license was for a period of eight years and the petitioner has an obligation to export the goods manufactured using the capital goods imported against the license.

3. Though the petitioner fulfilled the export obligation within time, the requisite certificate was not issued by the Joint Director General of Foreign Trade on certain administrative grounds. However, the respondent proceeded to initiate action against the petitioner and an Order-in-Original dated 25.4.2011 was passed demanding duty to the tune of Rs.1,66,000/- along with applicable interest. The petitioner furnished a bank guarantee for a sum of Rs.83,000/- and executed personal bond for the remaining amount.

4. It appears that even before the Order-in-Original was passed, the bank guarantee was encashed on 29.1.2010 and the bond continues to remain valid. As against the Order-in-Original dated 25.4.2011, the petitioner filed an appeal before the Commissioner (Appeals), who, by order dated 30.5.2013, allowed the appeal and set aside the order passed by the Original Authority/Assistant Commissioner of Customs (EPCG) dated 25.4.2011 and directed to maintain status quo till the petitioner produces export obligation discharge certificate (EODC). It was further observed by the Appellate

Authority that once the petitioner produces the EODC and if it is found in order, the amount recovered by encashing the bank guarantee should be refunded to the petitioner as per law. Ultimately, the petitioner was able to secure the EODC dated 30.9.2014.

5. Immediately, the petitioner made a request to the respondent to effect refund by a representation dated 06.11.2014. This was followed by two communications sent through their counsel. However, for nearly three years, nothing had happened and by a communication dated 31.7.2017, the Assistant Commissioner of Customs (Refunds) informed the petitioner's counsel to file necessary refund claim before him with all relevant documents namely Bill of Entry/TR6 duty payment challan, TR6 challan for encashment of bank guarantee and a copy of the bond cancellation, etc.

6. Further, the petitioner, through their counsel, addressed to the respondent dated 03.8.2017, pointing that there is no necessity for them to approach the Assistant Commissioner of Customs (Refunds) or filing an application for refund and placed reliance on the decision of this Court in the case of ***Nizamabad Agro Private Limited Vs. Assistant Commissioner of Customs (EODC) [reported in (2016) 340 ELT 166].*** However, both the respondent and the Assistant Commissioner of Customs (Refunds) reiterated the same stand and sent communications dated 04.9.2017 and 07.9.2017 respectively. Thus, the petitioner, thereafter, probably due to compulsion, presented an application for refund dated 25.9.2017 before the

Assistant Commissioner of Customs (Refunds) and approached this Court in view of the decision in the case of *Nizamabad Agro Private Limited.*

7. The learned Senior Panel Counsel appearing for the respondent has vehemently opposed the prayer sought for in these writ petitions and contended that the petitioner has to necessarily file application for refund under Section 27 of the said Act and that the appropriate authority has to consider that application in the manner provided under the said provision. He further submits that the petitioner should be relegated to the authority concerned to pursue the application for refund.

8. After hearing the learned counsel for the parties and carefully perusing the materials on record, this Court has no hesitation to hold that the stand taken by the respondent in directing the petitioner to approach the Authority concerned is wholly unsustainable. This conclusion is fortified by the decision of this Court in the case of *Nizamabad Agro Private Limited,* in which, the relevant portions read as under :

> *"4. The question would be as to whether the petitioner has to be directed to approach the Assistant Commissioner (Refunds) or a direction to be issued to the first respondent.*
>
> *5. The Hon'ble Division Bench of this Court in a case of Commissioner of Customs, Chennai Vs. M/s.Aristo Spinners Pvt. Ltd., reported in 2008-TIOL-87-HC-MAD-CUS, has considered the question, as to whether the refund of bank guarantee would amount to collection of tax and*

the Hon'ble Division Bench of this Court has held as follows:-

'6. In yet another case is Oswal Agro Mills Ltd. Vs. Assistant Collector of Central Excise, 1994 (2) SCC 546 also the Supreme Court has taken the same view to the effect that furnishing of bank guarantee pursuant to the order of the Court was not equivalent to payment of excise duty and for the purpose of securing revenue in the event of the revenue succeeding in the proceedings before the Court, the Court as the condition of staying the demand in the disputed tax or duty imposed a condition that the assessee should provide a bank guarantee for the full amount of tax or duty or part thereof. The bank guarantee is the security for the revenue that in the event of the revenue succeeds, its due will be recoverable being backed up with the guarantee of the bank. The amount of disputed tax or duty that was secured by a bank guarantee could not therefore be held to be paid to the revenue. Thus, it is clear that the furnishing of bank guarantee cannot be regarded as payment of duty by the importer to the revenue. Section 27, which speaks about the refund of the duty paid cannot be pressed into service to deny the refund.

7. In an identical set of facts, this Court, in the case of Commissioner of Customs (Exports) Vs. M/s.Jraj Exports (P) Ltd., 2007 (3) TNLJ 532, in which one of us is a party, has held in favour of the importer. In that decision the decision of the

Supreme Court in the case of Oswal Agro Mills Ltd. Vs. Assistant Collector of Central Excise, 1994 (2) SCC 546 has been taken in aid.'

Therefore, the petitioner need not be called upon to approach the Assistant Commissioner (Refunds) and the first respondent himself can consider the petitioner's claim as the first respondent has cancelled the bond and bank guarantee on the petitioner producing the Export Obligation Discharge Certificate.

6. Accordingly, the Writ Petition is disposed of by directing the petitioner to submit a representation to the third respondent along with a copy of this order and the third respondent shall take note of the legal position and also the factual position and effect refund within a reasonable time, not later than eight weeks from the date of the receipt of the representation by the third respondent."

9. Apart from the legal position, on facts, in the instant case, the respondent cannot now relegate the petitioner to the Assistant Commissioner (Refunds) in the light of the order passed by the Commissioner (Appeals) dated 30.5.2013. The Commissioner (Appeals) allowed the appeal filed by the petitioner and set aside the order passed by the respondent dated 25.4.2011. Further, the Commissioner (Appeals) directed that status quo to be maintained till the petitioner produces EODC and once it is produced and if it is found to be in order, the amount recovered by encashing the bank

guarantee should be refunded. Therefore, now calling upon the petitioner to approach the Assistant Commissioner (Refunds) is presumably with an intention to reject the said application as being time barred, as the Assistant Commissioner (Refunds) is likely to take a stand that the application should have been filed for refund within one year from the date of payment of duty.

10. Taking note of the undisputed facts of the case as well as the order passed by the Commissioner (Appeals) dated 30.5.2013, the writ petitions are allowed and the bond furnished by the petitioner shall stand canceled. There will be a direction to the respondent to refund the amount encashed through bank guarantee **less administrative charges, if any.** The above direction shall be complied with within 60 days from the date of receipt of a copy of this order. No costs.

09.11.2017

Internet : Yes

To
The Assistant Commissioner of Customs (EPCG), No.60, Rajaji Salai, Custom House, Chenai-1.

RS

T.S.SIVAGNANAM,J

RS

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of 2017

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