

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.11.2019

CORAM

THE HON'BLE MR. JUSTICE K.RAVICHANDRABAABU

W.P.No.18720 of 2019
and
W.M.P.No.18078 of 2019

M/s. Tube Investments of India Limited
Represented by Mr.Ramanujam,
Associate Vice President - Taxation,
Dare House, #234, NSC Bose Road,
Chennai - 600001.

...Petitioner

Vs.

1. Union of India
Represented by its Secretary
Ministry of Finance
Department of Revenue
New Delhi - 110001.
2. The Commissioner of Customs
No.1, Williams Road, Cantonment,
Tiruchirapalli - 620001.
3. The Superintendent of Customs
Inland Container Depot
Melpakkam Kainoor BO,
Arakkonam - 631003.

...Respondents

Prayer : Writ 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 Order No.TCP-CUS-PRV-COM-001-19 dated 10.04.2019 issued by the second respondent and quash the same.

For Petitioner : Mr.R.Parthasarathy
for Mr.V.Muthuraman

For Respondents: Mr.A.P.Srinivas
Senior Standing Counsel

O R D E R

The petitioner is aggrieved against the order of the second respondent dated 10.04.2019, wherein and whereby, the request of the petitioner to extend the benefit of Notification No.104/2009 - Customs dated 14.09.2009, in respect of goods already cleared vide five Bills of entry through ICD - Arakkonam during the period from February, 2013 to July, 2013, was rejected.

2. Following are the short facts and circumstances which made the petitioner to file the present writ petition :-

(a) The petitioner is a public limited company engaged in the manufacture of precision steel tubes, steel strips, bi-cycles, motor vehicle parts, automotive and industrial chains etc., in their factories located across the country. The petitioner has set-up a manufacturing facility at Tiruttani, Tamil Nadu for production of large diameter tubes. Importation of capital goods, in pursuance of the said project had commenced in November, 2012 and got completed in the year 2014. For setting up the said plant, the petitioner imported various capital goods. Initially, five shipments of plant and machinery had landed at Chennai seaport and were further transshipped to the Inland Container Depot (ICD) at Arakkonam. At the ICD - Arakkonam, the goods were initially stored in Customs Bonded Warehouses and subsequently, they were cleared on payment of applicable duties by filing Ex-Bond Bills of Entry. At the time of clearance of the goods, the petitioner availed the benefit of Customs Notification No.104/2009 - Cus dated 14.09.2009. The said Notification was issued by the Central Government to implement a scheme called "Status Holder Incentive Scheme", under which, duty credit scrips are issued to manufacturer exporters, who are status holders as an export promotion measure. The capital goods imported against such scrips are exempted from payment of Custom duties subject to the condition that the said scrip is produced before the proper officer of customs at the time of clearance for debit of the duties leviable on the goods. During the period between February, 2013 to July 2013, the petitioner filed the following five Ex-Bond Bills of Entry at ICD, Arakkonam.

S.No.	B/E No. & Date	Description of goods	Duty involved (Rs.)
1.	9341019/28.02.2013	Drawing Bench 120 Tonne	1,55,44,875
2.	2471490/19.06.2013	Slitting Line	1,88,75,089
3.	2472035/19.06.2013	Slitting Line	1,64,81,013
4.	2530076/25.06.2013	Slitting Line	2,11,01,230
5.	2807178/25.07.2013	Drawing Bench 150 Tonne	1,73,73,831
Total			8,93,76,038

(b) The exemption claimed by the petitioner was allowed by the Customs after duly debiting the status holder incentive scheme scrips submitted by the petitioner. However, subsequently, the third respondent through communication dated 06.12.2013, called upon the petitioner to pay the duty of Rs.8,93,76,038/- in cash on the ground that the ICD - Arakkonam was not a notified port for the purpose of importation of goods under the said Notification No.104/2009.

(c) Proviso to clause (v) of the said Notification empowers the Commissioner of Customs having a jurisdiction over any other port, by way of special order or public notice, to permit the importation of goods under the said Notification through a port not enumerated in Clause (v). Therefore, though the goods were permitted to be cleared availing the benefit of the said Notification, no objections were raised by the Department at the time of importation and clearance of the goods were permitted.

(d) The petitioner through letter dated 11.12.2013, addressed to the second respondent, justified the exemption availed and as a matter of abundant precaution, requested the second respondent to issue necessary directions/orders for treating ICD - Arakkonam as an approved place for importation of goods under the said Notification. Vide order dated 20.12.2013, the second respondent rejected the request in respect of imports already effected by the petitioner. It was specifically stated by the second respondent therein, that permission will be granted on a case to case basis and will not cover import that have already been effected. The petitioner filed writ petitions in W.P.Nos.17177 & 17178 of 2014 before this Court challenging the order of the second respondent dated 20.12.2013. By an order dated 25.10.2018, this Court remitted the matter back to the second respondent with a specific observation that five import transactions already done also deserve to be considered favorably based on the representation submitted by the writ

petitioner. Thereafter, the second respondent passed the present impugned order, refusing to extend the benefit of Notification No.104/2009 dated 14.09.2009 in respect of the above said five Bills of Entry, only on the reason that ICD - Arakkonam was not a notified port at the time of the subject matter import and that the power conferred on the Commissioner under the said Notification, to extend the benefit in respect of other ports, could be in respect of prospective import and not in respect of import made already.

3. The respondent filed a counter affidavit wherein, it is stated as follows:

Any permission is prospective in nature and the relevant case laws have been referred to in this regard as to why the request of the petitioner could not be considered retrospectively. ICD - Arakkonam was not included for clearance of goods under SHIS Scheme in the Notification No.104/2009 at the relevant point of time as it was not in existence. Once the ICD - Arakkonam started its operations from 14.10.2010, the Board had amended the original Notification by issuing a Notification No.5/2015 - Cus dated 20.02.2015 including ICD - Arakkonam as a Port for import of goods under SHIS Scheme. Till the Notification was amended to include ICD - Arakkonam as a port for SHIS Scheme, based on specific request, Commissioner of Customs is empowered to permit clearance of import consignments under SHIS scheme by passing special order. However, no special permission was obtained by the petitioner from the Commissioner.

4. Mr.R.Parthasarathy, learned counsel appearing for the petitioner after reiterating the contentions raised in the affidavit filed in support of the writ petition further submitted as follows :-

Though the ICD - Arakkonam was not originally included in the Notification No.104/2009, admittedly, it was included by way of substitution by issuing Notification No.5/2015 - Customs dated 20.02.2015. Further, the Commissioner is also empowered under the original Notification, to give permission to import and export from any other port which is not covered under the Notification, by special order. Therefore, inclusion of ICD - Arakkonam, by way of Notification No.5/2015 that too by substitution of the Clause which is already there in the original Notification, is to be construed only as retrospective and not prospective, as claimed by the Customs. In support of his contention, the learned counsel relied on the decision of the Apex Court reported in 2005 (187) ELT (162) SC.

5. On the other hand, the learned counsel for the Revenue after reiterating the contentions raised in the counter

affidavit submitted that for availing the benefit of exemption Notification, strict interpretation should be given and therefore, when admittedly, ICD - Arakkonam is not a port originally included in the Notification No.104/2009, the petitioner is not entitled to seek benefit of exemption in respect of the subject matter five Bills of Entry, when admittedly, the import has taken place prior to the inclusion of ICD - Arakkonam in the said Notification. He further contended that though, the Commissioner is empowered to permit import and export, in any other port than the ports referred to in the Notification, such power can be exercised in respect of prospective import/export and cannot be exercised in respect of the goods already imported/exported.

6. Heard both sides and perused the materials placed before this Court.

7. The point for consideration in this writ petition is as to whether the petitioner is entitled to the benefit of exemption Notification No.104/2009 dated 14.09.2009, which was subsequently amended by issuing various Notifications time to time. The dispute between the parties is in respect of five Bills of Entry referred to supra, through which, the petitioner imported some capital goods for their manufacturing facility located at Tiruttani, Tamil Nadu. It is stated that those goods were originally landed at Chennai seaport and were further transshipped to the Inland Container Depot (ICD) at Arakkonam. It is also not in dispute that the petitioner had cleared the goods only from ICD - Arakkonam. Through the Notification No.104/2009 dated 14.09.2009, status holder incentive scheme was introduced, under which duty credit scrips are issued to the manufacturer exporters as export promotion measure and the capital goods imported against such scrips are exempted from payment of custom duties. Therefore, the petitioner by taking advantage of Notification No.104/2009 submitted the SHIS scrips for the value of total duty involved of Rs.8,93,76,038/- towards the above five Bills of Entry and cleared the goods. There is no dispute to the fact that at the time of clearing the goods, the customs did not make any objection by contending that ICD - Arakkonam was not a notified port. However, subsequently, the petitioner was called upon to pay the above said duty in cash, only on the reason that ICD - Arakkonam was not a notified port for the purpose of importation of goods taking benefit under the Notification No.104/2009.

8. It is seen that the second respondent earlier passed an order of rejection on 20.12.2013, refusing to extend the benefit of the said Notification in respect of the above said five Bills

of Eentry. The petitioner challenged the said order before this Court in W.P.Nos.17177 & 17178 of 2014. This Court disposed the said writ petitions on 25.10.2018 by observing at paragraph Nos. 8, 9, 10, 11 as follows :-

"8. However, the learned Standing Counsel appearing on behalf of the respondents is unable to provide convincing reasons for non-inclusion of the ICD, Arakkonam. Counter is also silent in this regard. In the event of exclusion of a particular port or ICD, certain reasons are to be provided. However no reasons are given.

9. The learned standing counsel appearing for the respondents states that such a ground of discrimination has not been raised by the writ petitioner in the writ petition. Eventhen, this Court is bound to consider all the legal grounds across the bar at the time of hearing of the writ petitions.

10. When the importers of other ports and ICD, are availing the benefit of incentive scheme, importers of particular port cannot be denied such a benefit. Such a discrimination, if at all must be substantiated by the respondents. However, the learned counsel appearing for the respondents is unable to provide any convincing reasons for the purpose of exclusion of ICD Arakkonam, from the list of ports incorporated in the scheme.

11. This apart, the case of the writ petitioner was considered favorably by the authorities competent from the year 2014 onwards. As of now, the writ petitioner is availing the benefit of scheme and there was no objection at all. Thus, the five import transactions already done also deserve to be considered favorably based on the representation submitted by the writ petitioner. In view of the fact that the respondents have not furnished any candid reason for the purpose of non-inclusion of the ICD, Arakkonam in the list of scheme, the case of the writ petitioner deserves consideration on the hands of the respondents themselves."

9. It is an admitted fact that the said order of the Writ Court has not been put to challenge by the Revenue and on the other hand, it is stated that the present impugned order is passed as a consequence and compliance of the order passed in the above writ petition.

10. A careful perusal of the the said order of the Writ Court, which has become final, more particularly, the observation made under the paragraph No.11 would undoubtedly indicate that this Court, specifically directed the second respondent to consider the five import transactions already done by the petitioner favorably based on the representation submitted by them. In other words, this Court instead of issuing a positive Mandamus, directed the second respondent to issue such appropriate order favorably.

11. However, the second respondent has chosen to pass the present impugned order and rejected the benefit only by stating that port ICD - Arakkonam was not included in the exemption Notification at the relevant point of time. It is not in dispute that the ICD - Arakkonam is subsequently included in the exemption Notification, by issuing Notification No.5 of 2015 dated 20.02.2015. It is also not in dispute that the petitioner is permitted to import goods through ICD - Arakkonam thereafter, by availing the exemption Notification No.104/2009. The denial is only in respect of the past five imports, referred to supra.

12. In my considered view, the exemption Notification No.104/2009 though referred to certain ports originally, when admittedly it was amended periodically by including other ports as well and one such inclusion is ICD - Arakkonam, it cannot be said that the ports referred to in the exemption Notification originally are exhaustive in nature, more particularly, when the proviso to the said Notification empowers the Commissioner of Customs, to issue permission of import and export by issuing a special order. Therefore, the intention of issuing such Notification with such proviso is very clear that though certain reports are referred to therein, the Commissioner is not powerless to grant permission in respect of other ports as well, subject to certain conditions, as may be specified by him.

13. In this case, it is not the contention of the Revenue that the petitioner is not entitled to get the benefit of Notification had the ICD - Arakkonam been there in the list of ports originally. In other words, but for the exclusion of ICD - Arakkonam in the original Notification, the petitioner is entitled for benefit of such exemption Notification. As I already expressed supra, listing of ports in Notification No.104/2009 is not an exhaustive list and on the other hand, it is only inclusive in view of the fact that the authorities included other ports by amending the said Notification periodically. Even otherwise, as the Commissioner is empowered to grant such permission in respect of other ports as well, I am

not convinced with the submissions made by the Revenue in this aspect.

14. No doubt, it is contended by the Revenue that power conferred on the Commissioner, is only prospective and not retrospective. I think that the said contention of the Revenue is liable to be rejected by the reason of the observation made by the Apex Court in 2005 (187) ELT (162) SC wherein, under similar circumstances in respect of other scheme, the Apex Court has observed at paragraph Nos.3, 22, 23 and 28 as follows:-

"3. Shorn of all unnecessary details, the fact of the matter is as under :

The Respondent herein is an Association of the cultivators of tobacco. An incentive scheme was introduced by the Government of India in the year 1997 as regard export and import in terms of the Duty Entitlement Pass Book Scheme, whereby and whereunder 2% incentive was provided out of the export carried from the notified container depots. 'Guntur' was not mentioned in the notification dated 7.4.1997 issued pursuant to or in furtherance of the said policy decision which came into force with effect from 1.4.1997. In terms of the said notification exemption was granted from payment of additional duty leviable under [Section 3](#) of the Customs Tariff Act to those who had been issued a Duty Entitlement Pass Book by the Licensing Authority. Sub-clause (iv) of Clause (2) of the said notification states :

"(iv) The said Duty Entitlement Pass Book shall be valid for twelve months from the date of issue, for import and export only, at the port of registration which shall be one of the sea ports at Mumbai, Calcutta, Cochin, Kandla, Mangalore, Mormbgoa, Chennai Nhava Sheva, Paradeep, Tuticorin and Visakhapatnam, or any of the airports at Ahmedabad, Bangalore, Mumbai, Calcutta, Coimbatore, Delhi, Jaipur, Varanasi, Srinagar, Trivendrum, Hyderabad and Chennai or any of the Inalnd Container Depots at Bangalore, Coimbatore, Delhi, Gauhati, Kanpur, Pimpri (Pune), Pitampur (Indore), Moradabad, Ludhiana and Hyderabad.

22. Had the intention of the Government of India been only to extend the said benefit only to the exporters from any other seaport, airport or inland container depot, recourse to the proviso appended to sub-clause (iv) of clause (2) of the notification dated 7.4.1997 could have been taken. But by reason of the notification dated 27.11.1997, one 'sea port' and 'six inland container depots' have been added. The last two words in the category of seaport, namely, "Tuticorin and Vishakhapatnam" had been substituted by the words "Tuticorin, Vishakhapatnam and Kakinada. Similarly the last two words, namely, Ludhiana and Hyderabad" in the category of inland container depot had been substituted by the words "Ludhiana, Hyderabad, Nagpur, Agra, Faridabad, Jaipur, Guntur and Varanasi. It, therefore, cannot be said to be a case where some other seaports or inland container depots have been added for the purpose of extension of the benefit but the newly added seaports or inland container depots had been made a part of the original notification. The Union of India while making a subordinate legislation had advisedly used the word "substitution" in place of the word "addition". The object and purport of the subsequent notification issued by the Union of India was, thus, to grant the same benefit which had been granted to the exporters who were registered at the other seaports, airports or inland container depots as specified in the notification dated 7.4.1997 but also to those exporters, who had been exporting from such seaports or inland depots as specified in the amended notification dated 27.11.1997.

23. If the Central Government intended to extend the benefit to the members of the Respondent-Association only with prospective effect, it could have said so explicitly. Such a benefit could also have been extended by taking recourse to the proviso appended to sub-clause (iv) of clause (2) of the notification dated 7.4.1997. It may, therefore, be safely concluded that by reason of the amended notification, the Central Government only intended to rectify a mistake and, thus, the same will have retrospective effect and retroactive operation.

28. The doctrine of fairness also is now considered to be a relevant factor for construing a statute. In a case of this nature where the effect of a beneficent statute was sought to be extended keeping in view the fact that the benefit was already availed of by the agriculturalists of tobacco in Guntur, it would be highly unfair if the benefit granted to them is taken away, although the same was meant to be extended to them also. For such purposes the statute need not be given retrospective effect by express words but the intent and object of the legislature in relation thereto can be culled out from the background facts."

15. Since the above objection regarding the retrospective operation of the Commissioner's power is answered by the Apex Court in the above said decision, I am of the view that the contention of the Revenue in this aspect, is also liable to be rejected. Even otherwise, as I already observed supra, when this Court has specifically directed the second respondent to consider the case of the petitioner favorably, unless and until the said observation is set aside or modified, the second respondent is not justified in passing an adverse order once again, stating the very same reason, as stated in the previous order which was put to challenge in this Court in W.P.Nos.17177 & 17178 of 2014. Therefore, on that ground as well, I am inclined to hold that the order of the second respondent cannot be sustained.

16. Accordingly, this writ petition is allowed and the impugned order is set aside. Consequently, the respondent is directed to extend the benefit of Notification No.104/2009 dated 14.09.2009 to the petitioner in respect of the above said five Bills of Entry. Such exercise shall be done by the respondents within a period of four weeks from the date of receipt of a copy of this order. No costs. Connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. Union of India
Represented by its Secretary
Ministry of Finance
Department of Revenue
New Delhi - 110001.
2. The Commissioner of Customs
No.1, Williams Road, Cantonment,
Tiruchirapalli - 620001.
3. The Superintendent of Customs
Inland Container Depot
Melpakkam Kainoor BO,
Arakkonam - 631003.

+lcc to M/s.Lakshmikumaran, Advocate sr.92991
+lcc to Mr.A.P.Srinivas, Advocate sr.92647

W.P.No.18720 of 2019

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nr 18/12/2019