IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 24.09.2018

Pronounced on : 08.10.2018

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.Nos.10329 to 10331of 2008
and M.P.Nos.1 and 2 of 2008

M/s.Flemingo Duty Free Shop Private Ltd.,
B-3, Guindy Industrial Estate,
Guindy, Chennai 600 032.
Rep.by Vijayalakumari Ravi
The Regional Manager (South Logistics & Systems)
.. Petitioner in all W.Ps.

.Vs.

1.The Assistant Commissioner of Customs,
Bonds-(AIR),
Office of the Commissioner of Customs,
(AIRPORT), Integrated Cargo Complex,
Meenambakkam, Chennai 600 027.

2.The Chief Commissioner of Customs,
Custom House, No.39, Rajaji Salai,
Chennai 600 001.
.. Respondents in all W.Ps.

Prayer in W.P.No.10329 of 2008: Writ petition filed under Article 226 of the Constitution of India praying for issuance of a writ of Certiorari calling for the records of the first respondent ending with F.No.S4/19/2004-Bonds(AIR)- P 019 dated 18.03.2018 and quash the same.

Prayer in W.P.No.10330 of 2008: Writ petition filed under Article 226 of the Constitution of India praying for issuance of a writ of Mandamus directing the respondents to grant refund of the duty collected by them to the tune of Rs.35,35,220/- together with interest.

Prayer in W.P.No.10331 of 2008: Writ petition filed under Article 226 of the Constitution of India praying for issuance of a writ of Mandamus directing the 2nd respondent to consider the request/application dated 13.11.2007 in the light of the board circular No.10/2006-CUS dated 14.12.2006 and grant waiver of interest in respect of the Warehoused goods at the petitioner's Private Bonded Warehouse at B-3, Guindy Industrial Estate, Guindy 600 032 which were damaged in the floods on 03.12.2005.

For petitioner : Mr.C.Manishankar

(In all cases)
For Respondents : Mr.G.M.Syed Nurullah Sheriff
(In all cases)

COMMON ORDER

The petitioner has filed three writ petitions for the following reliefs:-

i) WP No.10329 of 2008 to quash communication dated 18.3.2008 issued by the first respondent.

ii) WP No.10330 of 2008 to direct the respondents to refund a sum of Rs.35,35,220/- together with interest paid by the petitioner on 09.11.2017.

iii) WP No.10331 of 2008 to direct the second respondent to consider the petitioner's request/application dated 13.11.2007 in the right of Board Circular No.10 of 2006-Cus dated 14.02.2006.

2. The Petitioner runs and operates a duty-free shop in the airport. The petitioner has been issued with a licence to store imported goods such as chocolates, liquors, cigarettes etc., without payment of duty for the purpose of export/sales exclusively from its duty free shop under Section 58 of the Customs Act, 1962.

3. Duty concession has been extended to “Duty Free Shops” in terms of the policy and relevant circulars of the Government, as such sales result in inflow of foreign exchange into the country.

4. The imported goods for such sales are permitted to be stored in their private custom bonded warehouse at Guindy and are dispatched to the duty-free shop which is the point of sale to replenish the stock for such sales at the duty free shop in the airport.

5. Both storage at the custom bonded warehouses and at the point of sale at the duty-free shop are duty-free. Only, if the imported consignments are otherwise cleared into the Domestic Tariff Area (DTA) from the warehouse, they are liable to customs duty.

6. On 3.12.2005, torrential rain flooded the city of Chennai as a result of which the petitioner’s custom bonded warehouse at Guindy, Chennai was inundated with flood water resulting in loss to the goods stored therein. Notices were given to the respondent and the insurer immediately by the petitioner.

7. By an interim report dated 20.2.2006, the licensed surveyor of the insurer assessed the value the goods damaged due to the flooding of the water inside the warehouse.

8. The petitioner was asked to apply for “remission” of duty under Section 23 if the Customs Act, 1982, from the respondents. This request was however rejected by the first respondent by their letter dated 14.11.2006.

9. Under these circumstances, the surveyors by their letter dated 5.12.2006 requested the petitioner to apply for abatement of duty in terms of Section 22 of the Customs Act, 1962.

10. The first respondent by their letter dated 6.1.2007 rejected the request on the ground that the damaged caused to the bonded goods was due to floods caused by rains and therefore cannot be considered as loss on account of the “accident” and therefore, abatement of duty also could not be considered.

11. On 27.8.2007, the petitioner decided to pay the aforesaid duty. Under these circumstances, the petitioner thereafter paid duty on 27.08.2007 and by letter dated 12.11.2007 and 13.11.2007 requested the respondent for waiver of interest in terms of the relevant police No.10/2008 Board Circular dated 14.02.2006

12.On 26.11.2007, the insurer's surveyor requested the petitioner to obtain an order for release of the goods. However, even this request was rejected by the first respondent by letter dated 22.01.2008 on the ground that since waiver of interest was pending before the second respondent, the question of handing over the damaged cargo and can be considered only on further orders of the second respondent.

13. By an order dated 22.1.2008 the first respondent informed the petitioner that the request for waiver of interest was examined by the second respondent and same cannot be acceded. Thereafter, on 10.3.2008, the petitioner requested the first respondent to provide the basis on which the demand was made.

14. The first respondent merely provided the calculation of interest on duty payable on the damaged goods lost in the flood in the warehouse and demanded a sum of Rs.12,32,074/- as interest by their letter dated 18.3.2008 impugned in WP No.10329 of 2008.

15. The respondent in their counter submitted that under section 22 of the Customs Act, 1962 abatement of duty on damaged or deteriorated goods are allowed only on account of any "accident" not due to any wilful act or negligence or default of the owner of goods or his employee.

16. According to the 1st respondent, the petitioner was guilty of negligence, therefore the demand for duty and interest thereon is not contrary to Section 22 (1) (c) of the Customs Act, 1962.

17. They further contended that demand for interest is justified in the light of the decision of the Honourable Supreme Court in Prathiba Processors versus Union of India 1996 (88) ELT 12 and the decision of the Supreme Court in Jayanthi T Krishna and Co. 2000 (119) ELT 4.

18. It has been further contended that in terms of the license obtained for the warehouse under Section 58 of the Customs Act, 1962, the petitioner has executed a bond binding themselves under section 59 and has agreed to observe all the provisions of the Act and the Rules and Regulations in respect of such goods and to for duty and interest on imported goods. Since the imported goods were not cleared for the purpose for which the permission was allowed, the petitioner was not only liable to pay duty but also interest thereon.

19. Thus, according to the respondents, the petitioner was liable to pay the aforesaid duty of Rs.35,35,220/- and also interest thereon.

20. It is further contended that the petitioner was misleading the court by making out a case for waiver of interest and duty when indeed the petitioner has undertaken to pay duty and interest in the event of failure to clear the goods as per the conditions of the bond.

21. The respondents have alluded to section 72 of the Customs act, 1962 which mandates that a proper officer may demand duty if the imported goods which have been bonded are not cleared for export.

22. They further submitted that in terms of sub-clause (d) of sub-section (1) of Section 72 of the Customs act, 1962 for which the aforesaid bond has been executed, the petitioner is liable to pay interest. Hence the demand for interest in terms of the impugned letter dated 18.3.2008 cannot be quashed.

23. As far as the applicability of the Board Circular No.10 of 2006-Cus dated 14.02.2006 it has been stated that waiver of interest is granted on merits of each case. In this case, since duty was payable, interest is also liable to be paid. Under these circumstances the respondents of requested for dismissal of the above petition on merits.

24. Heard the learned Senior Counsel and Additional Advocate General Mr.C.Mani Shankar for the petitioner and Mr.GM Syed Nurullah Sherrif, the learned Senior Standing Counsel on behalf of the respondents.

25. The facts are plain and simple. The respondents have been issued a licence to store imported goods within a distance of 3 km from the air cargo complex. The petitioner’s duty free shop is located inside the airport.

26. The value of the goods stored in the warehouse was not exceed Rs.3 crores at any given point of time. As soon as the petitioner came to know that the goods stored in the warehouse had been damaged due to flooding, notice was issued to the insurer and the Customs Department as per the requirement.

27. At the time when the flood destroyed the goods, Notification No.122/2004-Customs (N.T) dated 25.10.2004 was holding the field for waiver of interest on the warehoused goods. The power vested with the Chief Commissioner of Customs and Central Excise was enhanced from Rs. 15 lakhs to 2 crores under section 61 of the Customs Act, 1962 for waiver of interest. The insurance asked the petitioner to apply for remission of duty/abatement of duty under Section 22 and 23 of the Customs Act, 1962, going forward.

28. Elaborate exchange of correspondence of between the insurance company and the petitioner have been referred to.

29. It was under these circumstances on 16.9.2006, the petitioner requested for remission of duty on account of natural calamity viz., flood resulting in loss of the imported goods in the warehouse.

30. The first respondent by letter dated 14.11.2006 simply informed the petitioner that the request for remission of duty cannot be considered under the customs rules. Thereafter, the petitioner sent on its letter to the respondent on 16.11.2006, 24.11.2006 and on 5.12.2006 for abatement of duty.

31. By letter dated 6.1.2007 bearing reference F.No.S.Nisc.

19/2004 (AIR-Bonds), the petitioner was informed that Section 22 of the Customs Act, 1962 allows abatement of duty in case of imported goods have been damaged before clearance for home consumption on account of any accident not due to any wilful act, negligence or default of the owner or his employer or agent.

32. It was further clarified by the 1st respondent that in this case, the goods have been damaged due to floods caused by the rains on 3.12.2005. Flooding according to the 1st respondent inside the premises were created due to poor maintenance of the premises on account of negligence on the part of the petitioner and therefore, damage caused by rains cannot be considered as an accident because accident generally happen in a flash and in this case the floods were allowed to swell without taking any to the pre-caution to divert the floodwaters elsewhere.

33. It was concluded that flood water was allowed to swell into the premises though they could have been avoided had there been proper rain water harvesting which was not an option but compulsory for all buildings in the city.

34. By the impugned letter dated 18.3.2008 the petitioner was directed to pay the interest after the first respondent communicated the decision of the second respondent by letter dated 22.01.2008.

35. It may be noted that in terms of Section 49 of the Customs Act, 1962, payment of duty on warehoused is postponed to the date of clearance for home consumption. Thus, unless the goods are cleared for home consumption, no duty is payable.

36. Section 22 allows abatement of duty on damaged or deteriorated goods while Section 23 of the Customs Act,1962 allows remission of duty on lost, destroyed or abandoned goods. The question is whether the petitioner was entitled to abatement of duty under Section 22 or remission of duty under Section 23 of the Customs Act, 1962.

37. Both the provisions are reproduced below:-

Section 22	Section 23
Abatement duty on damaged or deteriorated goods:- Where it is shown to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs: (a)That any imported goods had been damaged or had deteriorated at any time before or during the unloading of the goods in India; or (b) That any imported goods, other than warehoused goods, had been demanded at any time after the unloading thereof in India but before their examination under Section 17, on account of any accident not due to any wilful act, negligence or default of the importer, his employees or agent; or (c)That any warehoused goods had been damaged at any time before clearance for home consumption on account of any accident not due any wilful act, negligence or default of the owner, his employee or agent; Such goods shall be chargeable to duty in accordance with the provisions of sub section(2). (2) The duty to be charged on the goods referred to in sub-section (1) shall bear the same proportion to the duty chargeable on the goods before the damage or deterioration which the value of the damaged or deteriorated good bears to the value of the goods before the damage or deterioration. (3) For the purpose of this Section, the value of damaged or deteriorated goods may be ascertained by either of the following methods at the option of the owner:- (a) the value of such goods may be ascertained by the proper officer, or (b) such goods may be sold by the proper officer by public auction or by tender, or with the consent of the owner in any other manner, and the gross sale proceeds shall be deemed to be the value of such goods.	Remission of duty on lost destroyed or abandoned goods:- (1) Without prejudice to the provisions of Section 13, where it is shown to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs that any imported goods have been lost otherwise than as a result of pilferage or destroyed, at any time before clearance for home consumption, the Assistant Commissioner of Customs or Deputy Commissioner of Customs shall remit the duty on such goods. (2) The owner of any imported goods may, at any time before an order for clearance of the goods for home consumption under Section 47 or an order for permitting the deposit of goods in a warehouse under Section 60 has been made, relinquish his title to the goods and thereupon he shall not be liable to pay the duty thereon. (provided that the owner of any such imported goods shall not be allowed to relinquish his title to such goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force.

38. In Indian Oil Corporation vs Collector of Customs 1985(21) ELT (T), the Tribunal referred to note on Clause 23 of the Customs Bill, 1962. It was observed that unlike Section 122(1) of the Sea Customs Act, 1878 under which remission of duty was permissible only if goods were lost or destroyed by unavoidable accident or delay, under Section 23 which replaced the previous section wherein remission of duty may be allowed in all cases where goods are lost or destroyed whatever may be the reasons.

39. The note on Clause 48 of the Finance Bill, 1983 read as follows:

> "Clause 48 seeks to amend Section 23 of the Customs Act, 1962, to exclude from its purview goods pilfered before their clearance for home consumption."

40. Clause 48 of the Finance Bill, 1983, read as follows:

> "48. In Section 23 of the Customs Act, in sub-section (1),-
>
> (a) for the words "Where it is shown", the words and figures "Without prejudice to the provisions of Section 13, where it is shown" shall be substituted ;
>
> (b) after the words "have been lost", the brackets and words "(otherwise than as a result of pilferage)" shall be inserted."

41. It was further explained that with the amendment pursuant to Finance Bill, 1983, remission of duty under Section 23(1) of the Customs Act was excluded on "pilfered goods" before their clearance for home consumption.

42. Section 22 and Section 23 of the Customs Act, 1962 are attracted under different situations Section 23 is applicable if the goods are "Lost or Destroye or abandoned before clearance before consumption.

43. On the other hand, Section 22 is applicable, if the goods are damaged or deteriorate before clearance implying there is residual value even after damage or deteriorate and therefore liable to duty on the abated value.

44. Section 22 of the Customs Act requires an importer to

show to the satisfaction of the Assistant Collector that the goods had been damaged and that such damage was not on account of wilful act, negligence or default of the owner, his employees or agent. Once an importer makes a report of damage to his goods to the Customs, sub-section (1) of section 22 requires that the damaged goods “shall” chargeable to duty in accordance with the provisions of sub-section (2).

45. It is thus clear as follows:

(a) “Wilful act, negligence or default of the owner, his employees or agent” is an exception for grant of abatement to damaged or deteriorated goods under Section 22 of the Act .

(b) Pilferage of goods is an exception for granting remission of duty on goods lost or destroyed before clearance for home consumption within the purview of Section 23(1) of the Act.

46. Recently, the Hon’ble Supreme Court in Mangalore Refinery & Petrochemicals Ltd. v. Commissioner 2015 (323) E.L.T. 433 (S.C.). held that “Where goods which are imported are lost, pilfered or destroyed, no import duty is leviable thereon until they are out of customs and come into the hands of the importer. It is clear therefore, that it is only at this stage that the quantity of the goods imported is to be looked at for the purposes of valuation”.

47. The Court further held that customs duty whether at a specific rate or ad valorem is not leviable on goods that are pilfered, lost or destroyed until a bill of entry for home consumption is made or an order to warehouse the goods is made.

48. The Tribunal had earlier held that a demand of duty on transaction value would be leviable in spite of “ocean loss”. The Court held that it flies in the face of Section 23 of the Customs Act in particular, the general statutory scheme and Rules 4 and 9 of the Customs Valuation Rules.

49. In this case the goods were allowed to be destroyed by an order dated 01.02.2013 of this Court before clearance for home consumption as they

were no longer fit for consumption as they posed health hazard to the occupants of the warehouse and to the people near the warehouse.

50. From the facts of the present case, it is clear that the imported goods were damaged after the rain water flooded the petitioner’s warehouse. The surveyors report indicates that the goods had residual and salvage value at that time.

51. Had the 1st respondent allowed the petitioner to clear the damaged goods then and there, duty on the abated value in terms of section 22 of the Customs Act, 1962 would have been sustainable.

52. However, 1st respondent did not permit the petitioner to clear the goods on the abated value. Instead, forced the petitioner to pay duty on the entire value and also did not allow its clearance from the warehouse.

53. Request for clearance of the goods was also turned down by the 1st respondent on the ground that the request for waiver of interest was under active consideration by the 2ndrespondent in terms of the Public Notice.

54. In the process, the goods lost their salvage value and later posed health hazard not only to the occupants of the petitioner’s bonded warehouse but also to the persons in the locality near the bonded warehouse.

55. Under these circumstances, by an order of this court on 01.02.2003 the Court allowed destruction. Thus, the goods were never allowed to be cleared even on their abated value.

56. In this context following passage from the decision of the Honourable Supreme Court in Unichem Laboratories Ltd. v. Collector 2002 (145) E.L.T. 502 (S.C.), is relevant:

> “No doubt that the authorities functioning under the Act must, as are in duty bound, protect the interest of the Revenue by levying and collecting the duty in accordance with law-no less and also no more - It is no part of their

duty to deprive any assessee of the benefit available to him in law with a view to augment the quantum of duty for the benefit of the Revenue .They must act reasonably and fairly".

57. In absence of home clearance of the imported goods into the Domestic Tariff Area, the clamour to appropriate of amount paid towards duty even on the abated value pales out. If the respondents had acted fairly, the revenue would have been entitled to appropriate the duty on abated value. However, by their conduct allowed the goods to be destroyed and thereby exempting the petitioner from payment of duty.

58. Respondents ought to have suo motto taken steps to refund the amount as the petitioner became entitled for remission of duty under Section 23 of the Customs Act, 1962, as no duty was payable. Interest also cannot be demanded under the circumstances.

59. Therefore, the amount of Rs.35,35,220/- paid on 09.11.2017 by the petitioner, is directed to be refunded together with interest to the petitioner within six weeks from the date of this order subject to the petitioner satisfying that there is no unjust enrichment in terms of Section 27 of the Act.

60. There will no necessity for the petitioner to file a formal refund claim. It will suffice, if the petitioner files necessary certificate from a chartered accountant to substantiate the right to get refund of the amount within two weeks from the date of receipt of this order.

61. While scrutinizing and considering the question whether the petitioner is entitled to refund or not or whether the amount has to be credited into the consumer welfare fund, the 1st respondent or any other officer, shall observe the decision of the Hon'ble Supreme Court in Unichem Laboratories Ltd., referred to supra and the decision of the Hon'ble Supreme Court in Mafatlal Industries referred to supra.

62. Under these circumstances and in view of the above observation W.P.Nos. 10329 and 10330 of 2008 are allowed with consequential relief by way of refund of the amount paid by the petitioner, subject to the petitioner satisfying that there is no unjust enrichment if refund is to be allowed.

63. In view of the above, there is no necessity to grant alternate relief in W.P.No.10331 of 2008. It is therefore accordingly dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

kkd

To

1.The Assistasnt Commissioner of Customs,
Bonds-(AIR),
Office of the Commissioner of Customs,
(AIRPORT), Integrated Cargo Complex,
Meenambakkam, Chennai 600 027.

2.The Chief Commissioner of Customs,
Custom House, No.39, Rajaji Salai,
Chennai 600 001.

+1cc to Mr.Mr.G.M.Syed Nurullah Sheriff, Advocate, S.R.No.69378
+1cc to Mr.Mr.C.Manishankar, Advocate, S.R.No.69761

W.P.Nos.10329 to 10331of 2008
and M.P.Nos.1 and 2 of 2008

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