RESERVED ON : 23.10.2018
DELIVERED ON : 25.10.2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.10.2018

CORAM

THE HON'BLE Mr. JUSTICE M.DURAISWAMY

W.P.Nos.3261 to 3264 of 2010

M/s.K.H.Shoes Pvt. Ltd.,
K.H.House
No.2, Thiru Naraqyanaguru Road,
Choolai, Chennai - 600 112.
rep by its Managing Director
M.Mohamed Shameem ..Petitioner in all W.Ps

Vs.

1.The Commissioner of Customs (Exports),
Office of the Commissioner
of Customs (Exports),
No.33, Customs House,
Rajaji Salai, Chennai - 600 001.

2.The Assistant Commissioner
of Customs (Exports),
No.33, Customs House,
Rajaji Salai, Chennai - 600 001.

3.Central Board of Excise and Customs,
Ministry of Finance,
Department of Revenue,
New Delhi. ... Respondents in
W.P.Nos.3261 to 3263 of 2010

1.The Commissioner of Customs (Airport & ACC),
Office of the Commissioner of Customs (Airport),
Integrated Cargo Complex,
Meenambakkam, Chennai - 600 007.

2.The Assistant Commissioner of Customs,
Draw Back Department,
Air Cargo Complex,
Meenambakkam, Chennai - 600 007. ... Respondents in
W.P.No.3264 of 2010

W.P.No.3261 of 2010 filed under Article 226 of The Constitution of India praying to issue a writ of mandamus to direct the respondents to grant drawback to the petitioner in respect of 207 shipping bills more fully described in the annexure to the Writ Petition amounting to Rs.5,86,23,750/- to the petitioner.

W.P.No.3262 of 2010 filed under Article 226 of The Constitution of India praying to issue a writ of certiorari to call for the records of the 1st respondent ending with the communication F.No.S.Misc.109/2008 EDC dated 16.10.2008 and to quash the same.

W.P.No.3263 of 2010 filed under Article 226 of The Constitution of India praying to issue a writ of certiorari to call for the records of the 3rd respondent in F.No.609/124/2008-DBK dated 05.05.2009 issued by the 3rd respondent and to quash the same.

W.P.No.3264 of 2010 filed under Article 226 of The Constitution of India praying to issue a writ of certiorari to call for the records in proceedings F.No.S.Misc.197/2008/EXP (AIR) ending with demand cum show cause notice dated 31.07.2009 issued by the 1st respondent and to quash the same.

For Petitioner : Mr.C.Manishankar, Senior Counsel
(in all W.Ps) for Mr.K.Krishnamoorthy

For Respondents: Mr.T.Pramod Kumar Chopda,
W.P.Nos.3261 to 3263 of 2010 - R1 to R3

Mr.V.Sundareswaran
W.P.No.3264 of 2010 - R1 & R2

COMMON ORDER

W.P.No.3261 of 2010 has been filed by the petitioner to issue a writ of mandamus to direct the respondents to grant Drawback to the petitioner in respect of 207 shipping bills, amounting to Rs.5,86,23,750/-.

2.W.P.No.3262 of 2010 has been filed by the petitioner to issue a writ of certiorari to call for the records of the 1st respondent relating to the communication dated 16.10.2008 and to quash the same.

3.W.P.No.3263 of 2010 has been filed by the petitioner to issue a writ of certiorari to call for the records of the 3rd respondent relating to the communication dated 05.05.2009 issued by the 3rd respondent (Central Board of Excise and Customs) and to quash the same.

4.W.P.No.3264 of 2010 has been filed by the petitioner to issue a writ of certiorari to call for the records relating to the demand cum show cause notice dated 31.07.2009 issued by the 1st respondent (the Commissioner of Customs (Airport)) and to quash the same.

5.Since the issues involved in all these Writ Petitions are common between the parties, the Writ Petitions are disposed of by this common order.

6.The brief case of the petitioner is as follows:

(i)According to the petitioner, the petitioner Company became a 100% Export Oriented Unit (EOU) by converting their existing Domestic Tariff Area (DTA). However, after the introduction of VAT Scheme in Tamil Nadu, the petitioner decided to exit from the EOU to function under Export Promotion Capital Goods (EPCG) Scheme. By their letter dated 15.02.2007, the petitioner requested the Development Commissioner to issue "No Objection Certificate" as per para 5.4 of the Handbook of Procedures of the Foreign Trade Policy pertaining to EPCG Scheme to exit from EOU Scheme. On 10.04.2007, the Development Commissioner issued No Objection Certificate and it was stated that Final Exit order will be issued after completion of the formalities. Thereafter, the petitioner de-bonded their units from 31.03.2007 and the Assistant Commissioner of Central Excise, Ranipet Division also issued a Certificate that no amount of duty of Customs/ Central Excise was pending due from the petitioner as they had paid the duty payable on the de-bonding. The Final Exit order was also issued by the Development Commissioner on 01.01.2008.

(ii)On 19.12.2007, the petitioner made an application for conversion of EOU shipping bills into Drawback shipping bills with effect from 01.04.2007 as the EOU has been converted into DTA. As there was no response, the petitioner gave a representation dated 22.07.2008 along with all the relevant documents, including a tabular statement giving details of payment of duty.

(iii)According to the petitioner, on 16.10.2008, the Commissioner of Customs (Seaports) had rejected the petitioner's request on the ground that the petitioner did not give any reasons which were beyond their control for not filing Drawback shipping bills without realizing the fact that the petitioner could not have filed the Drawback shipping bills till Final Exit order from the Development Commissioner.

(iv)Further according to the petitioner, the order dated 16.10.2008 was not communicated to them and they obtained the same by making an application under the Right to Information Act and the same was furnished by the Information Officer along with his letter dated 26.06.2009. The 3rd respondent, by communication dated 05.05.2009 conveyed the decision to reject the petitioner's claim for Drawback.

(v)The petitioner has challenged the orders dated 16.10.2008 and 05.05.2009 in W.P.Nos.3262 & 3263 of 2010 respectively. In W.P.No.3264 of 2010, the petitioner has challenged the demand cum show cause notice dated 31.07.2009 issued by the 1st respondent, reviewing his earlier order dated 20.11.2008 sanctioning Drawback.

(vi)According to the petitioner, the Commissioner of Customs (Airport) has issued the demand cum show cause notice on the instructions of the Chief Commissioner's communication dated 13.03.2009. The petitioner contended that the Commissioner does not have jurisdiction to review his earlier order and the same is barred by limitation and is in violation of principles of natural justice. In these circumstances, the petitioner has filed the above Writ Petitions.

7.The brief case of the respondents is as follows:

(i)According to the respondents, as per proviso to Rule 12 (1)(a) of the Customs and Central Excise Duties and Service Tax Drawback Rules, 1995, if the Commissioner of Customs is satisfied that the exporter or his authorized agent has, for reasons beyond his control, failed to make certain declarations relating to Drawback claim on the export goods on the shipping bills, he may allow exemption from these declarations that were not made in the first place and Drawback can then be given. The exemption is permissible only when the declarations were not made for reasons beyond the control of the exporter or his authorized agent.

(ii)According to the respondents, the petitioner has not stated that for the reasons beyond their control the declarations were not made. The respondents have also stated that despite numerous reminders, the petitioner has failed to furnish evidence for payment of duty on finished goods in stock, if any, as on 31.03.2007.

(iii)Further according to the respondents, it is possible that the goods were exported and since the same would have been made from non-duty paid inputs/raw materials etc, Drawback is not admissible on such goods. Even after 01.04.2007, the petitioner was entitled to warehouse required inputs/raw materials/consumables free of duty under Section 65 of the

Customs Act till final exit from the EOU Scheme. Since this was not done, Drawback cannot be allowed. The duty on inputs/raw materials was paid in July 2007 and Drawback is sought for exports made between April and December 2007, therefore, for the period upto July 2007, the exported goods were made out of non-duty paid inputs/raw materials. There is no legal provision to grant Drawback through post-export payment of duty on inputs/raw materials used in the exported goods.

(iv)As per sub-rule (ii) of second proviso to Rule 3 of Customs, Central Excise Duties and Service Tax Drawback Rules, 1995, no Drawback shall be allowed if the said goods are produced or manufactured using imported materials or excisable materials or taxable services in respect of which duties or taxes have not been paid. The initial communication dated 10.04.2007, which is a No Objection Certificate issued by the Ministry, was subject to fulfillment of certain conditions and admittedly, the Final Exit order was issued only on 01.01.2008. Hence, it is not fair on the part of the petitioner in claiming the Drawback for the period from July 2007 to December 2007. In these circumstances, the respondents prayed for dismissal of the Writ Petitions.

8.Heard Mr.C.Manishankar, learned senior counsel on behalf of Mr.K.Krishnamoorthy, learned counsel for the petitioner in all the Writ Petitions, Mr.T.Pramod Kumar Chopda, learned counsel for the respondents in W.P.Nos.3261 to 3263 of 2010 and Mr.V.Sundareswaran, learned counsel for the respondents in W.P.No.3264 of 2010.

9.On a careful consideration of the materials available on record and the submissions made by the learned counsel on either side, it could be seen that by letter dated 02.03.2009, the Joint Commissioner (CCO) informed the Commissioner of Customs (Seaports) to examine the issue in detail and submit the comments for perusal of Chief Commissioner. In response, the Commissioner of Customs (Seaports), by his letter dated 10.03.2009, stated that no fresh ground emerged than what was conveyed in the letter dated 16.10.2008. In the letter dated 16.10.2008, the Commissioner of Customs (Exports) informed the Technical Officer (DBK), CBEC, the petitioner's request for conversion of shipping bills into Drawback shipping bills, merit rejection. However, the Commissioner of Customs (Airport) granted sanction of Drawback claim made by the petitioner on 20.11.2008.

9.1.On 03.02.2009, the Joint Secretary called upon the Chief Commissioner to examine in detail the petitioner's request for Drawback. Subsequently, on 13.03.2009, the Joint Commissioner (CCO) has informed the Commissioner of Customs (Airport) that the Chief Commissioner has directed him to issue a demand for recovery of Drawback amount already sanctioned and disbursed to the petitioner. After this communication, the petitioner gave another representation dated 16.03.2009 to the Revenue Secretary to consider the claim for Drawback wherein it has been stated that till the Exit Letter was issued, the petitioner was permitted to file only EOU shipping bills and therefore, for the reasons beyond their control, they could not claim any Drawback till the Exit Letter was issued. Thereafter, by communication dated 05.05.2009, CBEC informed the petitioner that request for allowing Drawback on consignments exported prior to issuance of No Dues Certificate by the Customs and Central Excise authorities is not sustainable and cannot be acceded to. Thereafter, the petitioner gave a representation dated 09.07.2009 to the Revenue Secretary justifying their case.

9.2.On 31.07.2009, a demand cum show cause notice was issued demanding a sum of Rs.1,95,81,932/-, which was disbursed as Drawback to the petitioner. The basis of this demand is the rejection letter dated 16.10.2008 issued by the Commissioner of Customs (Exports) in respect of Drawback claimed for the exports made from the Seaport. On 24.08.2009, the petitioner sent a reply to the demand cum show cause notice raising various defenses.

9.3.On a perusal of the impugned order dated 16.10.2008, which is challenged in W.P.No.3262 of 2010, it could be seen that the Commissioner of Customs (Exports) has informed the Technical Officer (DBK), Ministry of Finance that the request of the petitioner for conversion of shipping bills into Drawback shipping bills is devoid of merits and is liable to be rejected. However, in the said letter, the Commissioner of Customs has also stated that the Board's directions are awaited for finalizing the matter.

9.4.By communication dated 05.05.2009, which is challenged in W.P.No.3263 of 2010, the Technical Officer (Drawback) informed the petitioner that the issue was examined by the Board and it was decided not to allow Drawback on consignments exported prior to issuance of No Dues Certificate by the Customs and Central Excise Authorities. The Joint Commissioner (CCO), by letter dated 13.03.2009 informed the Commissioner of Customs (Airport) that he was directed by the Chief Commissioner to inform the Commissioner to issue a demand for recovery of the Drawback amount already sanctioned and disbursed to the petitioner and furnish a report for the perusal of the Chief Commissioner.

9.5.On a perusal of the letter dated 05.05.2009, it is clear that the Technical Officer (Drawback) has not considered the case of the petitioner in a proper manner. The Technical Officer should have considered the case of the petitioner and passed a detailed order. That apart, as already stated, the communication dated 13.03.2009 issued by the Joint Commissioner (CCO) was only based on the direction of the Chief Commissioner for the recovery of Drawback amount, which was already sanctioned and disbursed to the petitioner. The order dated 05.05.2009 is a non-speaking order, which cannot be sustained. Since the order passed by the Technical Officer (Drawback) is a non-speaking order, the same is liable to be set aside and the Technical Officer should be directed to decide the matter afresh after taking into consideration the case of the petitioner in accordance with law.

9.6.For the reasons stated above, the communication dated 05.05.2009 issued by the 3rd respondent/Central Board of Excise and Customs in W.P.No.3263 of 2010, is set aside. The 3rd respondent is directed to decide the matter afresh, after issuing notice to the petitioner and after receiving their reply, pass a detailed order in accordance with law.

9.7.So far as the impugned demand cum show cause notice dated 31.07.2009 is concerned, the same is based on the communication dated 16.10.2008 of the 1st respondent rejecting the petitioner's claim for Drawback. The petitioner has submitted their reply to the demand cum show cause notice on 24.08.2009. The Commissioner of Customs (Airport) should consider the petitioner's reply dated 24.08.2009 and decide the matter without being influenced by the directions given by the Board.

9.8.The respondents should have given an opportunity to the petitioner to produce all the documents. The communication dated 16.10.2008 is internal communication between the Commissioner of Customs (Exports) and the Technical Officer (DBK). Admittedly, the said document was not served on the petitioner.

9.9.Since I am of the view that the 1st respondent in W.P.No.3264 of 2010 should decide the matter without being influenced by the directions of the Board, there is no necessity for interfering with the communication dated 16.10.2008. Therefore, the Writ Petition in W.P.No.3262 of 2010 is liable to be dismissed.

9.10.So far as the demand cum show cause notice dated 31.07.2009, which is the subject matter in W.P.No.3264 of 2010 is concerned, the 1st respondent is directed to decide the matter independently without being influenced by the directions of the Board.

9.11.Since the respondents are directed to decide the matter afresh, the prayer sought for in W.P.No.3261 of 2010 to issue a writ of mandamus to grant Drawback to the petitioner cannot be granted for the present.

9.12.Accordingly,

(i) W.P.No.3261 of 2010 is closed,
(ii) W.P.No.3262 of 2010 is dismissed,
(iii) W.P.No.3263 of 2010 is allowed with the above directions and
(iv)W.P.No.3264 of 2010 is disposed of with the above directions. No costs.

Sd/-
Assistant Registrar(CS-IX)

//True Copy//

Sub Assistant Registrar

va

To

1.The Commissioner of Customs (Exports),
Office of the Commissioner of Customs (Exports),
No.33, Customs House,
Rajaji Salai, Chennai - 600 001.

2.The Assistant Commissioner of Customs (Exports),
No.33, Customs House,
Rajaji Salai, Chennai - 600 001.

3.Central Board of Excise and Customs,
Ministry of Finance, Department of Revenue,
New Delhi.

4.The Commissioner of Customs (Airport & ACC),
Office of the Commissioner of Customs (Airport),
Integrated Cargo Complex,
Meenambakkam, Chennai - 600 007.

5.The Assistant Commissioner of Customs,
Draw Back Department,
Air Cargo Complex,
Meenambakkam, Chennai - 600 007.

+1cc to Mr.C.Manishankar, Advocate sr.73611 [19/12/2018]

W.P.Nos.3261 to 3264 of 2010

RR(CO)
EU(23/11/2018)