IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.07.2021

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

W.P.No.3640 of 2013
and M.P.No.1 of 2013

M/s.Hyundai Motor India Limited,
rep. By R.Sethuraman,
Director – Finance,
Plot No.H-1, SIPCOT Industrial Park,
Irrungattukottai, Sriperumbudur Taluk,
Kancheepuram District,
Tamil Nadu 602 117. ...Petitioner

Vs.

1. The Secretary,
   Government of India,
   Ministry of Finance,
   Department of Revenue,
   North Block, New Delhi 110 001.

2. Additional Director General
   Directorate of Revenue Intelligence,
   25, Gopalakrishna (Iyer) Street,
   T.Nagar, Chennai 600 017.

3. Commissioner of Customs (Sea Port),
   Customs House,
   No.60, Rajaji Salai, Chennai 600 001.

4. The Deputy Commissioner of Customs,
   Refunds – Sea
   Office of the Commissioner of Customs,
   (Port-Export), Customs House,
   No.60, Rajaji Salai, Chennai 600 001.

5. The Deputy Commissioner of Customs,
   Special Valuation Branch,
   Government of India,
   Customs House,
   No.60, Rajaji Salai,
   Chennai 600 001. ...Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, calling for the records relating to the impugned Demand Notice File No.S.Misc.57/2012-Refunds-Sea dated 08.01.2013, issued by the Fourth Respondent as it is illegal, arbitrary, without authority of law and null and void and quash the same.

For Petitioner : Mr.Hari Radhakrishnan
for M/s.IPN Associates

For Respondents 3 to 5 : Ms.Hema Murali Krishnan
(Senior Standing Counsel for Customs)

ORDER

The demand notice issued in File No.S. Misc. 57/2012 – Refunds-Sea, dated 08.01.2013, by the 4th Respondent, is under challenge in the present Writ Petition. The petitioner is M/s. Hyundai Motor India Limited and states that M/s. Hyundai Motor Company, Korea, obtained approval to establish HMIL in India from the Foreign Investment Promotion Board, Government of India, dated 11.03.1996. HMIL was registered on 06.05.1996 with the Registrar of Companies, Chennai. The facts regarding the establishment of the petitioner-Company as well as the nature of business are not disputed between the parties. The business transactions as well as the importing of goods by the petitioner are also not disputed by the respondents.

2.The issue in nutshell are elaborated by the learned counsel for the petitioner that the claim of Extra Duty Deposit (for brevity, 'EDD') refund made in proceedings dated 04.12.2012 is sought to be reviewed and reopened through the impugned order. The learned counsel for the petitioner reiterated that the issues relating to the refund of EDD were elaborately adjudicated by the Commissioner of Customs (Appeals) and an order was passed on 30.06.2004 and the Commissioner of Customs (Appeals) made a finding, which reads as under:

> "I also observe that Adjudicating Authority have not fully finalised this issue as the importation of goods during the period of agreement has not ended and the data of import (post signing of the agreement) is not available.
>
> Thus, it will be fair that I do not interfere with the order of Adjudicating Authority at this stage as far as the addition of Technical know-how fee is concerned.
>
> Thus, I modify the Order-in-Original to the limited extent that portion related to enhancement

of value of 352 components is set aside. Remaining portion of the Order-in-Original stands confirmed and appeal is disposed off accordingly.”

3.Challenging the order of Commissioner (Appeals), the petitioner preferred further appeal to the CESTAT, Principal Bench, New Delhi and the issues were adjudicated in detail and the CESTAT passed final order on 21.02.2007, which was reported in 2007 (214) E.L.T 436 (Tribunal-Delhi). The Tribunal allowed the appeal filed by the petitioner and passed the following orders:

> “8.The Commissioner's finding is that since the appellant was in automobile production from 1998, “there is no transfer of any new technology to any product.” This finding is contrary to the terms of agreement which mentioned new cars proposed to be introduced. There is no evidence on record to suggest that technology transfer agreement is a fraud and has been entered into only to facilitate payments under false pretext. The Commissioner's observation that an already established car company would not require infusion of new technology is contrary to the common knowledge that new automobile models or upgrading existing models is a high cost and high technology activity. Therefore, the basic premise of the impugned finding itself is faulty.
>
> 9.In view of what is stated above, impugned order is set aside and appeal is allowed with consequential relief, if any, to the appellants.”

4.The petitioner-Company obtained an information through the Right to Information Act that the department has not filed any appeal against the order passed by the CESTAT. The communication under the RTI Act was issued on 15.12.2011. Thus, it is not in dispute that the CESTAT order became final. Pursuant to the said order, the EDD refund amount was also sanctioned in respect of the petitioner-Company and it was paid and the petitioner also acknowledged the same vide letter dated 4th December, 2012. While so, the 4th respondent issued the impugned notice on 08.01.2013, stating that the refund of EDD made, became erroneous, and therefore, the same needs to be retained with the Department as Deposit, till finalization of the issue.

5.The learned counsel for the petitioner further contended that with reference to the period from 1997-2002, the refund was ordered and the petitioner also received the same. Even prior to that, a Show Cause Notice was issued on 30.07.2011 by the 2nd respondent for the period from 2006-10. The said Show Cause Notice issued under Section 124 of the Customs Act, 1962 provides details regarding the period for which the duty is claimed. The period is from 26.07.2006 to 31.12.2010 in respect of the said Show Cause Notice and an order passed thereafter, the petitioner-Company filed an appeal before the CESTAT in Appeal No.C/42049/2015 and the said appeal is pending. While filing the said appeal, the petitioner made a pre-deposit as required under the provisions of the statute. When the pre-deposit is made and the issues raised are subjudiced and in many such cases, the authorities are reopening the refunds already made. The Board issued a Circular No.984/2014-CX, dated 16.09.2014 and para 4 of the Board's order is extracted hereunder:

> "4.Recovery of the Amounts during the Pendency of Appeal:
>
> 4.1 Vide Circular No.967/1/2013, dated 1st January, 2013, Board has issued detailed instructions with regard to recovery of the amounts due to the Government during the pendency of stay applications or appeals with the appellate authority. This Circular would not apply to cases where appeal is filed after the enactment of the amended Section 35F of the Central Excise Act, 1944 or Section 129E of the Customs Act, 1962.
>
> 4.2 No coercive measures for the recovery of balance amount i.e., the amount in excess of 7.5% or 10% deposited in terms of Section 35F of Central Excise Act, 1944 or Section 129E of Customs Act, 1962, shall be taken during the pendency of appeal where the party/assessee shows to the jurisdictional authorities:
>
> > (i) proof of payment of stipulated amount as pre-deposit of 7.5%/10%, subject to a limit of Rs.10 Crores, as the case may be; and
> >
> > (ii) the copy of appeal memo filed with the appellate authority.
>
> 4.3 Recovery action, if any, can be initiated only after the disposal of the case by the Commissioner (Appeals)/Tribunal in favour of the Department. For example, if the Tribunal decides a case in favour of the Department, recovery action for the amount over and above the amount deposited under the provisions of Section 35F/129E may be initiated unless the order of the Tribunal is stayed by the High Court/Supreme Court. The recovery, in such cases, would include the interest, at the specified rate, from the date duty became payable, till the date of payment."

6.Relying on the said Circular, the learned counsel for the petitioner reiterated that if at all any erroneous refund is made in respect of EDD refund, the same cannot be received at this point of time, as with reference to the very same claim for the year 2006-10, the appeal is pending before the CESTAT and the petitioner has also made pre-deposit as contemplated, which was admitted. When a pre-deposit is made as per the Circular, the respondents cannot claim return of refund already made.

7.The learned Senior Standing Counsel appearing on behalf of the respondents made a submission that the appeal pending before the CESTAT is no way connected with the period for which the impugned demand notice was issued. Therefore, there is no infirmity as such. This apart, the EDD refund was made erroneously to the petitioner and the Department is entitled to recover the erroneous refund made. To substantiate the said ground, the learned Senior Standing Counsel referred to Para No.5 of the counter affidavit, which reads as under:

> "5.It may be seen that upon appearance before the DRI, on receipt of summons, the CEO has admitted that there was a standard price list available, even at the time of import but which was totally and willfully suppressed by them. Admittedly, in this case, the supplier of automobile car parts is none other than M/s Hyundai Motors Limited, Korea and it is imported by the petitioner, namely M/s Hyundai Motors India Limited. Therefore, there is a strong relationship between importer and supplier and it does influence the transaction value, which has been under declared by the petitioner earlier. It is only after production of the price list and after finding out that the goods have been undervalued to the tune of Rs.266.7 crores that the DRI has issued a show cause notice, which is the subject matter in W.P.No.26273 of 2011. Since the issue of relationship between the importer and the supplier remains unsettled in view of the show cause notice, our Department, which has to adjudicate the said show cause notice dated 31.07.2011 issued by DRI, is empowered U/S 28 of the Customs Act, 1962 to issue the notice for recovery of amounts erroneously refunded and accordingly, the impugned notice dated 08.01.2013 was issued to M/s HMIL, the petitioner herein. Therefore, it cannot be said by any amount of imagination that the amount sought to be recovered is illegal and not tenable in law."

8.Considering the arguments as advanced, this Court is of the considered opinion that the issues relating to the import period from 1997-2002 and the EDD deposit made were refunded pursuant to the orders passed by the CESTAT. When such a refund is made and the petitioner also received the refund amount, thereafter, the Show Cause Notice was issued for the imported period from 2006-2010. Based on the same principles, the petitioner filed the appeal before the CESTAT and the said appeal is pending, and the petitioner made a pre-deposit, as required under the statute. In such circumstances, the Board also issued a Circular dated 16.09.2014 that if an opinion is formed that the EDD was erroneously refunded as the matter is pending before the CESTAT, the demand cannot be made till the issues are settled by passing a final order. In the present case, admittedly, the CESTAT Appeal is pending. This being the factum, this Court is of the opinion that the impugned order issued on 08.01.2013 ought not to have issued by the respondents and they should have waited till the disposal of the CESTAT Appeal filed by the petitioner, which is pending.

9.This being the factum established, the impugned demand notice issued by the 4^{th} respondent in File No.S.Misc.57/2012-Refunds-Sea, dated 08.01.2013, is kept in abeyance till the disposal of the CESTAT Appeal filed by the petitioner in Appeal No.C/4204/2015. The respondents are at liberty to continue the proceedings after the disposal of the CESTAT Appeal, filed by the petitioner. Till such time, no coercive action shall be taken against the petitioner.

10.With these directions, the Writ Petition stands disposed of. No costs. Consequently, connected Miscellaneous Petition is closed.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

1. The Secretary,
   Government of India,
   Ministry of Finance,
   Department of Revenue,
   North Block, New Delhi 110 001.

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Directorate of Revenue Intelligence,
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+1 CC to M/s. Hema Muralikrishnan, Advocate, Sr. 30776.

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GPL(CO)
LS(23/07/2021)