

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 25.06.2018
Delivered on: 13 -07-2018

CORAM

THE HONOURABLE Mr.JUSTICE V.PARTHIBAN

W.P.Nos.4330 to 4337 of 2011

M/s.Premier Mills Pvt.Ltd.,
rep. by its Managing Director
Dr.K.V.Srinivasan ... Petitioner in W.P.No.4330 to 4333/2011.

M/S.SREE NARASIMHA TEXTILES
PVT.LTD. REP.BY ITS MANAGING DIRECTOR MR.K.
V.SRINIVASAN UNIT-I P.B.NO.2 SULUR
COIMBATORE-641 402. ...Petitioner in W.P.4334 to 4337/2011

Vs

1. The Chairman,
Board of Approvals,
Ministry of Commerce & Industry,
Udyog Bhawan, New Delhi-110011.

2. The Under Secretary
Appellate Committee,
Ministry of Commerce & Industry,
Department of Commerce,
Udyog Bhawan, New Delhi-110 011.

3. The Development Commissioner,
Madras Export Processing Zone SEZ & HEOUs,
Administrative Office Building,
National Highway 45, Tambaram,
Chennai-600 045.

4. The Joint Development Commissioner,
Madras Export Processing Zone SEZ & HEOUs,
Administrative Office Building,
National Highway 45, Tambaram,
Chennai-600 045.

5. The Asst.Development Commissioner,
Madras Export Processing Zone SEZ & HEOUs,
Administrative Office Building,
National Highway 45, Tambaram,
Chennai-600 045. ... Respondents in all the Petitions

PRAYER in W.P. 4330/2011: Petition filed under Article 226 of the Constitution of India, praying to issue a writ of Certiorari, to call for the records relating to the purported decision of 1st respondent in meetings held and 9.4.2010 as communicated to the petitioner by a letter dated 19.5.2010 bearing reference F.No.26/Misc./07-08/AV/2309 of 5th respondent on behalf of 3rd respondent, quash the same.

WP No.4331 of 2011

Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari, to call for the records relating to Letter dated 07.06.2010 bearing reference F.No.12013/10/2008/ADJ/AC of the 2nd Respondent and quash to the same

WP No.4332 of 2011

Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari, to call for the records relating to purported decision of the 1st Respondent in a meetings held on 20.03.2008 as communicated to the Petitioner by the 4th Respondent on behalf of the 3rd Respondent, vide letter/communication dated 22.04.2008 bearing reference F.No.26/508/07-08/AV and quash to the same

WP No.4333 of 2011

Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Mandamus, to direct the Respondents to grant the benefit of deemed export duty drawback as per the Foreign Trade policy and Hand book of Procedure on the WEGs installed outside the Bonded Premises of the Petitioner together with interest accrued thereon

WP No.4334 of 2011

Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari, to call for the records relating to Letter dated 07.06.2010 bearing reference F.No.12013/11/2008-ADJ/AC of the 2nd Respondent and quash to the same

WP No.4335 of 2011

Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari, to call for the records relating to purported decision of the 1st Respondent in a meetings held and 09.04.2010 as communicated to the Petitioner by a letter dated 19.05.2010 bearing

reference F.No.26/Misc/07-08/AV/2310 of the 5th Respondent on behalf of the 3rd Respondent and quash to the same

WP No.4336 of 2011

Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Mandamus, to direct the Respondents to grant the benefit of deemed export duty drawback as per the Foreign Trade policy and Hand book of Procedure on the WEGs installed outside the Bonded Premises of the Petitioner together with interest accrued thereon

WP No.4337 of 2011

Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari, to call for the records relating to purported decision of the 1st Respondent in a meetings held on 20.03.2008 as communicated to the Petitioner by the 4th Respondent on behalf of the 3rd Respondent, vide letter/communication dated 22.04.2008 bearing reference F.No.26/507/07-08/AV and quash to the same

For Petitioner : Mr.T.Mohan, SC for
in all W.Ps M/s.G.Mani & Nidhin Jaya Chander

For Respondents : Mr.G.Karthikeyan,
in all W.Ps Asst.Solicitor General

COMMON ORDER

Since common grounds and issues have been raised in all these Writ Petitions, they are taken up together for common disposal.

2. The writ petitioners, viz., M/s.Premier Mills Pvt.Limited and M/s.Sree Narasimha Textiles Pvt.Limited, which filed these writ petitions, are private limited companies involved in manufacturing of cotton yarn. The companies have their Export Oriented Units (hereinafter referred to 'EOUs') located at Coimbatore. The grievance of the petitioners is that Duty Drawback claim provided under Foreign Trade Policy has not been extended to the petitioners in respect of procurement of Wind Electrical Generators (in short, 'WEGs') for generation of electricity and its consumption.

3. The facts and the circumstances necessitating the filing of the Writ Petitions are stated hereunder:

The petitioners are involved in manufacturing of cotton yarn and the companies have their Export Oriented Units, exporting the cotton yarn manufactured by them. For generation and consumption of electricity, the petitioners have procured WEGs through local suppliers in Udumalpet District in Tamil Nadu. The energy generated by WEGs was transmitted to the grid of Tamil Nadu Electricity Board (TNEB) and required quantity of electricity in units was drawn and used for the petitioners' consumption. In this regard, the petitioners have also entered into an Energy Wheeling Agreement with the Tamil Nadu Electricity Board (TNEB). The energy drawn by the High Tension Service Connection at the EOU premises were used for running the machinery installed which in turn used for manufacture of the export product, i.e. cotton yarn. According to the petitioners, the identification of the location of Wind Mills was at the instance of Centre for Wind Energy Technology (C-WET) which is an autonomous body under the Ministry of New and Renewable Energy and certain areas were identified for location Wind Mills on the basis of availability of constant wind resources. After the procurement of WEGs, the same were located in various places on the basis of locational advantageous for effective functioning of Wind Mills and for effective generation of energy.

4. According to the petitioners, several factors were taken into consideration for location of Wind Mills like, environmental pollution, diversification of energy supply, elimination of imported fuel and thereby provides energy security and prevention of conflict over natural resources, etc. According to the petitioners, the wind energy is one of the cheapest sources of electrical energy. The supplier of WEGs, namely, M/s. Vestas Wind Technology India P. Limited imported vital components such as Main Gear Boxes, Generators, Nacelle base frames, Hubs, HV Cables, etc., on payment of customs duty and used the same in the manufacture of WEGs. In addition to that the supplier used the indigenous components like blades, blade tips and towers for manufacture of the said WEG. The petitioners under the Foreign Trade Policy, have a right to claim Duty Drawback on the components imported by the Supplier, meaning seeking refund of the customs duty paid by the supplier at the time of import of the components. The issue of Duty Drawback was placed before first respondent for their approval. However, it appears that in the meeting held in March 2008, the first respondent refused to approve the claim for Duty Drawback for the petitioners only on the ground that the WEGs are located outside the EOUs. The decision of the first respondent was communicated by the third respondent which is also impugned in the Writ Petitions.

5. Aggrieved by the decision of the first respondent in not granting approval towards Duty Drawback, the petitioners have made a representation to the Chairman, Grievance Redressal Committee, Department of Commerce (GRC), New Delhi in terms of provisions of the Foreign Trade Policy in May 2008. The Grievance Redressal Committee, on receipt of the representation from the petitioners, placed the matter before the first respondent to reconsider the entire issue particularly on the basis of the fact that due encouragement needs to be given for non-conventional energy resources and Wind Mills can be located only where wind blows in all seasons. After the matter being placed for reconsideration before the first respondent, however, the first respondent once again rejected the claim of the petitioners by non-speaking order dated 19.5.2010. The appeal petition filed by the petitioners before the second respondent/Appellate Committee was also rejected vide order dated 7.6.2010 on the basis of the decision of the first respondent. These orders disapproving the grant of Duty Drawback by the first respondent are put to challenge in these writ petitions.

6. Upon notice, Mr.G.Karthikeyan, learned Assistant Solicitor General entered appearance and filed a detailed common counter affidavit in respect of all the writ petitions.

7. Mr.T.Mohan, learned senior counsel appearing for the petitioners, at the outset, would submit that the location of WEGs outside the export oriented units (EOUs), cannot be the basis for rejection of claim towards Duty Drawback since WEGs are required to be located outside areas only where wind blows in all seasons consistently and constantly. It is admitted fact that the energy that was generated by WEGs was exclusively used by the petitioners units. Such being the case, the geographical location of Wind Mill away from the EOUs is not a material reason for denying the benefit of Duty Drawback. He would further state that when the Grievance Redressal Committee had forwarded the representation of the petitioners to the first respondent for reconsideration in the light of the Wind Mills being located outside the EOUs for effective generation of energy throughout all the seasons, the first respondent has mechanically rejected the claim once again without spelling out any reasons or pointing out any provisions in the Foreign Trade Policy as to how the claim of the petitioner for Duty Drawback could not be entertained. The learned counsel would submit that the Wind Mills need to be located within the premises of the EOUs is a preposterous stand on the part of the first respondent since the Wind Mills cannot be located in all places regardless of the fact whether there were available wind resources during all seasons. According to the learned counsel, once the generation of energy by the Wind Mill and its consumption by the

petitioners have become integral part of EOUs, the physical location of Wind Mills does not really the matter for the purpose of claim by the petitioner for Duty Drawback.

8. On the other hand, Shri G.Karthikeyan, learned Asst.Solicitor General of India, appearing for the respondents would submit that the petitioners were not entitled to the claim towards Duty Drawback in view of the location of Wind Mills outside the territorial jurisdiction of EOUs and no specific letter of permission was granted to the petitioners in support of their claim. According to the learned Asst.Solicitor General of India, the goods which were supplied other than one mentioned in the letter of permission and located outside the territorial jurisdiction of EOU, cannot be the subject matter for claim of Duty Drawback. In the absence of any specific mention in the letter of permission, the petitioners are not entitled to claim Duty Draw Back for WEGs. He would therefore submit that the petitioners cannot now seek for grant of relief and request this Court to reject all the Writ Petitions.

9. Learned senior counsel for the petitioners while concluding his arguments, would also rely on a decision reported in "2006(197) ELT 145 SC (Vikram Cement versus Commissioner of Central Excise, Indore)". He would particularly rely on paragraph 5 of the decision of the Hon'ble Supreme Court which is reproduced hereunder:

"5. As regards the Modvat/Cenvat credit on capital goods, if the mines are captive mines so that they constitute one integrated unit together with the concerned cement factory, Modvat/Cenvat credit on capital goods will be available to the assessee. On the other had, if the mines are not captive mines, but they supply to various other cement companies of different assessees, Modvat/Cenvat credit on capital goods used in such mines will not be available to the concerned assessee under the appropriate Modvat/Cenvat Rules. The matters are remanded to the respective original authorities for decision only on the above issue."

10. He would therefore that the above ratio laid down by the Hon'ble Supreme Court of India would be directly applicable on the facts of the present case since regardless of location of WEGs, they are admittedly integral part of manufacturing activity of the petitioners and therefore, they are entitled to Duty Drawback.

11. This Court has given its anxious consideration to the rival submissions of the learned counsels appearing for the parties. From the materials and the pleadings placed on record,

what emerges and strikes the Court is that the impugned orders passed by the first and third respondents and as communicated by the fourth respondent appear to be not on the basis of sound legal consideration and appreciation of the relevant factual materials which formed the basis for claim of the petitioners for Duty Drawback. There appears to be some force in the contentions put forth on behalf of the petitioners that the geographical location of the WEGs outside the EOUs, cannot be the reason for denying the Duty Drawback benefit to the petitioners since admittedly the location of Wind Mills is always on the basis of the constant availability of wind resources in all seasons as particularly, in this case, when the petitioners are the only consumers and beneficiaries of the energy generated by the Wind Mills it cannot be gainsaid that the location of Wind Mills outside the territorial jurisdiction can be an adverse factor for denying the benefit of Duty Drawback. While holding so, this Court is not inclined to go any further on the controversies raised in the Writ Petitions since this Court is of the prima facie view that the orders/communications impugned in the Writ Petitions appeared to have been passed and issued without appreciating the various factors and legal position in proper perspective.

12. In fact, when the Grievance Redressal Committee referred the matter back to the first respondent for reconsideration, it is imperative on the part of the first respondent to take into consideration the issues and the concerns raised by the petitioners in the light of the recommendation of the Grievance Redressal Committee. However, it appears that the first respondent without re-looking into the matter, has mechanically rejected the claim of the petitioner by sticking to its original decision. From the second communication of the first respondent, it could be seen that the first respondent was unwilling to review its own decision even in the light of certain positive materials available in support of the claim of the petitioners. The order as such passed by the first respondent without disclosing any reasons for not considering the claim of the petitioners on the basis of the facts presented before the authority, is per se unsustainable in law. When an adverse decision is taken of this nature denying the right of the petitioners to claim Duty Drawback, it is incumbent upon the authority to disclose the basis of such adverse decision and why the case of the petitioners could not be accepted. In the impugned communications, the first respondent appeared to have not taken any effort to address all the issues, but appeared to have taken a decision with closed mind.

13. For the above said reasons, the letters/communications impugned in the respective writ petitions, viz., W.P.Nos.4330, 4331, 4332, 4334, 4335 and 4337 of 2011 are hereby set aside.

The matter is remanded back to the first respondent for fresh consideration. The first respondent is directed to re-consider the entire issue afresh after providing an effective opportunity to the petitioners to put forth their claim comprehensively. In this regard, the first respondent is directed to pass final orders within a period of 12 weeks from the date of receipt of a copy of this order. It is also made clear that the first respondent shall also take into consideration the decision of the Hon'ble Supreme Court of India in "Vikram Cement versus Commissioner of Central Excise, Indore" reported in 2006 (197) ELT 145 (SC), particularly the ratio as laid down therein in paragraph 5 therein, which is extracted in for foregoing paragraphs of this order and also the factum of exclusive usage of WEGs by the petitioners alone for their manufacturing activity. Accordingly, these Writ Petitions are disposed of.

14. In view of the orders passed in W.P.Nos. W.P.Nos.4330, 4331, 4332, 4334, 4335 and 4337 of 2011, no orders need be passed in W.P.Nos.4333 and 4336 of 2011 and accordingly, they are closed for the present as the relief sought for therein, cannot be granted since the first respondent is directed to reconsider the matter afresh and take a final call in the matter as per the directions narrated above. No costs.

s/d-
Assistant Registrar (CS-V)

True Copy

Sub-Assistant Registrar

To

1. The Chairman,
Board of Approvals,
Ministry of Commerce & Industry,
Udyog Bhawan, New Delhi-110011.

2. The Under Secretary
Appellate Committee,
Ministry of Commerce & Industry,
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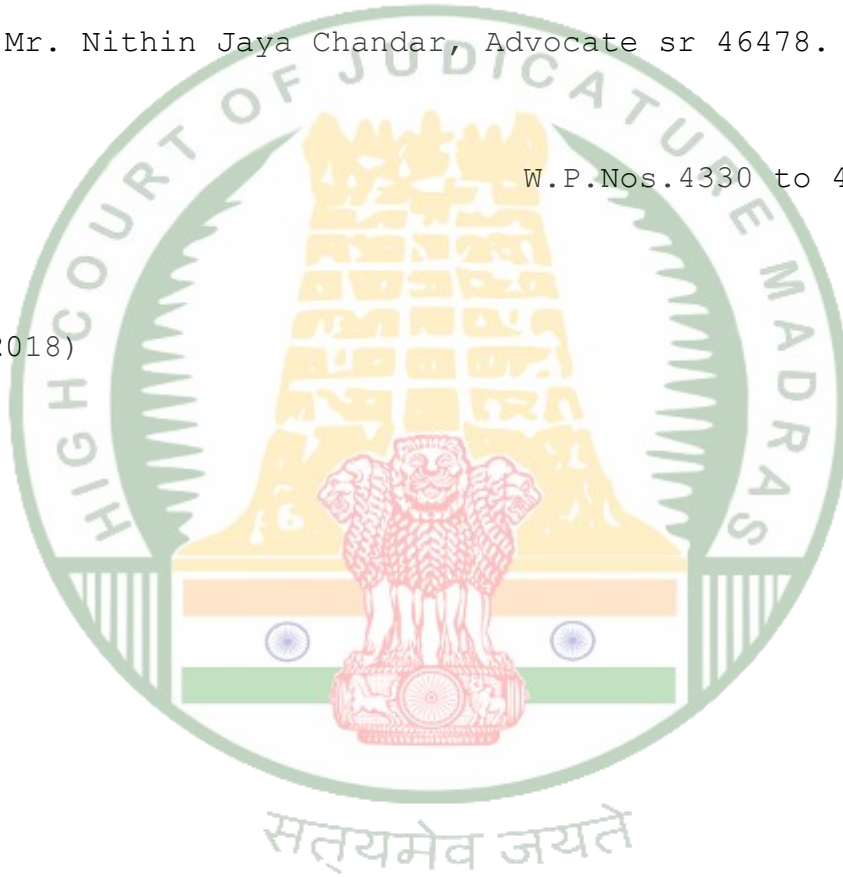
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+8 CCS to Mr. Nithin Jaya Chandar, Advocate sr 46478.

W.P.Nos.4330 to 4337 of 2011

NRL (CO)
SP (24/07/2018)



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