IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.03.2017

CORAM

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

Writ Petition No.38668 of 2015
and M.P.No.1 of 2015

M/s. Sabari Fashions
represented by its Partner
P.Murugesan,
S.F.No.21/22,
Banu Thottam,
Karaipudur, Arulpuram Post,
Tiruppur. .. Petitioner

Vs.

The Assistant Commissioner of customs,
St.John Inland container Depot,
1663/2B, Harbour express Bye Pass Road,
Tuticorin - 628 008 .. Respondent

Writ petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus to call for the records of the respondent in Original No.995/2012 dated 12.12.2012 and quash the order dated 12.12.2012 and consequently direct the respondent to return the amount of Rs.2,46,250/- paid by the petitioner towards the refund of duty draw back with interest for shipping (1) Shipping Bill No.1919590 dated 04.12.2010, (2) Shiping Bill No.1975938 dated 13.12.2010, (3) Shipping Bill No.2020921 dated 18.12.2010, (4) Shipping Bill No.2127687 dated 31.12.2010 and sum of rs.13,363/- paid towards penalty.

For Petitioner : Mr.M.Sivavarthanan
For Respondents : Ms.Hema Murali Krishna

O R D E R

The petitioner is the manufacturer and exporter of knitting garments. During the month of December, 2010, the petitioner exported goods for an amount of Rs.19,53,468/- under 4 shipping bills, viz., (1) Shipping Bill No.1919590 dated 04.12.2010 (2)

Shipping Bill No.1975938 dated 13.12.2010 (3) Shipping Bill No.202092 dated 18.12.2010 (4) Shipping Bill No.2127687 dated 31.12.2010.

2. It is stated by the petitioner that for the export made through the aforementioned shipping bills, they received the foreign exchange within the stipulated time under the Foreign Exchange Management (Export of Goods & Services) Regulations, 2000 and the petitioner Banker, namely, Vijaya Bank has also issued certificate of Export Realisation for all the four shipping bills. Towards the said export made by the petitioner, they were sanctioned and paid duty drawback amounting to Rs.1,46,510/-. However, it is stated that by inadvertence, the petitioner did not file the certificate of Export Realisation issued by the Bank in the office of the respondent. A show cause notice was issued on 13.08.2012 and however, the petitioner was not able to attend the personal hearing as the said notice received by the petitioner's staff, was not brought to the knowledge of the petitioner. Consequently, the respondent passed an order in Original No.995/2012 dated 12.12.2012 by directing the petitioner to pay a sum of Rs.1,46,510/- received as drawback together with interest and also by imposing penalty of Rs.10,000/-. The said order is challenged in this writ petition.

3. Before filing the writ petition, the petitioner, without prejudice to their rights to challenge the order in original, has paid a sum of Rs.2,46,250/- by way of demand draft dated 25.10.2014 and further a sum of Rs.13,363/- towards penalty by way of demand draft dated 25.10.2014 with a representation dated 17.11.2014 requesting the respondent to set right the issue and arrange to revoke the suspended shipping bills for duty drawback.

4. Learned counsel for the petitioner submitted that only reason for passing the impugned order in original was that the petitioner has failed to produce proof of realising the sale proceeds within the due date in respect of the above shipping bills and therefore, the respondent can be directed to consider the case of the petitioner as set out in the above representation dated 17.11.2014 in view of the fact that the petitioner has in fact realised the foreign exchange as evinced from the statement of the bank authorities.

5. The respondent has filed a counter affidavit and also additional counter affidavit. In the additional counter affidavit, it is stated that since the petitioner has not produced any certificate from bank for realisation of foreign exchange (BRC) for the subject export shipments, the impugned order was rightly passed. However, it is specifically admitted in the additional counter affidavit at paragraph Nos.8 and 9 as follows:

> 8. It is further submitted that on verification of the index to the type set from the photo copy of the documents Sl.No.5,6,7,8 (Bank certificate of export

and realization) submitted by the petitioner along with his affidavit before the Hon'ble High Court in W.P.No.38688/2015, this office has noticed that they have obtained the required certificate from the Bank. However, at no point of time the exporter has submitted the required copy of certificate from the bank. However, at no point of time the exporter has submitted the required copy of certificate to the proper officer at the Customs Office, Tuticorin, till date. The Details of realisation submitted by the petitioner is as below:

Sl.No.	Shipping Bill No. & Datge	Realisation Date	Bank Reference
1.	1919590/04.12.2010	29.12.2010	3038FODBC105135 29.12.2010
2.	1975938/13.12.2010	05.01.2011	3038FODBC105137 05.01.2011
3.	2020921/18.12.2010	14.01.2011	3038FODBC105143 14.01.2011
4.	2127687/31.12.2010	01.02.2011	3038FODBC115004 01.02.2011

9. However, now the authenticity of the said certificates have been verified with the concerned bank (M/s. Vijaya Bank, Tirupur). The Bank has confirmed the above referred certificate authenticity vide letter dated 31.01.2017. Based on the Bank confirmation, it is submitted that the petitioner has fulfilled the export obligation.

6. Heard both sides.

7. The petitioner suffered the impugned order in original dated 12.12.2012 wherein the demand of Rs.1,46,510/- was made as ineligible drawback amount also by imposing penalty of Rs.10,000/- and interest. The only reason for making such demand is that the petitioner failed to produce proof of realisation of the foreign exchange within the due date in respect of the above mentioned shipping bills. It is contended by the petitioner that the show cause notice issued to them was not brought to their knowledge as it was received by the staff members and therefore, they did not attend the personal hearing or file a reply to the

said notice. A perusal of the impugned order also indicate that the petitioner did not appear on the date of personal hearing nor filed any reply/representation before the respondent on such date of hearing. Normally, this Court would have directed the petitioner to file an appeal as against the order in original. But the peculiar and admitted facts and circumstances of the present case would show that it would be only an empty formality to direct the petitioner to file such an appeal as the respondent himself based on their admitted stand can consider the case of the petitioner. Though it is contended in the impugned order that the petitioner has failed to produce proof of having realised the sale proceeds within the due date, the fact remains that the petitioner had in fact received the foreign exchange within the stipulated time and the said fact is evident from the counter affidavit filed by the respondent at paragraph Nos.8 and 9 as extracted supra.

8. It is specifically admitted by the respondent, based on the Bank confirmation that the petitioner has fulfilled the export obligations. No doubt, the petitioner did not place the required materials at the time of personal hearing, for which also, the petitioner has stated some reason to condone such absence as it is contended that the show cause notice was not brought to the knowledge of the petitioner by the petitioner's staff who received the same. In any event, as the reason set out in the impugned order is factually incorrect, as admitted by the respondent himself in the counter affidavit as set out supra, I am of the view that there cannot be any impediment for the respondent to consider the representation of the petitioner dated 17.11.2014 and pass appropriate orders on the same by taking note of the other facts and circumstances which are now brought to the knowledge of the respondent by the petitioner, namely, proof of discharging the export obligation. Accordingly, the writ petition is disposed of, by directing the respondent to consider the representation of the petitioner dated 17.11.2014 and pass appropriate orders on the same within a period of eight weeks from the date of receipt of a copy of this order. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

vsi

To

The Assistant Commissioner of customs,
St.John Inland container Depot,
1663/2B, Harbour express Bye Pass Road,
Tuticorin - 628 008

+1cc to Mr.Sivavarthanan, Advocate, S.R.No.15182
+1cc to Mr.Hema Muralikrishnan, Advocate, S.R.No.15349
(25/04/2017)

KGK(CO)
RS(20/03/2017)

W.P.No.38668 of 2015