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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 10.01.2019

+ **W.P.(C) 6344/2018**

**INTERNATIONAL LEASE FINANCE
CORPORATION**

..... Petitioner

Through: Mr.Rajeev Sharma, Mr. Neeraj
Sharma, Mr.Alok Tiwari,
Ms.Anjali Menghani,
Ms.Dakshayani Saxena,
Ms.Shubhangi Mehrish &
Mr.Veera Singh, Advs.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Harpreet Singh, Sr.
Standing Counsel with
Ms.Suhani Mathur, Adv.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE PRATEEK JALAN

MR. S. RAVINDRA BHAT,J. (ORAL)

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1. The petitioner in this proceedings claims direction to the Customs authority to pass appropriate orders on its duty drawback claim under Section 74 of Customs Act, 1962 (hereinafter the "the Act").

2. The present petition is the third in this series of proceedings. Briefly, the petitioner who owns and leases aircrafts had entered into a transaction with M/S Kingfisher Airlines. Due to some default of the lessee, few aircrafts were detained by various

Revenue Authorities including Customs Authorities, as a consequence of which, the engine of one of these aircrafts was removed (cannibalized).

3. The petitioner as a lessor, and the owner of the aircraft, in order to safeguard its interest in the property, was compelled to take measures to fly back the aircraft. For this purpose, it facilitated the entry of an aircraft engine. At that stage, when the engine was flown in, M/S Kingfisher Airlines Ltd., was the importer. The engine was promptly detained; initially the Service Tax Authorities sought to exact the amounts allegedly due. Later, those proceedings were dropped. The Customs authorities, however, moved and detained the engine. At that stage, the petitioner, which owned the engine approached this Court by filing the W.P.(C) 2937/2013. That writ petition was disposed of by an order dated 11.02.2014. To avoid deterioration of functionality of the engine, the petitioner was permitted to furnish a bank guarantee in the sum of ₹8 crores, out of which ₹1 crore was to be deposited within six weeks of the order, directing release of the engine. The Customs Authorities were enjoined to adjudicate the proceedings and pass appropriate orders. The petitioner was also directed to comply with all the pre-conditions and necessary formalities, including filing the bill of lading to indicate its ownership. The Court expressly directed that after release of the engine, it “shall be allowed to be re-exported”. The rights and contentions of both the parties – the Revenue and the petitioner i.e., the owner of the engine, were kept open. This order was later clarified. The petitioner was permitted to re-export the aircraft by

paying the entire amount of ₹17.09 crores, based upon the determination of liability of basic duty and penalty by the Customs Authorities, without prejudice to its rights.

4. The petitioner was aggrieved by the Commissioner's decision and appealed to the Tribunal [CESTAT], which by its order dated 23.06.2017, accepted its plea and allowed the appeal. The petitioner was held liable for payment of duty since the engine had been imported. At the same time, the CESTAT held that the penalty was unwarranted as was the confiscation. These two amounts were set aside. The petitioner had to approach this Court yet again by filing W.P.(C) 6544/2018, claiming refund of the penalty amount, which had been deposited by it during the pendency of the appeal, since those amounts were not released by the Customs Authorities. This Court by its Division Bench order dated 24.09.2018 directed the release of those amounts after considering the entirety of the circumstances.

5. In the present case, the petitioner's claim is with respect to duty drawback. The petitioner relies upon Sections 71 and 74 of the Customs Act and submits that since the re-export was on account of the utilization of the engine and not for any other purpose, the import of it into India, in order to ensure that goods such as aircraft chassis etc. could be safely flown out of the country, the occasion for its commercial use did not arise. It was submitted that in terms of the statute – Section 74(1), the goods were easily identifiable and were imported into India on payment of duty, and were then entered for export. It was submitted that the sequence of events show that the engine was permitted to be re-exported and in these circumstances, the

claim for drawback was permissible. Learned counsel submitted that the customs authorities' position was that the drawback was impermissible on account of the deficiency memo which could not be adequately satisfied. It was submitted that the deficiency memo pertains to the requirement of the concerned entity [which seeks export] filing a declaration of "Guaranteed Remittance" document. It was submitted that in the peculiar facts and circumstances of this case, the question of remittance did not arise.

6. Learned counsel argues that there was no occasion originally for the goods i.e. the engine to have been brought in, but were in fact imported by M/s Kingfisher Airlines initially, only for the purpose of flying back the aircraft, which was lying unused. The petitioner as the owner was anxious and concerned to safeguard its property, and accordingly brought in the engine. The moment the engine's purpose was fulfilled i.e. the aircraft was to be taken back, it was permitted by the authorities to export it. It was further stated that the engine was always identifiable since it never left the customs bonded warehouse and the aircraft as a matter of fact was flown back with another engine. Learned counsel submits that since initially, the engine brought in was imported by M/s Kingfisher Airlines, formalities by way of amendment of the bill of entry was needed, which was complied with. Thereafter on 24.03.2014, the Additional Commissioner permitted the re-export. Learned counsel for the petitioner relies upon the Customs Authorities affidavit, which states *inter alia* as follows:

“The goods imported by the Exporter were unused and re-exported within a period of 02 Months & 01 days from the date of payment of duty on the imported goods as the duty in this case was paid on 12.08.2014 and the Let export Order was accorded on 14.08.2014. Even if the date of importation is considered as 29-11-2012, the Exporter have re-exported the goods within two (2) years, as stipulated under Section 74 of Customs Act 1962.”

7. Mr.Harpreet Singh, on behalf of the Commissioner of Customs submits that the requirement of submission of Guaranteed Remittance Declaration, is a pre-condition, imposed by the Reserve Bank of India through its circular issued through Foreign Exchange Management (Export of Goods and Services) Regulations, 2000. It was submitted that by virtue of Regulation 3(1), every exporter has to furnish a declaration in one of the forms in the schedule. It is submitted that the requirement of such declaration can be exempted *per* Regulation 4. Learned counsel stresses that Regulation 4, in its original form, did not envision the kind of situation which the present case discloses. It is stated that by further amendment of the Regulations dated 27.02.2001, other conditions i.e. Regulation 4 (k), (l) and (m) were introduced. It was submitted that in terms of Regulation 4(m), exemption could have been granted by the Reserve Bank of India. However, the petitioner did not claim such exemption, and in these circumstances, the Customs Authorities acted reasonably in declining the request for drawback.

8. It is evident from the above discussion that the petitioner was compelled by the unfolding of the circumstances – which perhaps

started with the unfortunate event of leasing the aircrafts in the first instance to M/s Kingfisher Airlines, and later the inability to meet the Revenue's demands. The first setback was that the petitioner's aircraft was detained, and subsequently seizure of the aircraft engine by the Customs authorities. Initially Service Tax Authorities laid claim over aircrafts. Later the jurisdiction of the Customs Authorities was invoked, who stated that the aircraft cannot be flown back. By that time the engine had been cannibalized. The petitioner who was anxious as the owner of the aircraft, sought to bring the engine for the sole purpose of facilitating the movement of the aircraft back to where it came from.

9. The first proceedings preferred before this Court in W.P.(C) 2937/2013 resulted in the release of the aircraft and imposition of various conditions including furnishing of bank guarantee etc. Those orders were modified and the petitioner paid ₹17.09 crores. The Customs Authorities assessed the Show Cause Notice and raised the demand; they also imposed penalty and sought to confiscate the goods i.e. the aircraft engine. Eventually CESTAT set aside the penalty and confiscation. Even at that stage, the Customs Authorities were recalcitrant and did not refund the penalty amount, which had been deposited way back in 2014. The amounts were released to the petitioner eventually after the direction of this Court in W.P.(C) 6544/2018.

10. If one sees the matter from the above aspects, the issue which this Court has to address itself to is whether the petitioner can claim

entitlement to the duty drawback under Section 74 of the Customs Act, which reads as follows:

“74. Drawback allowable on re-export of duty-paid goods.—

(1) When any goods capable of being easily identified which have been imported into India and upon which 1[any duty has been paid on importation,—

(i) are entered for export and the proper officer makes an order permitting clearance and loading of the goods for exportation under section 51; or

(ii) are to be exported as baggage and the owner of such baggage, for the purpose of clearing it, makes a declaration of its contents to the proper officer under section 77 (which declaration shall be deemed to be an entry for export for the purposes of this section) and such officer makes an order permitting clearance of the goods for exportation; or

(iii) are entered for export by post under section 82 and the proper officer makes an order permitting clearance of the goods for exportation, ninety-eight per cent. of such duty shall, except as otherwise hereinafter provided, be re-paid as drawback, if—]

(a) the goods are identified to the satisfaction of the 2[Assistant Commissioner of Customs or Deputy Commissioner of Customs] as the goods which were imported; and

(b) the goods are entered for export within two years from the date of payment of duty on the importation thereof: Provided that in any particular case the aforesaid period of two years may, on sufficient cause being shown, be extended by the Board by such further period as it may deem fit.

(2) Notwithstanding anything contained in sub-section (1), the rate of drawback in the case of goods which have been used after the importation thereof shall be such as the Central Government, having regard to the duration of use, depreciation in value and other relevant circumstances, may, by notification in the Official Gazette, fix. 3[(3) The Central Government may make rules for the purpose of carrying out

the provisions of this section and, in particular, such rules may—

(a) provide for the manner in which the identity of goods imported in different consignments which are ordinarily stored together in bulk, may be established;

(b) specify the goods which shall be deemed to be not capable of being easily identified; and

(c) provide for the manner and the time within which a claim for payment of drawback is to be filed.]”

11. The Revenue’s stand is premised upon the applicability of the Foreign Exchange Management (Export of Goods and Services) Regulations, 2000 [FEMA Regulations of 2000]. It is interesting to note that although the definition of ‘Export’ in Regulation 2(iv) is inclusive, the drift of that Regulation perhaps deals with exports envisioned in the course of trade, as evident from the emphasis placed upon “export includes the taking or sending out of goods by land, sea or air, on consignment or by way of sale, lease, hire-purchase, or under any other arrangement by whatever name called”. This Court is of the opinion that further discussion on this is not necessary, as the matter ultimately turns on the facts of the present case.

12. The exemptions under the original Regulation 4, by and large envisioned non-commercial export. Significantly, Regulation 4 (f) has dealt with the export of aircraft or aircraft engine and spare parts but for “overhauling and/or repairs abroad subject to their re-import into India”. The other condition was goods imported free of cost on re-export basis. The amendment by Regulation 4 generally

empowered RBI subject to the terms and conditions stipulated by it to promote the export.

13. In case the Revenue's stand were to be accepted, the petitioner would be bound to file a Guaranteed Remittance Declaration, which in turn would imply that it would remit back the amounts. The declaration is to ensure that the exporter [i.e. Indian resident by Regulation 7 of the said regulations] would receive the concerned amount. The requirement of a waiver, in the alternative, would arise only if the principal requirement of the GR declaration is at all attracted. In this case, it is undisputed that the exporter i.e. owner and the person entitled to the engine were one and the same i.e. the petitioner. Having regard to these circumstances, the necessity for blind adherence to a declaration and further necessity for waiver, in the opinion of the Court was entirely uncalled for. There is sufficient indication in the Regulations – i.e. the manner of definition of export and even the phraseology of Regulations regarding non-commercial exports – that in cases like the present one, if compelling circumstances lead the original owner to bring in goods to remedy an unforeseen eventuality, such as the need to fly back an aircraft, it is not to be subjected to such requirements. The absurdity is writ large on the face of the record.

14. Having regard to these facts, the Court is of the opinion that there is no question of respondents/Customs Authorities insisting that the GR requirement was mandatory or that, in its absence, exemption from RBI was necessary. For the above reasons, the writ petition deserves to and accordingly succeeds. A direction is given to the

respondents to process the drawback claim of the petitioner and release the amounts to the extent permitted in law, within four weeks. Interest on the said amount, due to the petitioner shall be payable, as permissible under Section 75A.

15. As in the directions in W.P.(C) 6544/2018, in the present case too, the respondents are directed to ensure that the refund of the amount with interest be remitted to the petitioner's account, the details of which should be disclosed within next one week to the Customs Authorities. Furthermore, in case the account is an overseas account or if the petitioner *per se*, does not have any account in India but seeks remittance into an account in India of another entity, the respondents shall ensure that the amount would be remitted into that account in the foreign currency or its equivalent in the Indian rupees.

16. The writ petition is allowed in the above terms. The order-in-original dated 24.11.2016, is accordingly quashed.

17. *Dasti.*

S. RAVINDRA BHAT, J

PRATEEK JALAN, J

JANUARY 10, 2019

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