

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.09.2019

CORAM:

THE HONOURABLE Dr.JUSTICE ANITA SUMANTH

W.P.Nos.29913 of 2004 and 21959 of 2005
and
WP.MP.No.23907 of 2005

M/s.Shin Ho Petrochemical (India) Ltd.,
Rep. by its Manager (Legal) A.Babu Prasad,
Ammullavoyil Village,
Andarkuppam P.O., Mahali New Town,
Chennai-600 103.

... Petitioner in both the WPs

Vs.

1. Union of India,
Rep. by its Secretary,
Ministry of Commerce,
New Delhi.
2. Director General of Foreign Trade,
Udyog Bhavan,
New Delhi - 110 011.
3. Deputy Director General of Foreign Trade,
Udyog Bhavan,
New Delhi - 110 011.
4. Foreign Trade Development Officer,
Directorate General of Foreign Trade,
Udyog Bhavan,
New Delhi - 110 011.
5. Assistant Commissioner of Customs (EPCG),
Custom House,
Old No.33, New No.60, Rajaji Salai,
Chennai-600 001.

... Respondents in WP.No.29913/2004

- 1.Union of India,
Rep. by its Secretary,
Ministry of Commerce,
New Delhi.

2. Director General of Foreign Trade,
Udyog Bhavan,
New Delhi - 110 011.
3. Deputy Director General of Foreign Trade,
Udyog Bhavan,
New Delhi - 110 011.
4. Foreign Trade Development Officer,
Directorate General of Foreign Trade,
Udyog Bhavan,
New Delhi - 110 011.
5. Foreign Trade Development Officer,
Office of Zonal Joint Director General of
Foreign Trade,
38 & 39, Whites Road, (I Floor),
Royapettah, Chennai - 600 014.
6. Assistant Commissioner of Customs Gr.5A.
Custom House,
Old No.33, New No.60, Rajaji Salai,
Chennai-600 001.

... Respondents in WP.No.21959/2005

Prayer in WP.No.29913 of 2004: Writ Petition is filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari, calling for the File No.20/304/93/EPCG-IV/2529 culminating in the notice dated 21.2.2002 issued from the File No.20/304/93/EPCG-IV/2529 by the third Respondent herein and quash the same.

Prayer in WP.No.21959 of 2005: Writ Petition is filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari, calling for the File No.20/337/93/EPCG-IV/769 culminating in the Notice dated 09.2.2004 issued from File No.20/337/93/EPCG-IV/769 by the Fourth Respondent herein and quash the same.

For Petitioner: Mr. S. Murugappan (in both the WPs)

For Respondents: Mr. B. Rabu Manohar,
(in WP.No.29913/2004)
CGSC

Mr. K. Srinivasa Murthy (for R1 to R5 in
Standing Counsel WP.21959/2005)

Mr. S. Rajasekar (for R6 in WP.21959/2005)

COMMON ORDER

The petitioner is an importer and availed the benefit of the Export Promotion Capital Goods Scheme (EPCG) Scheme in terms of which capital goods, viz. machinery and equipment were permitted to be imported at concessional rate of import duty subject to the condition that such capital goods be utilized in the manufacture and time bound export of goods in excess of a stipulated value. Upon application by the petitioner, an approval was issued by the Director General of Foreign Trade permitting clearances at concessional rate of duty by the customs authorities, the authorities monitoring the fulfillment of export obligations by the petitioner, in terms of value as well as period.

2. W.P.No.29913 of 2004 relates to EPCG licence No.2130152 dated 09.02.1993 and W.P.No.21959 of 2005 relates to EPCG licence bearing No.2100950 dated 09.10.1992. The impugned proceedings remain identical as far as both licences are concerned. Thus the facts and circumstances with regard to EPCG licence bearing No.2100950 dated 09.10.1992 are taken to be illustrative of the facts and circumstances in both Writ Petitions. Though the details of the transactions and certain dates may vary in both Writ petitions, such variation is not material and would not impact the conclusion arrived at by me in these Writ petitions, which is common to both Writ petitions.

3.The petitioner was granted an EPCG licence bearing No.2100950 dated 09.10.1992 and permitted to import four items at concessional rate for a total C.I.F value of Rs.68,04,796/-. The condition was that the petitioner would export expandable polystyrene for a value of US dollars \$ 6,85,570/- within a period of five years from the date of licence. In terms of the licence conditions, a bank guarantee and letter of undertaking ('LUT') had been executed by the petitioner. Though the LUT has not been placed on record by the petitioner, it is an admitted position that one of the terms contained therein provided for payment of interest on delayed payment of duty in the event of a shortfall in fulfillment of export obligations. There being no dispute on this factual aspect, the production of LUT dated 27.02.2003 by the petitioner to the 2nd respondent is not insisted upon.

4.The petitioner imported only two items i.e. Regular Standard Sieve (Dry Screen) with spare parts and Mass Flow Meters with accessories under a bill of entry bearing No.19970 dated 18.05.1993 as against the four items originally proposed. The assessable value of goods was Rs.6,75,457/- and in terms of

the EPCG licence read with Customs Notification No.160 of 1992, the petitioner paid 15% i.e. Rs.1,01,319/- as import duty for clearance of the goods. The value of the licence was also reduced from Rs.68,04,796/- to Rs.51,38,395/- since the items imported were fewer than originally proposed and the export obligations reduced to Rs.6,53,603/- from Rs.6,85,570/-.

5. Without going into unnecessary details, it would suffice to state that the petitioner did not comply with the export obligations and admittedly 18% of the export obligations remained unfulfilled as reported by letter dated 28.07.1998 from the petitioner to the Assistant Commissioner of Customs (R6). The petitioner sought extension of time for complying with the same. While so, on 30.05.2002 the petitioner received a letter from the Deputy Director General of Foreign Trade (R3) calling upon it to extend the validity of the bank guarantee executed originally as well as furnish a statement of export and putting the petitioner to notice that the documents executed by it at the time of issuing of the EPCG licence stipulated that any default/shortfall in meeting the export obligations would require it to remit the shortfall along with interest of 24% on the duty remaining unpaid from the date of import of first consignment till date of payment.

6. The petitioner replied on 12.06.2002 stating that it was exploring the possibilities of fulfilling the remaining export obligations and requesting some time for the purpose. On 09.02.2004, the petitioner received the impugned notice from the Foreign Trade Development Officer (R4) again reiterating the contents of letter dated 30.05.2002 and calling for compliance thereafter within 15 days from the date of issuance of the letter. The notice makes it clear that the duty remaining unpaid will have to be remitted with interest thereupon. The petitioner requested time till 23.03.2005 for remittance of the differential duty, however without interest.

7. On 19.04.2005 the petitioner was called upon to pay the interest of 15% of the duty paid belatedly computed from the date of clearance till the date of payment upon threat of initiation of penalty. The petitioner replied stating that there was no liability to interest, and the demand made was without authority. It is the aforesaid stand that is reiterated in this writ petition and argued before me by Mr. Murugappan, learned counsel who appears for the petitioner.

8. He draws my attention to Notification No.160 of 1992 dated 20.04.1999 under which the import was made pointing out that there was no reference whatsoever therein, to the levy of interest. A comparison was sought to be made between Notification Nos.160 of 1992 and 110 of 1995, dated 05.06.1995. The latter exempted specified capital goods from the levy of

customs duty and clause-4 thereof explicitly specified that any shortfall in remittance of duty under that Notification would be visited with interest at the rate of 15%. Thus the omission of a reference to 'interest' in Notification No.160 of 1992 is stated to be deliberate and conscious. On 26.09.2013, Notification No.46 of 2013-customs came to be issued amending a slew of Notifications issued over the years, from 1992 onwards till 2008, and inserting therein specifically, liability to interest in the original Notification.

9. In the present case, the two imports in question had been occasioned on 18.05.1993 (in W.P.No.21959 of 2005) and on 05.03.1993 (in W.P.No.29913 of 2004). Thus, the petitioner argues, both imports were occasioned prior to 2013 when the original notifications, admittedly, contained no provision for interest. The amendment consequent upon issue of Notification No.46 of 2013 would, according to the petitioner, operate only prospectively and would not thus impact the present cases. The petitioner relies on the judgment of the Supreme Court in the case of India Carbon Ltd. and others vs. State of Assam (106 STC 460) and decision of the Division Bench of the Andhra Pradesh High Court in Delta Paper Mills Ltd. vs. Collector of Central Excise, Guntur (77 E.L.T. 544). Though there are other decisions circulated as part of the paper book, no reference has been made to the same.

10. Separate counters have been filed by the Foreign Trade Development Officer (R5) and Assistant Commissioner of Customs (R6) in WP.No.21959 of 2005 and a common counter by the respondents in WP.No.29913 of 2004.

11. Heard learned counsel and applied my mind carefully to the rival contentions. Admittedly, the petitioner had executed a letter of undertaking backed by bank guarantee wherein it undertakes, that in the event of default/short fall in export obligations, the petitioner shall pay an amount equal to duty together with 24% interest per annum from the date of import of the consignment till date of payment. The levy of interest is thus not statutory, but a matter of contract as between the parties. The duty has, admittedly been remitted belatedly and as such, interest is liable to be paid in terms of the contract between the petitioners and the Director General of Foreign Trade/its Officers.

12. A learned single judge of this Court, in a decision dated 21.08.2013 in W.P.No.44020 of 2002 in FAL Industries Limited vs. Director General of Foreign Trade and three others, had considered an identical factual and legal matrix as before me, coming to the conclusion that the levy of interest was contractual and liable to be upheld. Though Mr. Murugappan states that an appeal has been filed challenging the aforesaid order,

no details have been furnished and the respondents also confirm that no notice has been received by them in this regard.

13. The stand of the petitioner hinges on the argument that the Notification under which the import was made i.e. No.160 of 1992, did not contain a provision for levy of interest at the relevant point in time. This is correct. However the question to be decided is as to whether the liability to interest would arise from an application of the relevant statutory provision/Notification or on the basis of the contract entered into as between the parties.

14. In this context, the judgment of the Supreme Court in the case of Rexnord Electronics and Controls Limited vs. Union of India and others (2008 12 SCC 156) is relevant. At paragraph-16, the Supreme Court frames the following question for its consideration:

'16. The core question which, therefore, arises for consideration is as to whether the term "interest" used therein would include within its fold interest payable under the bond furnished by the appellant before the Director General of Foreign Trade.'

15. That was a case where the petitioner had executed a bond under the same Notification as before me i.e. Notification No.160 of 1992 (also considered by learned single Judge in W.P.No.44020 of 2002). The payment of duty was belated and the petitioner had approached the Settlement Commission seeking immunity from prosecution and waiver of penalty, fine and interest under the Customs Act, which prayer had been accepted by the Commission. The matter travelled to the Supreme Court and the Bench considered the power of the Settlement Commission to waive interest in terms of Section 127(H) of the Customs Act. A clear distinction was drawn between statutory and contractual interest, with the Court observing that interest payable under the bond would fall under the latter category i.e. under the category of contractual interest. The Court also referred to a decision of the Bombay High Court in Tanu Healthcare Limited vs. Union of India (207 ELT 641), wherein a Division Bench of the Bombay High Court had held that the payment of interest under bond would be pursuant to a contractual obligation. This judgment then settles the legal issue before me.

16. The only point of distinction, if any, would arise from the fact that Notification No.46 of 2013 dated 26.09.2013 was not available to be considered by the Supreme Court. However, in my view, Notification No.46 of 2013 only reinforces and strengthens the position that interest will be liable to be paid in cases of delayed remittances even as per the original

Notification. In the light of the view taken by me, to the effect that liability to interest in the present case would be contractual and inter se the parties to the bond, Notification No.46 of 2013 is of no relevance. Thus, I am of the considered view that an interpretation of the Notification would not impact the conclusion arrived at by the Supreme Court particularly seeing as the impugned order and all preceding communications reveal clearly that the demand has been raised only in terms of the contract between the parties and not invoking the Notification. Also, significantly, the importer has been granted and has availed of the concession of lower rate of duty and this is a factor to be, in my view, accorded due weight in deciding upon the levy of interest on delayed remittances.

17. In the light of the discussion as above, both the writ petitions are dismissed. No costs. Consequently connected miscellaneous petition is closed.

-s/d-

Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

vs/sl

To

1. The Secretary,
Ministry of Commerce,
New Delhi.
2. The Director General of Foreign Trade,
Udyog Bhavan,
New Delhi - 110 011.
3. The Deputy Director General of Foreign Trade,
Udyog Bhavan,
New Delhi - 110 011.
4. The Foreign Trade Development Officer,
Directorate General of Foreign Trade,
Udyog Bhavan,
New Delhi - 110 011.
5. The Assistant Commissioner of Customs (EPCG),
Custom House,
Old No.33, New No.60, Rajaji Salai,
Chennai-600 001.

6. The Foreign Trade Development Officer,
Office of Zonal Joint Director General of
Foreign Trade,
38 & 39, Whites Road, (I Floor),
Royapettah, Chennai - 600 014.

7. The Assistant Commissioner of Customs Gr.5A.
Custom House,
Old No.33, New No.60, Rajaji Salai,
Chennai-600 001.

+1 CC to Mr.K.Srinivasamurthy, Advocate sr 81689

+1 CC to M/s.R. Rabu Manohar, Advocate sr 81810.

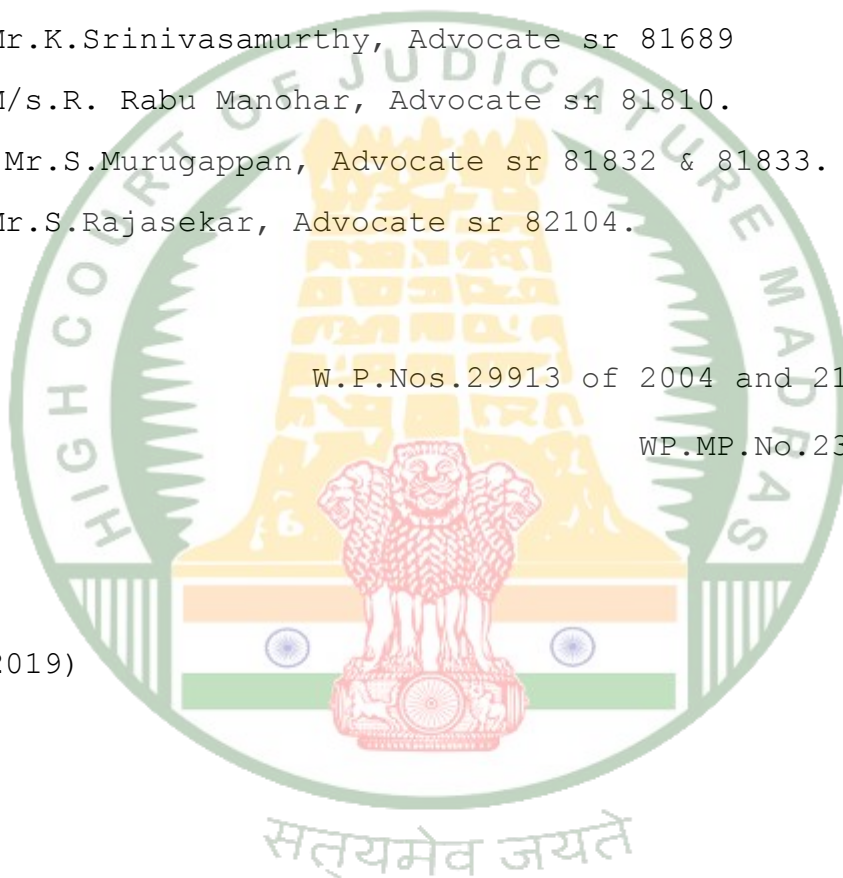
+2 Ccs to Mr.S.Murugappan, Advocate sr 81832 & 81833.

+1 CC to Mr.S.Rajasekar, Advocate sr 82104.

W.P.Nos.29913 of 2004 and 21959 of 2005
and
WP.MP.No.23907 of 2005

SAI (CO)

SP(13/11/2019)



WEB COPY