BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 09.07.2019

CORAM

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

W.P(MD)Nos.10110 to 10130 of 2019

M/s.Kurian Abraham (P) Ltd.,
Rep by its Director,
Mr.Philip C.Jacob,
13/1-423, M.S.Road,
Parvathipuram, Nagercoil.
... Petitioner in WP(MD). 10110 to 10120 / 2019

M/s.Kanam Latex Industries Pvt., Ltd.,
Rep by its Director,
Mr.Abraham C Jacob,
3/13f, West Peruvilai,
Pallavilai, Vettrunimadam Post,
Nagercoil. ... Petitioner in WP(MD). 10121 to 10130 / 2019

/ VERSUS /

The Assistant Commissioner Of Customs,
St.John Inland Container Depot,
No.1663/2b, Harbur Express Byepass Road,
Thoothukudi District. **... Respondent in WP(MD). 10110 to 10113, 10115, 10116, 10121 to 10130 / 2019**

The Assistant Commissioner Of Customs,
Custom House, Thoothukudi District.
... Respondent in WP(MD). 10114, 10117 to 10120/ 2019

Prayer in WP(MD). 10110/ 2019 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue Certiorarified Mandamus, call for the records pertaining to the impugned order in original NO.601/2016 dated 29.12.2016 issued by the respondent in C.NO.VIII/20/740/2015-RF-ICD and quash the same and further direct the respondent to sanction the refund as claimed by the petitioner.

Prayer in WP(MD). 10111/ 2019 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue Certiorarified Mandamus, call for the records pertaining to the impugned order in original NO.602/2016 dated 29.12.2016 issued by the respondent in C.NO.VIII/20/05/2016-RF-ICD and quash the same and further direct the respondent to sanction the refund as claimed by the petitioner.

Prayer in WP(MD). 10112/ 2019 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue Certiorarified Mandamus, call for the records pertaining to the impugned order in original NO.603/2016 dated 29.12.2016 issued by the respondent in C.NO.VIII/20/24/2016-RF-ICD and quash the same and further direct the respondent to sanction the refund as claimed by the petitioner.

Prayer in WP(MD). 10113/ 2019 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue Certiorarified Mandamus, call for the records pertaining to the impugned order in original NO.604/2016 dated 29.12.2016 issued by the respondent in C.NO.VIII/20/75/2016-RF-ICD and quash the same and further direct the respondent to sanction the refund as claimed by the petitioner.

Prayer in WP(MD). 10114/ 2019 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue Certiorarified Mandamus, call for the records pertaining to the impugned order in original NO.605/2016 dated 29.12.2016 issued by the respondent in C.NO.VIII/20/85/2016-RF-ICD and quash the same and further direct the respondent to sanction the refund as claimed by the petitioner.

Prayer in WP(MD). 10115/ 2019 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue Certiorarified Mandamus, call for the records pertaining to the impugned order in original NO.606/2016 dated 29.12.2016 issued by the respondent in C.NO.VIII/20/123/2016-RF-ICD and quash the same and further direct the respondent to sanction the refund as claimed by the petitioner.

Prayer in WP(MD). 10116/ 2019 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue Certiorarified Mandamus, call for the records pertaining to the impugned order in original NO.607/2016 dated 29.12.2016 issued by the respondent in C.NO.VIII/20/196/2016-RF-ICD and quash the same and further direct the respondent to sanction the refund as claimed by the petitioner.

Prayer in WP(MD). 10117/ 2019 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue Certiorarified Mandamus, call for the records pertaining to the impugned order in original NO.929/2016 dated 29.12.2016 issued by the respondent in C.NO.VIII/20/1638/2015-RF-ICD and quash the same and further direct the respondent to sanction the refund as claimed by the petitioner.

Prayer in WP(MD). 10118/ 2019 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue Certiorarified Mandamus, call for the records pertaining to the impugned order in original NO.930/2016 dated 29.12.2016 issued by the respondent in C.NO.VIII/20/1760/2015-RF-ICD and quash the same and further direct the respondent to sanction the refund as claimed by the petitioner.

Prayer in WP(MD). 10119/ 2019 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue Certiorarified Mandamus, call for the records pertaining to the impugned order in original NO.1024/2016 dated 22.12.2015 issued by the respondent in C.NO.VIII/20/11132&1848/2016-RF-ICD and quash the same and further direct the respondent to sanction the refund as claimed by the petitioner.

Prayer in WP(MD). 10120/ 2019 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue Certiorarified Mandamus, call for the records pertaining to the impugned order in original NO.74/2017 dated 12.01.2017 issued by the respondent in C.NO.VIII/20/1030, 1450, 1569 & 1296/2016-RF-ICD and quash the same and further direct the respondent to sanction the refund as claimed by the petitioner.

Prayer in WP(MD). 10121/ 2019 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue Certiorarified Mandamus, call for the records pertaining to the impugned order in original NO.609/2016 dated 30.12.2016 issued by the respondent in C.NO.VIII/20/06/2016-RF-ICD and quash the same and further direct the respondent to sanction the refund as claimed by the petitioner.

Prayer in WP(MD). 10122/ 2019 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue Certiorarified Mandamus, call for the records pertaining to the impugned order in original NO.610/2016 dated 30.12.2016 issued by the respondent in C.NO.VIII/20/86/2016-RF-ICD and quash the same and further direct the respondent to sanction the refund as claimed by the petitioner.

Prayer in WP(MD). 10123/ 2019 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue Certiorarified Mandamus, call for the records pertaining to the impugned order in original NO.611/2016 dated 30.12.2016 issued by the respondent in C.NO.VIII/20/74/2015-RF-ICD and quash the same and further direct the respondent to sanction the refund as claimed by the petitioner.

Prayer in WP(MD). 10124/ 2019 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue Certiorarified Mandamus, call for the records pertaining to the impugned order in original NO.612/2016 dated 30.12.2016 issued by the respondent in C.NO.VIII/20/07/2016-RF-ICD and quash the same and further direct the respondent to sanction the refund as claimed by the petitioner.

Prayer in WP(MD). 10125/ 2019 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue Certiorarified Mandamus, call for the records pertaining to the impugned order in original NO.613/2016 dated 30.12.2016 issued by the respondent in C.NO.VIII/20/59/2016-RF-ICD and quash the same and further direct the respondent to sanction the refund as claimed by the petitioner.

Prayer in WP(MD). 10126/ 2019 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue Certiorarified Mandamus, call for the records pertaining to the impugned order in original NO.614/2016 dated 30.12.2016 issued by the respondent in C.NO.VIII/20/121/2016-RF-ICD and quash the same and further direct the respondent to sanction the refund as claimed by the petitioner.

Prayer in WP(MD). 10127/ 2019 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue Certiorarified Mandamus, call for the records pertaining to the impugned order in original NO.615/2016 dated 30.12.2016 issued by the respondent in C.NO.VIII/20/167/2016-RF-ICD and quash the same and further direct the respondent to sanction the refund as claimed by the petitioner.

Prayer in WP(MD). 10128/ 2019 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue Certiorarified Mandamus, call for the records pertaining to the impugned order in original NO.616/2016 dated 30.12.2016 issued by the respondent in C.NO.VIII/20/140/2016-RF-ICD and quash the same and further direct the respondent to sanction the refund as claimed by the petitioner.

Prayer in WP(MD). 10129/ 2019 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue Certiorarified Mandamus, call for the records pertaining to the impugned order in original NO.617/2016 dated 30.12.2016 issued by the respondent in C.NO.VIII/20/197/2016-RF-ICD and quash the same and further direct the respondent to sanction the refund as claimed by the petitioner.

Prayer in WP(MD). 10130/ 2019 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue Certiorarified Mandamus, call for the records pertaining to the impugned order in original NO.618/2016 dated 30.12.2016 issued by the respondent in C.NO.VIII/20/25/2016-RF-ICD and quash the same and further direct the respondent to sanction the refund as claimed by the petitioner.

For Petitioner : Mr.Hari Radhakrishnan
For Respondents : Mr.R.Aravindan
Standing Counsel

COMMON ORDER

This common order is passed by consent of both learned counsel in respect of two batches of writ petitions relating to two different petitioners, since the facts as well as the legal issues are common in both.

2. Heard Mr.Hari Radhakrishnan, learned counsel for the petitioners and Mr.Aravindan, learned Standing Counsel for the respondent.

3. The facts in issue are as follows:-

The petitioners are importers of Surgical Gloves and Examination Gloves (in short 'Gloves'). Upon importation of the Gloves in bulk, the same are sterilised, repacked and labeled and marketed thereafter in the domestic market upon payment of Value Added Tax / Central Sales Tax. The Gloves are liable for Customs Duty, Additional Customs Duty (ACD) and Special Additional Duty (SAD), the second, at the rate of 4%.

4. Notification No.102-2007-Customs, dated 14.09.2007, exempts imports from levy of ACD upon satisfaction of all conditions imposed thereunder. One of the conditions imposed is that the importer shall provide evidence of payment of appropriate sales tax in respect of the Gloves sold in the domestic market. According to the petitioner, the imported gloves sterilised, repacked and labeled, have been sold in India and evidence of payment of local sales tax has also been produced. Mr.Aravindan, fairly states that this aspect of the matter is not in dispute. Thus the petitioner, according to him, is entitled to the refund of the ACD paid and upon applications being filed in terms of Notification No.102-2007, refund claims were sanctioned for the period till 11.07.2014.

5. Thereafter, a show cause notice was issued to the petitioners, dated 01.10.2015, proposing to reverse the refunds already sanctioned and calling upon the petitioner to show cause why all refunds sanctioned not be so reversed. A detailed reply was filed by the petitioner despite which, the impugned orders dated 29.12.2016 and 30.12.2016 have been passed, wherein the Assessing Authority partly accepts the claim of the petitioners in relation to the period till 11.07.2014 and confirms the proposals for the period after 11.07.2014.

6. The rejection is made based on an amendment to the provisions of Section 2(f) of the Central Excise Act, which define manufacture. With effect from 11.07.2014, the provisions of Section 2(f) had been substituted to bring within the scope of the term 'manufacture' activities of packing / repacking / labeling / relabeling of goods. According to the department, the imported goods had not been sold in the form in which they had been imported, but had been subjected to deemed manufacture since they had undergone sterilization, repacking and labeling. On this basis, the claims of the petitioner, insofar as they covered the period subsequent to 11.07.2014 were rejected.

7. An objection is raised at the threshold by Mr.Aravindan on the ground of laches. He points out that the date of the impugned order is 29.02.2016 though admittedly issued only on 19.04.2016. The Writ Petition has however been filed only in mid 2019. To this an explanation is offered by the petitioner, to the effect that the petitioner had challenged identical proceedings of the department as before me by way of an appeal to the Customs, Excise and Service Tax Appellate Tribunal in respect of the period April 2014- July 2014. The order of the Tribunal is dated 16.03.2018.

8. The impugned orders were thus not challenged awaiting the order of the Tribunal, received only on 19.04.2016. On 25.02.2019, a request was made to the respondent seeking reconsideration of the order-in-original in the light of the order of the Tribunal, dated 16.03.2019. This was followed by a reminder dated 11.03.2019. Since there was no response to either of the requests, the present writ petitions have been filed albeit with a delay of three years. I find this explanation reasonable. The order of the Tribunal is dated March 2018 and no doubt there is a delay of one year even for request to reconsider the order-in-original. However, the petitioner has not shown total negligence in seeking redressal but is seen to have taken some action and hence, this argument is rejected.

9. On merits, no counter has been filed in the matter. Mr.Aravindan, learned Standing Counsel had specifically on 26.06.2019 confirmed the position that he does not wish to file a counter and is ready to argue on the basis of instructions received by him from the department.

10. The main augment of the revenue is that the gloves imported are different from those sold in the domestic market on account of the process of sterilization and subsequent repacking to which they have been subject. The definition of 'manufacture' also includes the process of repacking and as such, the goods are deemed to have been 'manufactured'. He also points out that the order of the CESTAT dated 16.03.2018 has not been accepted and appeals have been filed before this Court, though belated. Learned counsel for the petitioner confirms in this regard that only one petitioner has received notice from the Registry of the High Court till date.

11. I am of the considered view that the exemption as sought should be considered and extended qua the goods imported. The question that arises is whether the two processes of sterilization and repacking would change the nature of the goods imported such as to render them ineligible for the benefit of the Notification and the refund sought. The relevant portion of Notification No.102/200 is extracted herein:-

'*.The exemption contained in this notification shall be given effect if the following conditions are fulfilled:-*

(a) the importer of the said goods, shall pay all duties, including the said additional duty of customs leviable thereon, as applicable, at the time of importation of the goods;

(b) the importer, while issuing the invoice for sale of the said goods, shall specifically indicate in the invoice that in respect of the goods covered therein, no credit of the additional duty of customs levied under sub-section (5) of section 3 of the Customs Tariff Act, 1975 shall be admissible;

(c) the importer shall file a claim for refund of the said additional duty of customs paid on the imported goods with the jurisdictional customs officer;

(d) the importer shall pay on sale of the said goods, appropriate sales tax or value added tax, as the case may be;

(e) the importer shall, inter alia, provide copies of the following documents along with the refund claim;

(i) document evidencing payment of the said additional duty;

(ii) invoices of sale of the imported goods in respect of which refund of the said additional duty is claimed;

(iii) documents evidencing payment of appropriate sales tax or value added tax, as the case may be, by the importer, on sale of such imported goods."

12. Paragraph 2(d) states that the importer shall pay on the sale of 'said goods' appropriate sales tax or value added tax. This has admittedly, been done. According to the department the process of sterilization and repacking effect changes to the goods itself, which submission I do not agree with and reject. Sterilization of

the goods does not change the glove into another commodity. Likewise, labelling of glove also does not change the commodity itself. Having undergone both processes the glove remains a glove only.

13. The definition of 'deemed manufacturer' with effect from 11.07.2014, is thus not applicable in the context of the present case and reliance upon the same is misconceived.

14. These writ petitions are allowed in the above said terms. No costs.

Sd/-
Assistant Registrar(CO)

/TRUE COPY/

Sub Assistant Registrar

To

1 Assistant Commissioner of Customs,
St.John Inland Container Depot,
No.1663/2B, Harbur Express Bye Pass Road,
Tuticorin-628 008.

2 The Assistant Commissioner Of Customs,
Custom House, Thoothukudi District.

+2 CC to M/s.HARI RADHAKRISHNAN, Advocate (SR-74368 & 74369 [F] dated 10/07/2019)
+1 CC to M/s.R.ARAVINDAN, Advocate (SR-74352[F] dated 10/07/2019)

W.P(MD)Nos.10110 to 10130 of 2019
09.07.2019

TA
JM/18.09.2019/8P/6C