

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	03.08.2020
Pronounced on	01.09.2020

CORAM:

THE HONOURABLE MR. JUSTICE M.S. RAMESH

W.P.Nos.26149 of 2015

Johnson Lifts Pvt.Ltd.,
Rep by Head -Finance V.Ravichandran
No.1, East Main Road,
Anna Nagar, Western Extension,
Chennai - 600 101.Petitioner

Vs

The Assistant Commissioner of Custom (Refunds),
Office of the Commissioner of Customs,
Custom House, No.60, Rajaji Salai,
Chennai - 600 001.Respondent

Prayer: Writ Petition filed under Article 226 of the
Constitution of India to issue a Writ of Certiorarified Mandamus
calling for the records in Order-In-Original No.37233/15 Job
No.36233/15 dated 30.04.2015 in S25/SAD/2356/15 in
F.No.S24/SAD/3453/2013-refunds passed by the respondent and
quash the same as arbitrary and illegal and direct the
respondent to grant refund to the petitioner.

For Petitioner : Mr.Joseph Prabakar

For Respondent : Mrs.Hema Muralikrishnan

O R D E R

The Writ Petition was called through Video Conferencing on
03.08.2020. By consent of both the parties, the Writ Petition is
taken up for final disposal.

2. The brief facts of the case are as follows:-

The petitioner herein had imported one "Elevator in SKD
condition" under a Bill of Entry dated 18.06.2012. Upon import,
the petitioner had paid Additional Duty of Customs at the rate
of 4% under Section 3(5) of the Customs Tariff Act, 1975

amounting to Rs.39,899.70/-. The Notification No.102/2007 dated 14.09.2007 (as amended) provides for refund of Additional Duty of Customs paid under Section 3(5) of the Customs Tariff Act, 1975, upon sale of the imported goods in India, subject to certain conditions. The petitioner herein, upon sale of the Elevator in India, claimed refund of the Additional Duty of Customs, in terms of Notification No.102/2007 dated 14.09.2007. However, his claim came to be rejected through the impugned Order-in-Original No.37233/2015 dated 30.04.2015, on the ground that the description of the imported goods and the goods sold in India does not tally and hence, is in violation of the condition in Notification No.102/2007 dated 14.09.2007. Aggrieved against the order of rejection, the present Writ Petition has been filed.

3. Mr. Joseph Prabhakar, learned counsel for the petitioner submitted that the Government Circulars in Circular No.6/2008 dated 28.04.2008 and Circular No.16/2008 dated 13.10.2008, prescribes the mode for making a refund claim, which mandates submission of certain supporting documents, including a certificate from the Statutory Auditor along with the Correlation Certificate attested by the Statutory Auditor. When the petitioner submitted the required statutory certificate along with Correlation Certificate from his Auditor, certifying that the goods imported were the same that were sold locally, the respondents are not justified in rejecting his refund claim. In support of such a submission, the learned counsel relied upon a decision of the Hon'ble Division Bench of this Court in the case of PP Products Ltd. vs. Commissioner of Customs, Chennai Seaport Commissionerate-IV, Chennai reported in 2019-VIL-220-Mad-CU.

4. Mrs. Hema Muralikrishnan, learned Standing Counsel appearing for the respondents would place reliance on the reasoning given in the impugned order of rejection and submit that, there is a discrepancy in the description between the goods imported and the subsequent sale of goods in India and in view of the non-fulfillment of condition 2(e)(ii) of the Notification No.102/2007 dated 14.09.2007, there is no infirmity in the impugned order. She would further place reliance on the averments in Paragraph 17 of the counter affidavit filed by the respondent and submit that, since the petitioner has not availed the alternate remedy of an appeal against the Order-in-Original, the Writ Petition itself is liable to be dismissed.

5. I have given careful consideration to the submissions made by the respective counsels.

6. As observed earlier, Notification No.102/2007 dated 14.09.2007 (as amended), provides for refund of Additional Duty of Customs paid under Section 3(5) of the Customs Tariff Act, 1975 upon sale of imported goods in India, subject to certain

conditions. Among the conditions prescribed, the importer was required to pay the appropriate Sales Tax or Value Added Tax and should also produce documents evidencing payment of appropriate Sales Tax or Value Added Tax, as the case may be, on sale of such imported goods.

7. By Circular No.6/2008 dated 28.04.2008, the Central Board of Excise and Customs had prescribed the procedures to be adopted for refund of the 4% Additional Duty of Customs, in pursuance of Notification No.102/2007 dated 14.09.2007. As per Clause 5.1 of this Circular, the importer was required to furnish a certificate from the Statutory Auditor, certifying that the imported goods and the local goods are one and the same. The said clause of the Circular reads as follows:-

5. Documents to be enclosed with refund claim:

5.1 Notification No.102/2007-Customs, dated 14.09.2007 prescribes the documents that shall be enclosed along with the refund claim. In order to ensure sanction of refund properly, it is clarified that the document evidencing payment of ST/VAT (in original) duly issued by or acknowledged by the concerned ST/VAT authorities shall be submitted by the importer. A certificate from a Chartered Accountant or any other independent authority certifying payment of ST/VAT would not be acceptable in lieu of the original documents. However, a certificate from the statutory auditor/Chartered Accountant, who certifies the importer's annual financial accounts under the Companies Act or any statute, correlating the payment of ST/VAT on the imported goods (in respect of which refund is claimed) with the invoices of sale, would be required along with the original tax/duty payment documents as proof of payment of appropriate ST/VAT for the purpose of para 2(d) & (e) of the said notification.

8. The only reason adduced by the respondent in rejecting the petitioner's claim for refund is that, the goods that were locally sold are not the goods that were imported. For such a reasoning, the respondent had relied upon the description in the Bill of Entry of the imported goods, which reads as, "Elevator in SKD condition", whereas, the description mentioned in the Sale Invoice dated 31.10.2012 reads as "1No Johnson 6 Passenger (408 kgs) Electric Mini Sukranti Lift". Since the respondent was of the view that these two descriptions are distinct, they had concluded that the goods sold are not the same as that imported under the Bill of Entry.

9. The petitioner had filed the refund application, along with all the certificates/enclosures mandated under Notification No.102/2007 dated 14.09.2007, as clarified in Circular No.6/2008, dated 28.04.2008. Among these enclosures, a certificate dated 20.02.2013 was enclosed stating that the accountants therein are the Statutory Auditors and that the Bills of Entry and the corresponding TR6 Challan, Sales Invoice and supporting documents have been verified and certified that the same goods that were imported under the Bills of Entry were sold under Sales Invoice and the appropriate VAT/CST has been paid to the authorities. Along with the certificate, the correlation sheet was also enclosed certifying that both the imported goods and the locally sold goods are one and the same.

10. The procedure contemplated for seeking exemption/refund of the Additional Duty of Customs is under Notification No.102/2007 dated 14.09.2007 read with Circular No.6/2008 dated 28.04.2008. If that be so, the respondent is mandated to strictly adhere to the procedure prescribed under this notification/circular and cannot deviate from the same. However, in the instant case, the respondent seems to have applied their own logic and imagination to differentiate the imported goods with the goods sold locally inside India. If at all, the respondent was of the view that the descriptions in the imported goods and locally sold goods are different, the only yardstick that requires to be applied is the conditions prescribed in Notification No.102/2007 dated 14.09.2007 and Circular No.6/2008 dated 28.04.2008. In other words, Circular No.6/2008, which clarifies the conditions prescribed in Notification No.102/2007 dated 14.09.2007, requires the importer to produce the certificate of the Statutory Auditor along with the correlation statement and if such certificate and correlation statement are produced, the respondent is bound to accept the description of the goods in the import documents as well as the Sales Invoice to be one and the same, on the strength of the certificate/correlation statement.

11. Curiously, the respondent seems to have differentiated the term "elevator" from a "lift". I do not find any substantial difference in the meaning of these two terms to differentiate the product itself. Apart from this infirmity in the description, there is no other reason adduced in the impugned order. When such infirmities are noticed by the respondent, there was a duty cast on them to place reliance on the Statutory Auditor's certificate and the correlation statement, as required under Notification No.102/2007 dated 14.09.2007.

12. Though the condition prescribed under the notification does not prescribe a different procedure and even assuming that the respondent was not satisfied with the certificate issued by

the Statutory Auditor, such a decision should be based on certain incriminating and reliable documents before him and further, the reasons for disbelieving the certificate requires to be spelt out. Such a proposition has been laid down by a Hon'ble Division Bench of this Court in PP Products Ltd. (supra). The relevant portion of the order reads as follows:-

10. We find that there are three documents which the importer has to produce for being entitled for refund of SAD, they being, (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. The adjudicating authority appears to have done a thorough scrutiny of the documents and granted refund for substantial portion of the claim. In respect of the remaining portion, the only reason for rejection is that the appellant has not adopted the same code while describing the product in their sale invoices. The explanation offered by the appellant/importer is that the numbers which followed the letters HDPE/LDPE/LLDPE are relevant only for person who is importing goods from the foreign country on orders being placed by the appellant and is of no consequence on the sale while selling the product in the local market. In our considered view, the adjudicating authority has not come to a conclusion that the product sold was entirely different. In fact, there was nothing on record to disbelieve the Chartered Accountant's certificate which certified that both products are one and the same. If the adjudicating authority had to disbelieve such certification, then there should have been material to do so. However, the larger question would be whether at all such jurisdiction is vested with the adjudicating authority, when there is no allegation of any fraud or misrepresentation against the appellant.

11. In our considered view, the Commissioner (Appeals-II), the first appellate authority was right in its observations/findings which are quoted herein below:-

"?..... It is seen from the tabular column of discrepancy given in the Order-in-Original by the lower authority, only the grades

of the granules are missing but the description 'HDPE' and 'LDPE' is found in both the documents. It is seen that the appellants have used the generic description of the imported goods in the sales invoices and non-mentioning of grade will not change the imported goods different. Hence, the goods imported and the goods sold are one and the same and are co-relatable. The lower authority has not issued any DM or PH to the appellants for making the deficiencies good or to make any submissions. The department has not proved that the goods sold are different from the goods imported. The lower authority has not disputed the fulfillment of the other substantive conditions of the notification by the appellants. Rejection of partial amount of refund on this flimsy ground is not sustainable.?

13. In view of all the reasoning adduced by this Court and the dictum laid down by the Hon'ble Division Bench in PP Products Ltd. (supra), the impugned order of rejection of the refund application is totally opposed to the procedural regulation and hence the authority, exercising his powers, has exceeded his jurisdiction and therefore, the impugned order itself is liable to be quashed.

14. It would be pertinent to refer to the second ground raised by the respondent with regard to the maintainability of the Writ Petition, for not availing the alternate remedy of an appeal. For such a proposition, reliance was placed on a decision of this Court in M/s. King Overseas vs. Assistant Commissioner of Customs, Chennai. The decision was rendered by a learned Single Judge of this Court in W.P.No.22321 of 2014 dated 31.10.2014, wherein, the learned Single Judge was of the view that the Writ Petition cannot be maintained, when the alternate remedy has not been exhausted. This decision has been quoted in the counter affidavit dated 13.01.2016, filed by the respondent.

15. The learned counsel for the petitioner had brought to the notice of this Court that the decision of the learned Single Judge in W.P.No.22321 of 2014 in the case of M/s.King Overseas was taken on appeal in W.A.No.1331 of 2015 and by an order dated 13.10.2015, in the case of M/s. King Overseas vs. Assistant Commissioner of Customs, Chennai, the order of the learned Single Judge in W.P.No.22321 of 2014 was set aside. The order in Writ Appeal came to be decided on 13.10.2015 and the respondent/department was represented by their Standing Counsel.

16. It is rather unfortunate that the counter affidavit

filed dated 13.01.2016, by the Deputy/Assistant Commissioner of Customs (Legal), has been carelessly sworn in, even without verifying the status of the further appeal made against this order, particularly, when the department was also a party in the Writ Appeal. Though it is a matter of serious concern that such counter affidavits are being placed before the High Courts, without due verification of the facts, this Court would only remark to indicate that such careless approach in drafting should be avoided in future.

17. Having said so, this Court is of the view that though there is an alternate remedy of appeal as against the impugned order in the present case, the same shall not be a bar to maintain this Writ Petition under Article 226 of the Constitution of India, since there is a violation of the procedure prescribed under the statute and thereby, the order itself is wholly without jurisdiction.

18. Apart from this aspect, admittedly, the impugned order has been made without issuance of a show cause notice, calling for the petitioner's objections and as such, is in violation of the Principles of Natural Justice. On this ground also, the petitioner may be entitled to invoke the writ jurisdiction without availing the alternate remedy, as held in a catena of decisions of the Hon'ble Apex Court and various High Courts.

19. The aforesaid powers of the High Court to entertain a Writ Petition under Article 226 of the Constitution of India, even though the petitioner had not exhausted the alternative forum for redressal, has been reiterated, in various decisions of the Hon'ble Supreme Court. One such decision in L.K.Verma vs. HMT Ltd. Reported in AIR 2006 SC 975, holds that a writ Court may exercise its discretionary judicial power to review inter-alia in cases where the authorities lack jurisdiction or for enforcement of fundamental rights or if there is violation of Principles of Natural Justice. Thus, the second ground raised by the petitioner questioning the maintainability of the Writ Petition, cannot be sustained.

20. For all the foregoing reasons, the impugned Order-in-Original No.37233/2015, dated 30.04.2015 is set aside and the respondent shall refund the claim made by the petitioner, which is the subject matter of the Order-in-Original, together with interest at the rate of 6% p.a. from the date of the refund application. The respondent shall endeavour to disburse the refund amount, atleast within a period of 4 weeks from the date of receipt of a copy of this order.

21. Accordingly, the Writ Petition stands allowed. No costs.

Sd/-
Assistant Registrar (CCC)

//True copy//

Sub Assistant Registrar

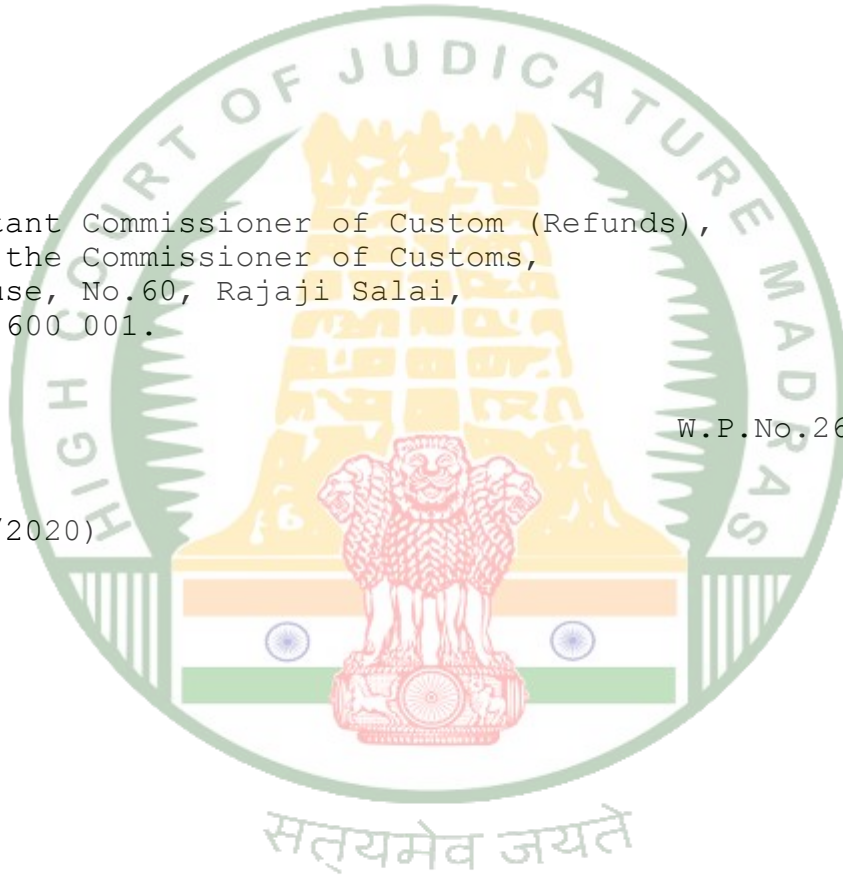
hvk

To

The Assistant Commissioner of Custom (Refunds),
Office of the Commissioner of Customs,
Custom House, No.60, Rajaji Salai,
Chennai - 600 001.

W.P.No.26149 of 2015

KK (CO)
GMY (28/10/2020)



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