IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.10514 of 2017

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Indian Oil Corporation Ltd. a company incorporated under the Companies Act, having its office at Baranuni Refinary, P.O. Barauni refinery, P.S. Barauni, through its Senior finance Manager Ravi Kant Agarwal, Son of Shri Om Prakash Agarwal resident of BCI/59, Barauni Refinery Township, PO Barauni Refinery Township, P.S. Begusarai District - Begusarai.

... ... Petitioner/s

Versus

1. Central Board of Excise and Customs (Drawback Division) Ministry of Finance, Department of Revenue, Governmetn of India through its Under Secretary (Drawback), having its office at 4th floor, Jeevan Deep Building, Parliament Street, New Delhi-110001.
2. Joint Secretary to the Government of India, C Ministry of Finance, Department of Finance Revision (Revision Application Unit) having its office at 14, HUDCO Vishala Building, B Wing, Bhikaji Cama Place, New Delhi - 110066.
3. Commissioner of Central Excise and Service Tax having its office at Central Revenue Building, Birchand Patel Marg, Patna
4. Joint Commissioner of Central Excise and Service Tax having its office at Central Revenue Building, Birchand Patel Marg, Patna

... ... Respondent/s

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Appearance :

For the Petitioner/s : Mr.D.V.Pathy, Adv.

For the Respondent/s : Mr. Satya Prakash Tripathy, Adv.

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN
and
HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA

ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE JYOTI SARAN)

Date : 14-08-2019

This writ petition under Article 226 of the Constitution of India is filed to question the order dated 03.05.2017 purportedly passed by the respondent No.1

summarily rejecting the application of the petitioner for condonation of delay in exercise of powers vested under Rule 17 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 (hereinafter referred to as 'the Drawback Rules'). The petitioner alongside also questions the order dated 16.11.2015 passed by the respondent No.2, the Joint Secretary, Government of India in reversing the order passed by the Commissioner (Appeals) Custom, Central Excise and Service Tax, Patna. The third order questioned by the petitioner is the order dated 08.08.2011 passed by the respondent No.4, the Joint Commissioner, Central Excise and Service Tax, Patna whereby the application filed by the petitioner for fixation of brand rate for the April, 2010 was not held maintainable because the Commissioner in exercise of powers vested under Rule 6(1) had refused to condone the delay. Copies of the orders dated 3.5.2017 passed by the Government of India under Section17, on revision and by the Joint Commissioner are impugned at Annexures 7,5 and 3 respectively to the writ petition.

Facts of the case briefly stated is the petitioner is a public sector undertaking of the Government of India and is engaged in the business of manufacture of Petroleum products. A memorandum is stated to have been entered between

Government of India and the Government of Nepal for export of petroleum products namely, High Speed Diesel (H.S.D), Motor Spirit (M.S), Superior Kerosene Oil (SKO) and Liquified Petroleum Gas(LPG) to the Nepal Oil Corporation. It is the case of the petitioner that the petitioner has been exporting petroleum products through Land Customs Stations from its different marketing installations and is entitled to claim fixation of brand rate under 'the Drawback Rules'. The case of the petitioner is that it is in this connection and for fixation of brand rate for the month of April, 2010 that the petitioner made an application to the respondent No.4, the Joint Commissioner of Central Excise in the prescribed format on 29.06.2010, a copy of which is at Annexure-1 series. The petitioner also filed application for condonation of delay on 18.08.2010 before the respondent No.3, the Commissioner of Central Excise, a copy of which is at Annexure-2. This application of the petitioner was held not maintainable by the respondent No.4, Joint Commissioner on grounds that the Commissioner had refused to condone the delay. A copy of such order dated 08.08.2011 circulated vide memo No.795 dated 09.08.2011 is impugned at Annexure-3 to the writ petition. The petitioner filed a statutory appeal before the Commissioner (Appeals) which was allowed by order dated

11.10.2012 at Annexure-4 to the writ petition with consequential reliefs. The department went in revision before the Government of India and by order dated 16.11.2015 impugned at Annexure-5, the revision was allowed and the application for brand rate fixation filed by the petitioner was held time barred. A memorial by the petitioner before the Government of India in its Ministry of Finance has also been rejected by order dated 03.05.2017 impugned at Annexure-7 and feeling aggrieved the petitioner is before this Court.

We have heard Mr. D.V. Pathy, learned counsel for the petitioner and Mr. Satya Prakash Tripathy, learned Senior Standing counsel for the department and we have perused the records.

It is because the orders of the statutory authorities in refusing to condone the delay despite the explanation given by the petitioner in his condonation at Annexure-2 was not backed by reasons that we were persuaded to direct the department to produce the records of the proceedings relatable to the petitioner by our order dated 16.4.2019 and which has since been produced. Since the application of the petitioner at Annexure-1 series to claim the benefit under 'the Drawback Rules' for fixation of brand rate has not been rejected, on merits, the limited issue which falls for consideration before us is whether the rejection of the condonation application is backed by reasons and/or whether the Commissioner (Appeals) having found merit in the explanation given by the petitioner in his condonation application to condone the delay, there was any occasion for the superior authorities to interfere therewith.

While handing over the records a list of dates was also provided by the learned counsel for the department and which made reference to an order dated 2/5.07.2010 holding the application of the petitioner for fixation of brand rate, not maintainable. This fact was obviously an obstruction in consideration of the claim of the petitioner because in case the application of the petitioner for fixation of brand rate under 'the Drawback Rules' filed on 29.6.2010 itself was held not maintainable on 2/5.07.2010 then there was no occasion to entertain the condonation application filed for condonation of delay in filing the application for fixation of brand rate under 'the Drawback Rules'. We thus posted this matter on 29.07.2019 and again on 08.08.2019 allowing the parties to address on this issue because if the main application itself stood rejected then there was no occasion for any condonation to be filed.

The position was contested by Mr. Pathy to submit that since the order dated 2/5.07.2010 had never been communicated to the petitioner, it had no meaning. He further submits that in case the main application itself was rejected then there was no occasion for the statutory authority to entertain the condonation application which indeed was entertained and consequently rejected to hold the main application as not maintainable. According to Mr. Pathy, if the main application filed for fixation of brand rate was rejected on 2/5.07.2010 then the orders holding the application not maintainable consequent upon rejection of the condonation application had no meaning. Proceeding here from, he submits that since by the orders impugned the statutory authorities have held the application filed by the petitioner for fixation of brand rate not maintainable because the condonation had been refused by itself confirms that this order dated 2/5.07.2010 was never acted upon.

Learned counsel for the department opposing the writ petition has submitted that since the reasons assigned by the petitioner for condonation of delay did not persuade the statutory authorities to condone the delay hence no interference is called for in the decision taken.

We have heard learned counsel for the parties and we have perused the records.

As we have observed above, the only issue which falls for consideration before us is whether the rejection of the condonation application is backed by reasons as also whether there was any occasion for the revisional authority to interfere with the order passed by the appellate authority to condone the delay and to allow the application. In fact, there is no contest on merits of the claim as well as on the entitlement of the petitioner to seek a brand rate rather the only impediment on such relief is the delay whatsoever. In other words, if the delay is condoned, the relief is consequential.

We would first of all consider the order dated 2/5.07.2010 which finds reference in the list of dates to inform that the application of the petitioner for fixation of brand rate was rejected. The said order bearing Memo No. 237 dated 2/5.07.2010 can be found at page 61 of the file and it is while informing the Accounts Officer of the petitioner of the deficiencies noticed in his application that he was communicated that the application is not maintainable. According to Mr. Pathy, whatever deficiencies was noticed, was removed by the petitioner and that those letter was either not communicated or not acted upon because the condonation application was taken up for consideration on merits.

We find substance in the submission made by Mr. Pathy, because at page 79 we find re-submission of revised application by the petitioner on 23.07.2010 together with enclosures and which was acted upon as confirmed from the subsequent correspondences on the records of the file. Meaning thereby, the deficiencies being removed, the application was entertained and in the meanwhile the petitioner filed his application for condonation of delay on 18.08.2010 which according to the order of the Joint Commissioner at Annexure-3 was rejected by the Commissioner as he did not consider it a fit case for allowing extension of 30 days.

Mr. Pathy has invited our attention to the chart at Annexure-12 series to submit that it contains the details of the exports made by the petitioner from its different marketing installations and a cursory glance of the delay caused in filing the application would confirm that it is in between 1 to 30. In other words, it is within the power of condonation vested in the Commissioner. Since the order of the Joint Commissioner dated 08.08.2011 impugned at Annexure-3 simply held the application not maintainable on grounds that the condonation application had been rejected by the Commissioner and the reasons thereof was not explained, although the petitioner in his condonation application at Annexure-2 had specifically mentioned that it is in the process of gathering information from its marketing location covering different Land Customs Station that some delay had occurred and which was prayed to be condoned, that we were persuaded to examine the reasons that crossed the mind of the Commissioner to refuse condonation.

On perusal of the file, we were surprised to note that no formal order was passed in this regard although the consideration of condonation application and its disposal was a quasi judicial discharge by the Commissioner of Central Excise. In fact it is through a file noting and a simple query by the Commissioner as to the 'grounds for condonation' which has been interpreted as a rejection of the application. The file noting confirms that the Commissioner has simply noted that a condonation can be considered where an applicant had provided adequate evidence of being prevented by sufficient cause in filing the application within the prescribed time but if no reason has been cited then on what grounds the condonation can be granted. We notice that this query by the Commissioner has been interpreted as a rejection and the communication to such effect was made by the Additional Commissioner to the Accounts Officer of the petitioner vide his order dated

16.09.2010.

We are surprised by the manner in which the issue has been handled because apart from the fact that the petitioner had mentioned reasons in his application dated 18.08.2010 to pray for condonation of delay, a copy of which is at Annexure-2 there is no positive order by the Commissioner, Central Excise to reject this application rather it is simple query which has been interpreted as a rejection.

The other lacuna of the proceeding is that in case the Commissioner was not satisfied on the reasons assigned by the petitioner in his condonation application, he should have afforded an opportunity to the petitioner to clarify the position but certainly the manner of disposal of the condonation application leaves much to be desired.

In our opinion, the communication in this regard made by the Additional Commissioner through the letter dated 16/22.09.2010 is not a correct reproduction of the state of affairs in absence of any formal order of rejection and consequently the order of the Joint Commissioner in treating the said observation as a rejection of the condonation application to hold the application of the petitioner as not maintainable suffers from the same infirmity.

Such mechanical rejection was questioned by the petitioner in appeal and the Commissioner (Appeals) by his order dated 11.10.2012 at Annexure-4 has taken note of the stipulations present in Rule 6 and 7 of ‘the Drawback Rules’ in so far as it vested jurisdiction in the Commissioner to condone the delay in filing application under ‘the Drawback Rules’ which had been further expanded by the amendment dated 24.6.2010.

Rule 6 of ‘the Drawback Rules’ as it stood amended under the 2006 Amendment Rules in so far as it provides for condonation reads as under:

> “6(1)(a) Where no amount or rate of drawback has been determined in respect of any goods, any manufacturer or exporter of such goods may, within sixty days from the date relevant for the applicability of the amount or rate of drawback in terms of sub-rule (3) of rule (5), apply in writing to the Commissioner of Central Excise or the Commissioner of Customs and Central Excise, having jurisdiction over the manufacturing unit, of the manufacturer exporter or, of the supporting manufacturer, as the case may be, for determination of the amount or rate of drawback thereof stating all the relevant facts including the proportion in which the materials or components or inputs services are used in the production or manufacture of goods and the duties paid on such materials or components or the tax paid on input services:
> **Provided** that such Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, may, if he is satisfied that the manufacturer or exporter was

> prevented by sufficient cause from filing the application within the aforesaid time allow such manufacturer or exporter to file such application within a further a period of thirty day;
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> ………………………………………………….”

It is not in dispute that the application of the petitioner filed on 29.6.2010, was within the condonable period present in the proviso.

The said provision was amended vide notification dated 24.6.2010 whereunder the claim could be filed within 3 months from the date of Let Export Order and which could be further extended by 3 months by the Assistant Commissioner and the Deputy Commissioner and by another 6 months by the Commissioner. The Government of India in its Ministry of Finance, Department of Revenue vide Circular No. 13 of 2010 circulated on 24.6.2010 amended the time limit in respect of the claim raised under Rule 6 and 7 of ‘the Drawback Rules’. There were amendments made by the said Circular as to the time limits prescribed in other provisions as well but in so far as the claims under Rule 6 and 7 is concerned which is the subject matter of consideration, the time limit for filing the application was enhanced to 3 months from the date the Let Export Order and which could be further extended by 3 months either by AC/DC and another 6 months by the Commissioner. The date is very relevant because the circular was enforced on 24.06.2010 revising the time limit for filing the claim for brand rate application, which was filed by the petitioner on 29.6.2010 i.e after the revised time limit came into force and within the extended time period allowed under the amended Rules of 2006, which was condonable at the hands of the Commissioner. Now while the application of the petitioner was filed within the condonable period provided in the proviso to Rule 6(1) that the time limit so prescribed itself was amended vide Circular No.13 of 2010 circulated on 24.6.2010 i.e prior to the filing of the application on 29.6.2010 to claim for fixation of brand rate under 'the Drawback Rules', he became entitled to the benefit of the revised time limit. The Commissioner (Appeals), while considering the appeal preferred by the petitioner has taken note of the fact that the factum of export was not in dispute and that the dispute was on the issue of delay, which was fit for condonation on the reasons assigned as also in view of the revised time limit prescribed in the circular No.13 of 2010 dated 24.6.2010.

In our opinion, where Rule 6 of 'the Drawback Rules' as it stood amended by the Amendment Rules, 2006 allowed an applicant to file his application within 60 days of the date of Let Export Order which could be extended by further 30 days by the Commissioner on recording satisfaction, that the petitioner filed his application for fixation of brand rate within this period of 90 days accompanied with an application for condonation of delay and before such application of the petitioner as well as the condonation application could be disposed on its merits, the time limit itself got revised much prior thereto on 24.6.2010, the statutory authorities were bound to consider the application because not only the time limit was revised much before filing of the application by the petitioner on 29.6.2010 but even the condonation application gave valid reasons for the delay caused.

The Commissioner (Appeals) has taken note of the relevant dates to allow the application of the petitioner on its merit and which decision of the Commissioner (Appeals) has been erroneously interfered with by the Joint Secretary purportedly exercising the powers of the Government of India simply on grounds that the Circular dated 24.6.2010 had no retrospective application and cannot be extended to an export of April, 2010.

In our opinion the very premise drawn is erroneous because the prayer to condone the delay in filing any application seeking such privilege, is always relatable to an event which has taken place earlier and while Rule 6 as it originally existed, allowed such claim application to be filed within 60 days which limit could be extended by further 30 days under the order of the Commissioner, the only legal position that has under gone a change by the Circular no.13 of 2010 dated 24.6.2010 of the Government of India is to revise the time limit not only in respect of filing of the claim application but also in respect of the power to condone the delay. The very fact that this time limit was revised during the period available to the petitioner to file his claim application albeit accompanied with petition for condonation of delay, his claim would sail within the jurisdiction of revised time period and the import of the Circular dated 24.6.2010 to apply to such cases, has been correctly interpreted by the Commissioner (Appeals) and has been illegally interfered with not only in the order of the Joint Secretary purportedly exercising the power of the Government of India but also in the rejection of the application under rule 17 of the rules by the order dated 03.05.2017.

Another lacuna which we find in this proceeding is that although the revisional jurisdiction is to be exercised by the Government of India in its Ministry of Finance which would obviously be the head of the Department but such power has been usurped by the Joint Secretary which exercise is de hors the statutory conferment. It is also informed by Mr. Pathy that the Joint Secretary to the Government of India is an officer in the rank equal to the Commissioner (Appeals). Thus apart from the fact that the orders impugned fail to sustain on merits even on the decision making process, the order dated 16.11.2015 purportedly exercised power by the Joint Secretary Government of India to interfere with the order passed by the Commissioner (Appeals) is lawfully neither sustainable on merits nor on the manner of discharge.

Having heard counsel for the parties we hold that the remarks of the Commissioner on the condonation application would not amount to rejection of the condonation application in absence of any order to such effect. Besides, the fact that such remark was interfered by the Commissioner (Appeals) to find merit in the explanation to the delay given by the petitioner coupled with the revised time limit under the Circular dated 24.6.2010, the order of the Joint Secretary dated 16.11.2015 in purported exercise of revisional jurisdiction impugned at Annexure-5 together with letter dated 03.05.2017 of the Under Secretary, Government of India in its Ministry of

Finance impugned at Annexure-7 are on complete misappreciation of the legal position and are accordingly quashed and set aside.

The writ petition is allowed and since the claim of the petitioner has been allowed by the Commissioner (Appeals) the consequences shall follow and made available to the petitioner within a period of 3 months from the date of receipt/ production of a copy of this judgment.

Let the records so produced by Mr. Satya Prakash Tripathi be returned to him for onward transmission to the department.

(Jyoti Saran, J)

(Arvind Srivastava, J)

Bibhash/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	16.08.2019
Transmission Date	NA