IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.10.2017

CORAM

THE HONOURABLE Mr. JUSTICE T.S.SIVAGNANAM

W.P.No.24852 of 2004

M/s.S F Patel and Sons (Juda) (P) Ltd.,
Plot A24, Madras Export Processing Zone,
G S T Road, Tambaram,
Chennai - 600 045.
represented by its Joint Managing Director,
Jagdish C. Patel ... Petitioner

Vs.

1.The Commissioner of Central Excise (Appeals),
Chennai.

2.The Deputy Commissioner of Central Excise,
Tambaram Division,
130-B, Mudichur Road,
Tambaram West, Chennai - 45. ... Respondents

Prayer: Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus calling for the records as comprised in order in original No: 42/2003 dated 30.06.2003, on the file of the Deputy Commissioner of Central Excise, Tambaram Division, Chennai - 45/2nd respondent, and quash the same and consequently direct the 2nd respondent to sanction refund of Rs.2,52,751/- for the period October 2001 to October 2002 as done by the 2nd respondent vide order in original No 2/2004 dated 19.02.2004 for the period 12.11.2002 to 05.03.2003.

For Petitioner : Mr.Cynduja krishnan
For Mr.R.Karthikeyan

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

ORDER

Heard Mr.Cynduja Krishnan, learned counsel for the petitioner and Mr.A.P.Srinivas, learned Senior Standing Counsel appearing for the respondents and carefully perused the materials placed on record as well as the counter affidavit filed by the respondents.

2.The petitioner has filed this writ petition challenging the Order-in-Original dated 30.06.2003, by which, the 1st respondent reclassified the goods manufactured by the petitioner under Chapter Heading 96.16 of the Central Excise Tariff Act, 1985, in terms of the provisions contained in Section 3 of the Excise Act, 1944, read with Section 12 of the Customs Act, 1962. It was further ordered that since the petitioner has paid appropriate duty of excise payable under the said heading and the duties have been discharged by the petitioner for the goods cleared during the period from October 2001 to October 2002, the claim for refund filed by the assessee for an amount of Rs.2,52,751/- is rejected. Since a show cause notice was issued to the petitioner, the petitioner, on submitting objections, requested adjournment of the personal hearing on the ground that the identical issue in respect of the petitioner's sister concern is pending before the Commissioner of Central Excise (Appeals) and requested postponement of the hearing. This communication is dated 06.06.2003. However, the 1st respondent did not await the decision of the Commissioner of Central Excise (Appeals), but passed the impugned order. The Commissioner of Central Excise (Appeals), in an identical case, by order dated 11.08.2003, allowed the appeal filed by the sister concern and held that the EXIM policy classifies perfumes containing spirit for retail sale and spirituous toilet preparation under Chapter 33 33 00 05 and 33 03 00 09 and what would otherwise fall under Chapter 33, by virtue of note 1(d) is excluded and taken to the Medicinal and Toilet Preparations Act, 1955 for the purpose of Central Excise. Therefore, the Commissioner of Central Excise (Appeals) held that it is incorrect to classify perfumes containing alcohol to classify under any chapter of Central Excise Tariff Act, 1985. With this observation, the order passed by the original authority, as in the instant case, was set aside and the appeal was allowed. Enclosing the order passed by the Commissioner of Central Excise (Appeals), the petitioner approached the respondents to restore their application for refund of the duties paid under Chapter 96.16 of the Central Excise Act. For the subsequent clearances effected, the original authority passed Order-in-Original No.2/2004 dated 19.02.2004 and accepted the classification as contended by the petitioner and ordered refund of the excess excise duty and excess SAD paid by the petitioner for the DTA clearances during the period from 12.11.2002 to 05.03.2003.

3.In the light of the above facts, this is a fit case where the matter has to be remanded to the 2nd respondent for fresh consideration since not only in the case of the assessee's sister concern, their claim has been accepted, but in the assessee's own case for the subsequent clearances, the stand taken by the assessee has been accepted. The 2nd respondent could have awaited the decision of the Commissioner of Central Excise (Appeals) since within less than 30 days, the Commissioner of Appeals had passed the orders after the petitioner's representation dated 06.06.2003. Be that as it may, for the reasons stated above, the impugned order calls for interference.

4.Accordingly, the Writ Petition is allowed. The impugned order is set aside and the matter is remanded to the 2nd respondent, who shall take note of the orders passed by the Commissioner of Central Excise (Appeals) in the case of the assessee's sister concern in Order-in-Appeal No.58/2003 dated 11.08.2003 and the assessee's own case in Order-in-Original No.2/2004 dated 19.02.2004 and issue appropriate orders for grant of refund of the excess of excise duty. The above direction shall be completed within a period of three months from the date of receipt of copy of this order. No costs.

Assistant Registrar
Dt.8.11.17

//True Copy//

Sub Assistant Registrar

To

1.The Commissioner of Central Excise (Appeals),
Chennai.

2.The Deputy Commissioner of Central Excise,
Tambaram Division,
130-B, Mudichur Road,
Tambaram West, Chennai - 45.

+1 cc to Mr.A.P.Srinivas, advocate,sr.74291.

Nm(co)
krd 23/11

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