IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 20.12.2018

CORAM

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.P.No.8416 of 2008
and
M.P.Nos.1 & 2 of 2008

M/s.Forbes Gokak Ltd.,
Represented by Mr.S.Raja, Asst. Manager-EXIM,
FACIT Avenue, Perungudi,
Chennai - 600 096. ... Petitioner

Vs.

1. Chief Commissioner of Customs,
   Custom House,
   No.6, Rajaji Salai,
   Chennai - 600 001.

2. Assistant Commissioner of Customs,
   Bonds Department,
   Customs House,
   No.60, Rajaji Salai,
   Chennai - 600 001.

3. State Bank of India,
   Commercial Branch,
   NSC Bose Road,
   Chennai - 600 001. ... Respondents

Writ Petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, calling for the records culminating in the Order dated 20.03.2008 issued from File No.S4/329/1995 (Pt) Bonds by the First Respondent and quash the same.

For Petitioner: Mr.S.Murugappan
For R1 and R2 : Mrs.R.Hemalatha
Senior Standing Counsel
For R3 : Mr.S.Sethuraman

ORDER

The present Writ Petition is pertaining to the order dated 20.03.2008 issued from File No.S4/329/1995 (Pt) - Bonds, by the first respondent.

2. The petitioner claims to be a company, which had taken over M/s.Fal Industries by way of merger in terms of the order passed in C.P.No.229 of 2005 dated 12.04.2006. The petitioner company claims that it is a 100% export oriented unit, coming under the scheme called Electronic Hardware Technology Park (EHTP) announced by the Ministry of Commerce, Government of India.

3. Under the said scheme, the petitioner company is entitled to procure its requirements, free of customs duty in respect of imports and excise duty in respect of locally manufactured goods to meet its export obligation, for which, the petitioner was granted a licence by Software Technology Parks of India, an Autonomous society under the Government of India, which is designated as a nodal agency for such purposes by the Government. By virtue of such permission to the petitioner company, the petitioner was also granted a private bonded warehouse in terms of Provisions of Customs Act 1962, by the second respondent, for procurement of the goods free of duty. The petitioner company was doing well initially, however, in the latest years, due to fast technological changes in the computer hardware market and heavy competition in the overseas market, the petitioner company could not continue the business profitably and hence, production activity was closed by April 1998. Despite closure, the petitioner company was required to pay the duty on the imported materials to an extent of Rs.27,58,000/- and an amount of Rs.18,45,004.52/- was payable as duty in respect of those components.

4. It could be seen that the petitioner had approached the second respondent for debonding, for which, Rs.18,45,005/- was paid as duty on 01.03.2007. However, the second respondent, after receiving the same, informed the petitioner company that to process the petitioner's request for debonding, an undertaking backed by bank guarantee for an amount of Rs.22,96,197/- towards interest payable on customs duty has to be executed, for which, the petitioner provided an undertaking and also guaranteed for an amount of Rs.22,96,197/- through the third respondent on 28.03.2007, which was periodically extended. Subsequently, by letter dated 11.04.2007, the bonded warehouse and the utilisation bonded goods were debonded by the 2nd respondent. Thereafter, the petitioner company submitted a letter to the 1st respondent requesting for waiver of the bond interest. Since the request was not favorably considered, the petitioner company was directed to pay the interest within 10 days, by the order of the second respondent dated 26.10.2007.

5. The petitioner had challenged the said order dated 26.10.2007 in W.P.No.34667 of 2007 on the ground that the petitioner was not given an opportunity to explain the case in person. An order was passed in the above Writ Petition on

31.01.2008, directing the 1st respondent to offer the petitioner an opportunity of personal hearing and thereafter, pass an appropriate order. In compliance to the order of this Court, the 1st respondent, after hearing the petitioner, had passed a final order dated 20.03.2008, rejecting the claim of the petitioner seeking waiver of interest. As against which, the present Writ Petition is filed.

6. The learned counsel for the 1st and 2nd respondents had filed a detailed counter, affirming all the facts adduced by the petitioner except to state that the petitioner unit, when requested for debondoing and waiver of interest, the normal warehousing period for EOU is 3 years for inputs, spares and consumables, and 5 years for capital goods, as per Section 61(1) of the Customs Act, 1962. The petitioner unit imported raw materials under the EOU Licence No.E-076 dated 23.06.1995, which got expired on 22.06.2000, after which, the petitioner unit had neither got the Green Card renewed from STPI, Chennai, nor renewed the EOU Licence, which made the petitioner unable to apply for extension of warehousing period for 20 bonds, for which, the duty amount of Rs.18,45,000/- has since been paid on 01.03.2007.

7. The learned counsel for the 1st and 2nd respondents would further submit that the petitioner had to pay interest for the above customs duty of Rs.18,45,000/- at the rate of 24% from 23.06.2000 to 28.02.2003 and thereafter, at 15% upto and including the date of payment of duty as per Circular No.48/02 - Cus dated 01.03.2002. The total amount of interest payable by the petitioner unit on the basis of duty calculation done by EOU on self assessment basis, is a sum of Rs.22,96,197/-. Apart from the above submissions, the 1st and 2nd respondents would submit that the petitioner unit had requested the second respondent for debonding, for which, the second respondent demanded bank guarantee of Rs.22,96,197/- to be executed by the petitioner unit, as per which, the petitioner unit executed a bank guarantee of Rs.22,96,197/- towards interest payable on customs duty through the third respondent on 28.03.2007. However, the bank guarantee executed by the petitioner unit was subsequently expired on 28.09.2007, hence, the petitioner unit was advised to renew the same for further period of one year to process their request for waiver of interest, accordingly, the petitioner unit had renewed the same up to the period of 28.09.2008. However, as the petitioner had not chosen to utilize the materials imported duty free since 1998, their request for waiver of interest was rejected by the 1st respondent. Apart from the above submissions, the first respondent has also stated that the the petitioner unit started its commercial production in June 1995 and the export obligation period had ended in June 1999 and since the petitioner unit completed the export obligation period of four years, which was fixed by the Ministry of Industry, New

Delhi, the waiver of interest as sought for by the petitioner cannot be granted.

8. The 3rd respondent also filed a formal counter, stating that the 3rd respondent bank is neither a necessary nor a proper party to the Writ Petition.

9. Heard the learned counsel for the petitioner and the learned counsel for the respondents, and perused materials available on record.

10. The issue involved in this Writ Petition is with regard to rejection of waiver of interest sought for by the petitioner, when the petitioner has sought for debonding, which was rightly acknowledged by the 2nd respondent and issued letter dated 11.04.2007 informing the petitioner that bonded warehouse and unutilised bonded goods are debonded.

11. The learned counsel for the petitioner would vehemently argue that the order of the 1st respondent is without application of mind, as the 1st respondent failed to take into account that the goods were not imported in terms of Notification No.52 of 2003, but only in terms of Notification No.13 of 1981 dated 09.02.1981. The 1st respondent, relying on Notification No.52 of 2003, rejected the waiver and passed the impugned order demanding interest in terms of Section 61 of Customs Act, which is totally contrary to each other, as the interest cannot be claimed at all.

12. Per Contra, the learned counsel for the 1st and 2nd respondents had vehemently contended that there were 20 bonds in the warehouse after the expiry of warehousing period and it was noticed that the assessable value of bonded goods were not available in the Bond Register, and it is found from Bills of Entry that the assessable value for 20 bonds is to the value of Rs.27,50,044/- and approximate duty comes to around Rs.18,45,004.52. The Bills of Entry were pertaining to the period from 1996-1998, during which assessment year, a self assessment was made by the petitioner company, and customs duty of Rs.18,45,000/- was paid by the petitioner, which was accepted pending verification of the correctness of the assessment of petitioner company.

13. On appreciation of the arguments, we have to look into and refer Section 61 of the Customs Act, which is extracted hereunder:

61. Period for which goods may remain warehoused.—

> (1) Any warehoused goods may be left in the warehouse in which they are deposited or in any warehouse to which they may be removed,—

(a) in the case of capital goods intended for use in any hundred per cent. export oriented undertaking, till the expiry of five years; 2[***] 3[(aa) in the case of goods other than capital goods intended for use in any hundred per cent. export-oriented undertaking, till the expiry of three years; and]

(b) in the case of any other goods, till the expiry of one year, after the date on which the proper officer has made an order under section 60 permitting the deposit of the goods in a warehouse: Provided that— 4[(i) in the case of any goods which are not likely to deteriorate, the period specified in 5 [clause (a) or clause (aa) or clause (b)] may, on sufficient cause being shown, be extended—

(A) in the case of such goods intended for use in any hundred per cent. export-oriented undertaking, by the Commissioner of Customs, for such period as he may deem fit; and

(B) in any other case, by the Commissioner of Customs, for a period not exceeding six months and by the Chief Commissioner of Customs for such further period as he may deem fit;]

(ii) in the case of any goods referred to in clause (b), if they are likely to deteriorate, the aforesaid period of one year may be reduced by the 6[Commissioner of Customs] to such shorter period as he may deem fit: Provided further that when the licence for any private warehouse is cancelled, the owner of any goods warehoused therein shall, within seven days from the date on which notice of such cancellation is given or within such extended period as the proper officer may allow, remove the goods from such warehouse to another warehouse or clear them for home consumption or exportation.

(2) 7[Where any warehoused goods—

(i) specified in 8[sub-clause (a) or sub-clause (aa)] of sub-section (1), remain in a warehouse beyond the period specified in that sub-section by reason of extension of the aforesaid period or otherwise, interest at such rate as is specified in section 47 shall be payable, on the amount of duty payable at the time of clearance of the goods in accordance with the provisions of section 15 on the warehoused goods, for the period from the expiry of the said warehousing period till the date of payment of duty on the warehoused goods;

(ii) specified in sub-clause (b) of sub-section (1), remain in warehouse beyond a period of 9[ninety days], interest shall be payable at such rate or rates not exceeding the rate specified in section 47, as may be fixed by the Board, on the amount of duty payable at the time of clearance of the goods in accordance with the provisions of section 15 on the warehoused goods, for the period from the expiry of the said 9[ninety days], till the date of payment of duty on the warehoused goods]: Provided that the Board may, if it considers it necessary so to do in the public interest, by order and under circumstances of an exceptional nature, to be specified in such order, waive the whole or part of any interest payable under this section in respect of any warehoused goods: Provided further that the Board may, if it is satisfied that it is necessary so to do in the public interest, by notification in the Official Gazette, specify the class of goods in respect of which no interest shall be charged under this section. Explanation.—For the purposes of this section, "hundred per cent. export-oriented undertaking" has the same meaning as in Explanation 2 to sub-section (1) of section 3 of the Central Excises and Salt Act, 1944 (1 of 1944)*.]

14. On perusal of Section 61(1) of the Act, it is clear that the normal warehousing period is 5 years for capital goods and 3 years for other than the capital goods. As far as the petitioner company is concerned, the petitioner company admittedly has imported raw materials like Frame, Skid coils, Spring Retainers, etc, which comes under other than the capital goods as declared by the petitioners themselves.

15. On perusal of the Notification No.52 of 2000-Cus dated 31.03.2003, the duty exemption under Electronic Hardware Technology Park (EHTP) is subject to the unit execute the bond binding itself to pay on demand, the amount equal to the duty leviable on the goods and interest at a rate specified by the Government in respect of goods other than capital goods. The relevant portion of the said notification is as follows:

"3. The unit executes a bond in such form and for such sum and with such authority, as may be specified by the said officer, binding himself,-

(a) to bring the said goods into the unit or and use them for the specified purpose mentioned in clauses (a) to (e) in the opening paragraph of this notification;

(b) to maintain proper account of the receipt, storage and utilization of the goods;

(c) to dispose of the goods or services, the articles produced, manufactured, processed and packaged in the unit, or the waste, scrap and remnants arising out of such production, manufacture, processing or packaging in the manner as provided in the Export and Import Policy and in this notification;

(d) to pay on demand -

(1) an amount equal to duty leviable on the goods and interest at a rate as specified in the notification of the Government of India in the Ministry of Finance (Department of Revenue) issued under Section 28AB of the said Customs Act on the said duty from the date of duty free import of the said goods till the date of payment of such duty, if -

(i) in the case of capital goods, such goods are not proved to the satisfaction of the said officer to have been installed or otherwise used within the unit, within a period of one year from the date of import or procurement thereof or within such extended period not exceeding five years as the said officer may, on being satisfied that there is sufficient cause for not using them as above within the said period, allow;

(ii) in the case of goods other than capital goods, such goods as are not proved to the satisfaction of the said officer to have been used in connection with the production or packaging of goods for export out of India or cleared for home consumption within a period of three years from the date of import or procurement thereof or within such extended period as the said officer may, on being satisfied that there is sufficient cause for not using them as above within the said period, allow;

(iii) in the case of,-

(a) goods produced or packaged, such goods have not been exported out of india, and

(b) unused goods (including empty cones, bobbins or containers, if any, suitable for repeated use) as have not been exported or cleared for home consumption, within a period of one year from the date of import or procurement of such goods or within such extended period as the said officer, as the case may be, on being satisfied that there is sufficient cause for not using them as above within the said period, allow;

(II) in case of failure to achieve the said positive Net Foreign Exchange Earning, the duty equal in amount to the portion of the duty leviable on the said goods but for the exemption contained in this notification and the duty so payable shall bear the same proportion as the unachieved portion of Net Foreign Exchange Earning bears to the positive Net Foreign Exchange Earning to be achieved along with interest as the rate as specified in the notification of the Government of India in the Ministry of Finance (Department of Revenue) issued under Section 28AB of the said Customs Act, on the said duty to be paid on demand from the date of importation or procurement of the said goods till the payment of such duty."

16. It is further seen from the Notification No.52 of 2000-Cus dated 31.03.2003, that the specified goods are not found to be in satisfaction to the officer, which normally have to correlate with the production for packing of goods for export out of India or cleared for home consumption within a period of 3 years from the date of import or procurement thereof.

17. It is also clear from the records that as admitted by the petitioner before the authorities as well as before this Court in the affidavit filed in support of the Writ Petition that they commenced production in 1995 and met exports to the tune of 27.5 Crores till April 1998. Due to the fast ecological changes in the computer field and changes in the computer hardware technology market and fierce competition in the overseas market, the petitioner company could not continue its business profitably and production activities were closed by April 1988 and only in the year 2004, as admitted by the petitioner themselves, they sought for debonding by providing an

undertaking backed by a bank guarantee, which also came to be accepted by the 2nd respondent, by its letter dated 11.04.2007 by imposing a condition that on accepting the payment of duty of the unutilised material on execution of the bank guarantee together with bond, the bonded warehouse and unutilised bonded goods were debonded.

18. It is not in dispute that the petitioner claimed waiver of interest imposed for the unutilised goods imported duty free which were available in the bonded warehouse after the expiry of warehousing period. It is also not in dispute that when the petitioner applied for debonding, the unutilised goods imported duty free were available in the bonded warehouse.

19. On a careful perusal of proviso to Section 61 of the Customs Act, 1962, which enunciate the circumstances under which the waiver can be applied based on the notifications in the official gazette issued by Central Government in the appropriate time. However, the exceptions given under proviso to Section 61 of Customs Act, cannot be made applicable to the petitioner company, for the reason that the interest leviable was for the unutilised goods imported duty free, which were available in the bonded warehouse after the expiry period and no reason was stated by the petitioner for keeping the imported materials unutilised, over these long years.

20. Under these circumstances, this Court is of the view that the petitioner has not made out any case for waiver of interest. The grounds raised by the petitioner is not sufficient to set aside the impugned order and accordingly, this Writ Petition fails and the same is dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

s/d-
Assistant Registrar(CO)

True Copy

Sub-Assistant Registrar

raja

To

1. The Chief Commissioner of Customs,
Custom House,
No.6, Rajaji Salai,
Chennai - 600 001.

2. The Assistant Commissioner of Customs,
Bonds Department,
Customs House,
No.60, Rajaji Salai,
Chennai - 600 001.

3. The Manager,
State Bank of India,
Commercial Branch,
NSC Bose Road,
Chennai - 600 001.

+1 CC to M/s.R. Hemalatha, Advocate sr 89141.
+1 CC to Mr.S.Murugappan , Advocate sr 89126.

W.P.No.8416 of 2008
and
M.P.Nos.1 & 2 of 2008

GMR(CO)
SP(21/02/2019)