BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 13.06.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

W.P.(MD)No.6582 of 2018
and
W.M.P.(MD)Nos.6376 and 6377 of 2018

M/s.Industrial Mineral Company (IMC),
Represented by its Manager (Exports),
Ashok Kumar ... Petitioner

-Vs-

1.The Commissioner of Customs,
Custom House, New Harbour Estate,
Tuticorin-628 001.

2.The Assistant Commissioner of Customs (Refunds),
Custom House, New Harbour Estate,
Tuticorin-628 001. ...Respondents

PRAYER:Writ Petition is filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorarifed Mandamus, calling for the records relating to the impugned communication made by the second respondent in C.No.VIII/20/249/2017-RF, dated 27.10.2017, insofar as the petitioner's present claim is concerned and quash the same as illegal and beyond Judicial Discipline and consequently direct the second respondent herein to accept the subject refund application dated 27.09.2017, and to settle and release the pending Excess Export Duty amount of Rs.26,41,805/- collected by the respondent herein, claimed by the petitioner vide Receipt No.8773, dated 27.09.2017, in the light of the order of Hon'ble Customs Excise & Service Tax Appellate Tribunal vide Final Order No.41412/2015, dated 14.10.2015.

For Petitioner : Mr.A.K.Jayaraj

For Respondents : Mr.B.Vijayakarthikeyan
Standing Counsel.

ORDER

Heard the learned counsel on either side.

2. By consent of both parties, the main Writ Petition itself is taken up for final disposal.

3. The case of the petitioner is that they are registered 100% Export Orient Unit and Manufacturer and Exporter of processed and upgraded ilmenite falling under CTH 26140020. According to the petitioner, before 01.03.2013, there was no export duty on ilmenite and from 01.03.2013, the Central Government vide Notification No.15/2013-Cus., dated 01.03.2013 has imposed 10% export duty on ilmenite, unprocessed and 5% on ilmenite, upgraded (beneficiated ilmenite including ilmenite ground) (2.5% w.e.f., 01.03.2015 vide Notification No.08/2015-Cus., dated 01.03.2015). As the petitioner's product is processed and upgraded ilmenite, the petitioner sought for filing shipping bill with 5% export duty by classifying the product under Chapter Heading No.26140020. But, the Department insisted for paying export duty @ 10% instead of 5% for the petitioner's product - upgraded ilmenite. Thereafter, the petitioner requested the Department vide protest letter dated 07.03.2014 to permit them to file shipping bills under CTH 26140020 by paying export duty @ 10% under protest. Thereafter, the Department vide its letter C.No.VIII/06/104/2012-Export, dated 11.03.2014, accorded permission for export of 'Ilmenite, Processed & Upgraded' @ 10% export duty under protest. Accordingly, the petitioner had filed 10 shipping bills for export of 'Ilmenite Upgraded (Processed)' by classifying them under Chapter Heading No.26140020 of Customs Tariff Act, 1975 and paid duty @ 10% under protest by mentioning 'under protest' in the body of the shipping bills itself and Department had allowed export.

4. Thereafter, when an identical issue came up before the Customs Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai, in V.V.Minerals v. Commissioner of Customs, Tuticorin, in Final Order No.41412/2015, dated 14.10.2015, wherein, it was held that ilmenite exported by the appellant therein was classifiable under CH26140020 of CTH.

5. The petitioner filed refund claim to refund the excess export duty paid by him under protest, but the same was returned by the second respondent stating that it cannot be entertained.

6. According to the respondents, they have gone on appeal challenging the order of the Tribunal in V.V.Minerals v. Commissioner of Customs, Tuticorin, in Final Order No.41412/2015, dated 14.10.2015 to the Hon'ble Supreme Court and the matter is pending. Therefore, the refund claimed by the petitioner cannot be entertained.

7. Heard both sides.

8. Admittedly, the petitioner has paid the duty under protest @ 10%. But the appropriate duty would be 5% from 01.03.2013 vide Notification No.15/2013-Cus., dated 01.03.2013 and 2.5% from 01.03.2015 vide Notification No.08/2015-Cus., dated 01.03.2015. When a decision was taken by the Higher Judicial Forum, it is binding on the subordinate authorities. The Tribunal,

admittedly, held that the duty is not leviable @ 10% as claimed by the appellant, but, it is only leviable under CH26140020, as per the Notification issued by the Department then and there.

9. It is well settled that the duty paid by the assessee under protest, if ultimately found, was not leviable, it would automatically entitle him for refund. The payment under protest by itself would tantamount to claiming refund, but, it cannot be turned down merely because he has not filed any appeal or appeal was filed by the Department before a higher forum.

10. In similar circumstances, while dealing with the matter relating to the petitioner, this Court in W.P.(MD)No.2140 of 2018 dated 22.03.2018, has observed that the Adjudicating Authority himself had mentioned that the case of the petitioner is similar to that of V.V.Minerals v. Commissioner of Customs, Tuticorin. The appeal filed by him against that case, is yet to reach finality and there is no stay against the judgment of the Tribunal. Further, the goods covered under shipping bills of the petitioner were rightly classifiable under CH26140020 of CTH. The writ petition was allowed in favour of the petitioner.

11. In view of the decision of the Tribunal, the petitioner is entitled to get refund. Since a binding decision has not been followed by the Adjudicating Authority in this case, this Court can interfere straight away without relegating the assessee to file an appeal.

12. In this view of the matter, the impugned order passed by the second respondent in C.No.VIII/20/249/2017-RF dated 27.10.2017 shall stand quashed.

13. The learned counsel appearing for the petitioner, on instructions, offers to furnish immovable property security in respect of the refund amount. The said security shall not be encumbered till the issues are finally resolved by the Hon'ble Supreme Court. The Adjudicating Authority will be at liberty to pass revised orders based on the outcome of the decision of the Hon'ble Supreme Court. The second respondent is directed to refund the amount in question to the petitioner within a period of four weeks from the date of receipt of a copy of this order, after taking immovable property security from the petitioner as indicated above.

14. The Writ Petition stands allowed accordingly. No costs. Consequently, the connected miscellaneous petitions are closed.

Sd/
Assistant Registrar(CS-II)

/True copy/

Sub Assistant Registrar

+1cc to Mr.A.K.JAYARAJ, Advocate, SR.No. 68338
+1cc to Mr.B.VIJAY KARTHIKEYAN, Advocate, SR.No. 68168

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RSB
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