DDR

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION ST NO. 1392 OF 2019

Axiom Cordages Ltd. ..Petitioner
Vs.
Union of India & ors. ..Respondents

…........

Dr. Sujay Kantawala a/w. Poorva Patil a/w Brijesh Pathak for petitioner.
Mr. Pradeep Jetly, Senior Counsel a/w. Mr. Yashodeep Deshmukh I/b. G. Asnani for respondent Nos.1 & 2.

…........

CORAM : S.C. DHARMADHIKARI &
M.S. KARNIK, JJ.

RESERVED ON : 14th FEBRUARY, 2019
PRONOUNCED ON : 15th MARCH, 2019

<u>JUDGMENT (PER M.S.KARNIK, J.)</u>:-

Heard.

2. Rule. Rule is made returnable forthwith. Heard finally by consent of the parties.

3. By this Petition filed under Article 226 of the

Constitution of India, the petitioner challenges the order dated 3rd December, 2018 passed by the 2nd respondent – Development Commissioner SEEPZ Special Economic Zone, Andheri (E), Mumbai denying the petitioner benefit at 5% under the Merchandise Exports from India Scheme ('MEIS' for short). It is further prayed that a suitable direction be issued to the respondents for release of the MEIS benefit applicable for the exports made by the petitioner from January, 2018 as per Annexure at Exhibit 'P'.

4. The facts of the case in brief are as under :

The petitioner is a limited company having a 100% Export Oriented Unit ('EOU' for short) located at Boisar, District – Palghar. The petitioner is involved in the manufacture of various types of synthetic ropes. In case of export, shipping bill is filed claiming applicable and admissible export benefits under the MEIS. According to the petitioner, it is entitled to MEIS benefit at 5% which has been denied. The impugned order passed by the respondent No.2 is solely based on the adjudication order dated 20/11/2018 passed by the 3rd respondent. Though the petitioner had filed the application claiming benefit long time back, and as even this Court directed the respondent No.2 to decide the representation, instead of complying with the order of this Court, the petitioner realized that the 2nd respondent awaited passing of the adjudication order by the 3rd respondent and only on the basis of the order passed by respondent No.3, denied the benefit of MEIS at 5% which the petitioner is entitled on the exports made by them.

5. On 12/7/2017, Shipping Bill Nos. 7289261 and 7289281 were filed by the petitioner under RITC 5607 9090. The Shipping Bills were investigated by the respondent No.4 - R & I department, which claimed that the goods meant for export were classifiable under 5607 4900 and the benefit of 2% under MEIS was only available under the said scheme. The R&I Department sought a report from the Divisional CGST and Central Excise Division about the classification of the goods being exported by the petitioner. By a report dated 28/12/2017,

the Divisional Department gave a report to the R&I Department informing that the sample of the goods exported by the petitioner was classifiable under Tariff heading 5607 9090. The 4th respondent investigated and thereafter issued a show cause notice to the petitioner on 8/1/2018. Apart from issuance of show cause notice, a letter dated 23rd April, 2018 was issued by the office of the Deputy Commissioner of Customs (Preventive), JNPT, inter alia directing to withhold issuance of MEIS scrips. The personal hearing in the show cause notice dated 8/1/2018 was fixed before the 3rd respondent on 3/5/2018. The petitioner filed reply to the show cause notice on 22/5/2018.

6. By various representations dated 13/3/2018, 5/4/2018, 29/5/2018 and 25/6/2018, made to the 2nd respondent, the petitioner requested him to release the benefit under MEIS since the clarification from the jurisdictional CGST office was already on record and as such withholding of the benefit available to the petitioner is illegal. The petitioner approached this Court by filing a Petition since there was no

decision on the representation.

7. Writ Petition No. 8094 of 2018 filed by the petitioner in this Court was disposed of on 16/8/2018 directing the 2nd respondent to consider the Petition and its annexures as a representation of the petitioner and to pass a speaking order.

8. The 2nd respondent heard the petitioner as well as 3rd and 4th respondents on 25th September, 2018 and raised queries to the officers of 3rd and 4th respondents. A detailed reply was filed by the respondents on 28/9/2018. The office of the 4th respondent filed a detailed reply before the 2nd respondent on 27/9/2018.

9. The 2nd respondent passed the impugned order on 3rd December, 2018 denying the benefit of MEIS to the petitioner at 5%, relying upon the adjudication order dated 20/11/2018 passed by the 3rd respondent (Commissioner of Customs (NS-II), Jawaharlal Nehru Custom House, though the order of the 3rd respondent was an appealable order. Even the copy of the order

dated 20/11/2018 was not served on the petitioner as on the date of passing of the impugned order.

10. It is the grievance of the petitioner that the 2nd respondent even failed to release the MEIS benefit for the exports made from January, 2018, which was beyond scope of the show cause notice issued and adjudicated by the 3rd and 4th respondents. According to learned counsel, the 2nd respondent could not have denied the benefit on the finally assessed shipping bills which have been allowed clearance after following due process of law by the officers of 3rd and 4th respondents and the assessments have attained finality.

11. Learned counsel for the petitioner would contend that the 2nd respondent has simply endorsed and blindly followed the order-in-original dated 20/11/2018 passed by the 3rd respondent. According to learned counsel, no opportunity was given to the petitioner to contest the adjudication order dated 20/11/2018. Learned counsel would submit that the 2nd respondent had fixed the hearing on 25/9/2018 when it was

contended that the shipping bills were finally assessed under the classifiable Tariff 56079090 from July 2017 onwards. Learned counsel would contend that the order-in-original dated 20/11/2018 was not even received by the petitioner and the same was an appealable order and therefore respondent No.2 is not justified in relying on the adjudication order.

12. Our attention is invited by learned counsel to the impugned order passed by the respondent No.2 dated 3rd December, 2018. It is his submission that the order-in-original dated 20/11/2018 passed by the 3rd respondent was never received by the petitioner. The 2nd respondent, behind back of the petitioner relied upon the order-in-original dated 20/11/2018 passed by the Customs authorities and rendered a finding that as the Customs authorities, empowered to decide the issue of classification under the Customs Tariff Act has finally decided and settled the issue of classification, thus held that the issue of incentive under MEIS benefits can also be decided accordingly. This approach of the 2nd respondent,

according to learned counsel is not in consonance with law and completely contrary to the principles of natural justice.

13. On the other hand, learned Counsel Shri Jetly supported the order passed by the 2nd respondent. It is his submission that once the issue of classification has been finally decided and settled vide the order-in-original dated 20/11/2018 by the Customs authorities which is empowered to decide the issue of classification under Customs Tariff Act, if based on this classification, the issue of incentive under MEIS benefits is decided, it cannot be said that there is any infirmity in the view taken.

14. According to Shri Jetly, the Customs authority is a proper authority to decide the classification under the Customs Tariff Act and the said power is not vested with the 2nd respondent. Therefore, once the issue of classification is finally settled by the competent Customs authority, issue of benefit under MEIS Scheme will also follow the order on classification. In the submission of Shri Jetly, there is no error whatsoever in

the approach of the 2nd respondent.

15. We have heard learned counsel for the parties. With the assistance of the learned Counsel, we have gone through the Petition, perused the annexures. We have also gone through the impugned order as well as order-in-original dated 20/11/2018 passed by the 3rd respondent. We have also gone through the affidavit-in-reply filed by Shri Milind V. Golap, Assistant Commissioner of Customs (Preventive).

16. It is the petitioner's case that they are entitled to MEIS benefit at 5% for export under the RITC 5607 9090 and therefore shipping bills were filed by the petitioner under RITC 5607 9090. However, according to the claim of R & I, the goods meant for export were classifiable under 5607 4900 and the benefit of 2% under MEIS was only available under the said scheme. From April, 2015, the Government of India introduced the MEIS and incentives were introduced on exports of goods including ropes. Prior to April, 2015, there was no incentive on exports of the subject goods irrespective of classification. From

April, 2015, no incentive was available on goods falling under sub-heading 56074900 of the Customs Tariff. It is the case of the 4th respondent that pursuant to the introduction of MEIS, the petitioner changed the classification of the selfsame ropes exported by them from sub-heading 56074900 to sub-heading 56079090 of the Customs Tariff and claimed MEIS at 5%. This according to the respondents was motivated with a view to incorrectly avail ineligible MEIS incentive under sub-heading 56079090.

17. A show cause notice dated 8/1/2018 was issued inter alia calling upon the petitioner to show cause as to why ropes exported during the period April, 2015 to December, 2017 should not classified under heading 5607-4900 instead of 56079090. The show cause notice was adjudicated vide order-in-original dated 20/11/2018. The adjudicating authority inter alia held that the ropes exported during the period of April 2015 to December 2017 are to be classified under sub-heading 56074900 of the Customs Tariff as opposed to the customs sub-

heading 56079090 adopted by the petitioners. Admittedly the petitioners have filed an appeal against the order-in-original before the Customs, Excise and Service Tax Appellate Tribunal West Zonal Bench at Mumbai ('CESTAT' for short).

18. Thus according to the 4th respondent the composition of the goods is the deciding factor for ascertaining the classification of the goods.

19. The challenge to the order-in-original dated 20/11/2018 is pending in an appeal filed by the petitioner before the CESTAT.

20. Insofar as the proceedings before the 2nd respondent requesting to release the benefit under MEIS is concerned, it is the contention of the petitioner that the jurisdictional CGST office and Central Excise Division has already clarified that the goods exported by the petitioner was classifiable under the tariff heading 5607-9090. Thus, it is the contention of the petitioner that the proceedings before the 2nd respondent are distinct and

independent proceedings for the purpose of classification of the goods exported vis-a-vis proceedings before the 3rd respondent. Thus it is the case of the petitioner that the classification of the goods under Customs Tariff and Central Excise Tariff for the benefit of MEIS is required to be done independently without being influenced by the order-in-original passed by the respondent No.3.

21. We find that the 2nd respondent relying upon the order-in-original dated 20/11/2018 passed by the 3rd respondent denied the beneift of 5% under MEIS. The order-in-original dated 20/11/2018 is the only basis for denying the claim of the petitioner. This Court in an earlier round of litigation in Writ Petition No.8094 of 2018 to which one of us (Dharmadhikari, J.) was a party, vide order dated 16/8/2018 directed the 2nd respondent to consider the Petition and its annexures as a representation of the petitioner and to pass a speaking order after hearing the petitioners. It is contended by the petitioner that the 2nd respondent awaited the orders on

classification from the 3rd respondent and only then proceeded to decide the claim based on this order-in-original.

22. We find force in the submission of learned counsel for the petitioner that before passing any final orders, the 2nd respondent should have given the petitioners an opportunity to deal with the order-in-original dated 20/11/2018. From the record it appears that the order-in-original dated 20/11/2018 was received by the petitioner only on 5/12/2018, that is after the impugned order is passed by the 2nd respondent.

23. This Court vide its order dated 16/8/2018 in Writ Petition No.8094 of 2018 had in clear terms directed the 2nd respondent to consider the Petition and its annexures as a representation of the petitioner and to pass a speaking order after hearing the petitioner. If at all the 2nd respondent wanted to rely upon the order-in-original dated 20/11/2018, the least the 2nd respondent should have done is to give an opportunity to the petitioner to deal with the order-in-original dated 20/11/2018 for considering its effect/impact on the proceedings

before the 2nd respondent.

24. Though the petitioner has raised several contentions interalia contending that the order-in-original dated 20/11/2018 cannot be relied upon as appeal against the same is pending before the CESTAT and that the classification of goods under the Customs Tariff Act and Central Excise Tariff Act are separate, distinct and independent of the proceedings before the 3rd respondent, in our opinion, the matter needs to be remitted back to the 2nd respondent for fresh consideration for affording the petitioner an opportunity of dealing with the order-in-original dated 20/11/2018 and its effect on the proceedings before the 2nd respondent and in terms of the earlier order passed by this Court on 16/8/2018. Hence the following order.

ORDER

i) The impugned order dated 3rd December, 2018 passed by the 2nd respondent is quashed and set aside.

ii) The matter is remitted back to the 2nd respondent for a fresh decision on merits and in accordance with law.

iii) Needless to mention that we may not be understood to have expressed any opinion on merits of the matter and all contentions are kept open.

iv) Let a fresh decision be taken within a period of eight weeks from today after hearing all concerned.

25. Rule is partly made absolute in the above terms with no order as to costs.

(M.S. KARNIK, J.) **(S.C. DHARMADHIKARI, J.)**