

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.08.2017

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No.1894 of 2017

M/s.C.P.Aquaculture (India) Private Ltd.,
rep.by its Director: Theerapong Atimoke,
No.104, G.N.T.Road,
Nallur & Vijayanallur Village,
Sholavaram Post,
Chennai-600 067. ... Petitioner

Vs

- 1.The Commissioner of Central Excise,
Chennai I Commissionerate,
Nungambakkam High Road, Chennai.
- 2.The Deputy Commissioner of Central Excise,
"E" Division, Chennai I Commissionerate,
No.R-40/A-1, TNHB Building, 100 Feet Road,
Moggapair East, Chennai-600 037. ... Respondents

Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus calling for the records relating to the impugned order in Original No.202/2016(R) dated 04.11.2016 passed by the second respondent and quash the findings given by the second respondent in restricting the interest amount payable on delayed refund and further direct the second respondent appropriate amount of interest for the delayed payment of refund as claimed by the petitioner in their letter dated 31.03.2015.

For Petitioner : Mr.K.Jayachandran

For Respondents: Mr.A.P.Srinivas,
Senior Panel Counsel

ORDER

Heard Mr.K.Jayachandran, learned counsel for the petitioner and Mr.A.P.Srinivas, Senior Panel Counsel appearing for the respondents.

2. With the consent of the learned counsel on either side, the main writ petition itself is taken up for final disposal.

3. The petitioner has filed this writ petition challenging the order passed by the second respondent in Order-in-Original No.202/2016 dated 04.11.2016. By the impugned order, the petitioner's application for demand of interest on the amount refunded has been restricted only for a period of 41 days calculated from 09.12.2014, the date on which the completed claim for refund was filed.

4. The petitioner's case is that the matter pertaining to whether the petitioner was liable to pay duty or not on the exports of prawns and shrimps, attained finality on 27.12.2010 when the CESTAT passed final orders. Though the Tribunal passed the order on 04.06.2009 allowing the petitioner's appeal, it being not a speaking order, the petitioner had approached this Court and filed a writ petition which was disposed of by order dated 21.11.2010 directing the Tribunal to pass a detailed order and pursuant to the said direction, the Tribunal passed a detailed order on 27.12.2010. This order was entirely in favour of the petitioner thereby holding that calculation of duty by the petitioner in respect of the exports effected by them from 1999 and earlier was erroneous. The petitioner filed an application for refund on 03.03.2011. According to the petitioner, the application was complete in all respects and if it was not so, the respondents were duty bound to return the same within 48 hours of filing such application. Admittedly, this having not been done, the petitioner would state that the application for refund was complete in all respects. In the mean time, the Department filed an appeal to the Hon'ble Supreme Court challenging the order passed by the Tribunal and the appeal was dismissed by the Hon'ble Supreme Court on 11.03.2014. As the detailed order has been passed by the Tribunal on 21.11.2010 and the appeal was filed by the Department to the Hon'ble Supreme Court and the order has been passed by the Hon'ble Supreme Court on 11.03.2014, it appears that the same attained finality only during March 2014. Pursuant thereto, the respondents sanctioned refund of Rs.9,62,93,597/- and the same was credited into the petitioner's bank account. Even before that, the petitioner had filed an application dated 31.03.2015 for payment of interest. This was followed by a reminder dated 03.08.2016. This application was considered and the impugned order was passed granting interest for 41 days being a sum of Rs.6,48,992/-. This amount has been credited to the petitioner's bank account on 28.09.2016.

5. The petitioner's case is that the impugned order restricting the interest claim to 41 days is erroneous and the petitioner is entitled for interest from the date of the application dated 03.03.2011. Further it is submitted that the

finding contained in paragraph-15 of the impugned order stating that 114 numbers of challans were submitted by the petitioner to Chennai-V Division only on 09.09.2014 after which the refund claim was processed, is factually an incorrect statement and it is clearly an afterthought. In this regard, the attention of this Court was drawn to the order passed by the Assistant Commissioner of Central Excise dated 16.01.2015 sanctioning refund and in the said order, the said Assistant Commissioner has recorded that the petitioner has produced the original TR-6 challans numbering 114. Therefore, it is submitted that the said finding rendered by the second respondent in the impugned order is factually incorrect and it is only with a view to get over the petitioner's claim for interest. In support of the said contentions raised by the petitioner, the learned counsel for the petitioner referred to the decisions of the High Court of Judicature at Bombay in *Swaraj Mazda Limited v. Union of India*, reported in 2009 (235) E.L.T. 788 (Bom.) and in *IVRCL Infrastructures & Projects Ltd. v. Union of India*, reported in 2010 (257) E.L.T. 33 (Bom.), and also the decision of the Hon'ble Supreme Court in *Union of India v. Hamdard (Waqf) Laboratories*, reported in 2016 (333) E.L.T. 193 (S.C.).

6.The learned Senior Standing Counsel appearing for the respondents, by referring to the factual averments set out in the impugned order, submitted that the second respondent has clearly stated as to why the interest amount has been restricted to 41 days. He further submitted that the petitioner had submitted the 114 original challans only on 09.09.2014 and restriction of interest to 41 days is proper. Further it is submitted that as against the impugned order, the petitioner has an appellate remedy which they have not availed.

7.After hearing the learned counsels for a considerable length of time, this Court finds that the issue agitated by the petitioner in this writ petition, is purely factual. This is so because the question would be as to what is the date on which the petitioner had submitted the original TR-6 challans before the concerned authority. No doubt in the order granting refund dated 16.01.2015 the refund authority has recorded that 114 challans have been produced by the petitioner, but while passing the order of refund, the question of interest was not the subject matter. Therefore, the said authority could not have had an occasion to take note of the date of submission of the challans as what was being adjudicated was only the entitlement for refund of the duty paid by the petitioner and the order has been passed taking note of the judgment of the Hon'ble Supreme Court dated 11.03.2014.

8.One more aspect which should be taken note of is that the petitioner's application for refund and other similar cases also appears to have been kept pending awaiting the decision of the

Hon'ble Supreme Court before whom the appeal was pending and disposed of only in the month of March 2014. Therefore, the other issue would be whether the Department would be justified in refusing to pay interest for the said period, though the application for refund was complete in all respects. Thus, these issues are purely factual.

9.The decision of the Hon'ble Supreme Court, referred to by the learned counsel for the petitioner in Union of India v. Hamdard (Waqf) Laboratories, reported in 2016 (333) E.L.T. 193 (S.C.). had been rendered after the assessee exhausted the remedies available under the Act. The applicability of the decisions of the High Court of Judicature at Bombay in Swaraj Mazda Limited v. Union of India, reported in 2009 (235) E.L.T. 788 (Bom.) and in IVRCL Infrastructures & Projects Ltd. v. Union of India, reported in 2010 (257) E.L.T. 33 (Bom.), would depend upon the facts of the present case.

10.In my considered view, it is too early a stage for this Court to apply these decisions since the factual matrix is yet to be verified which exercise obviously cannot be done in a writ petition especially when the petitioner has an effective alternate remedy by way of an appeal. Therefore, this Court is inclined to direct the petitioner to file an appeal as against the impugned order as the appellate authority has jurisdiction to call for the original files, verify the date of application, whether the application was complete in all respects and if it was not so, why it was not returned within 48 hours, whether the petitioner had sought for time to produce the original challans, whether the original challans were produced along with the application for refund or was it submitted only on 09.09.2014, what was the stage of the matter before the Hon'ble Supreme Court between the date of the Tribunal's order, ie. 04.06.2009 and the judgment of the Hon'ble Supreme Court on 11.03.2014 etc. These issues have to be necessarily thrashed out before the appellate authority which is a fact finding authority and would be able to re-appreciate the facts which are available on record. Therefore the petitioner has to necessarily avail the appellate remedy.

11.Accordingly, the writ petition is disposed of directing the petitioner to present an appeal before the Commissioner of Central Excise (Appeals), Chennai, within a period of sixty days from the date of receipt of a copy of this order and when such application is filed, the Commissioner of Central Excise (Appeals) shall entertain the appeal without reference to the limitation and fix an earlier date for hearing, considering the fact that duty was remitted by the petitioner without prejudice

to its rights, in the year 1999 and preferably dispose of the appeal within a period of thirty days from the date on which it is presented and complete in all respects. The authorised representative of the petitioner shall be afforded an opportunity of personal hearing. No costs.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

KM
To

- 1.The Commissioner of Central Excise,
Chennai I Commissionerate,
Nungambakkam High Road, Chennai.
- 2.The Deputy Commissioner of Central Excise,
"E" Division, Chennai I Commissionerate,
No.R-40/A-1, TNHB Building, 100 Feet Road,
Moggapair East, Chennai-600 037.

+ 1 cc to Mr. K. Jayachandran, Advocate Sr.58743
+ 1 cc to A.P. Srinivas, Advocate Sr.59132

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EU 5.09.17

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