IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.06.2021

CORAM

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

W.P. Nos.9853, 9858 & 9859 of 2020

and WMP Nos.11972 and 11974 of 2020

and WMP No.22550 of 2020

M/s.K.H.Exports India Pvt. Ltd.,
K.H.Centre,
15/2, College Road,
Nungambakkam, Chennai-600 006.
Rep. by its Managing Director,
M.Abdul Wahab ...Petitioner in all WPs

Vs.

1. The Commissioner of Customs (Exports),
   Office of the Commissioner of Customs (Exports),
   No.33, Customs House,
   Rajaji Salai, Chennai-600 001.

2. The Assistant Commissioner of Customs (Exports),
   No.33, Customs House,
   Rajaji Salai, Chennai-600 001.

3. Central Board of Indirect Taxes & Customs,
   (Drawback Division),
   Ministry of Finance, Department of Revenue,
   New Delhi. ...Respondents in all WPs

Prayer in WP.No.9853 of 2020: Writ Petition filed under Article 226 of the Constitution of India praying to issue Writ of Certiorari calling for the records of the Third Respondent ending with the communication F.No.609/124/2009-DBK 1139 dated 09.08.2019 and quash the same.

Prayer in WP.No.9858 of 2020: Writ Petition filed under Article 226 of the Constitution of India praying to issue Writ of Certiorari calling for the records of the Third Respondent ending with the communication F.No.609/124/2008-DBK 383 dated 02.03.2020 and quash the same.

Prayer in WP.No.9859 of 2020: Writ Petition filed under Article 226 of the Constitution of India praying to issue Writ of Mandamus directing the respondents to grant drawback to the petitioners in respect of 207 shipping bills more fully described in the annexure to the writ petition amounting to Rs.5,86,23,750/- to the Petitioners.

(In all WPs)
For Petitioner : Mr.C.Manishankar, Senior Counsel for Mr.S.Arun Prasad

For Respondents: Mrs..Hema Muralikrishnan Senior Standing Counsel

COMMON ORDER

A common order is passed in respect of these three Writ Petitions, since the cause of action giving rise to the relief sought is one and the same.

2. The prayer in W.P.No.9853 of 2020 is for issuance of Writ of Certiorari calling for the records of the third Respondent concluding with the communication F.No.609/124/2009-DBK 1139 dated 09.08.2019 and quash the same. The prayer in WP.No.9858 of 2020 is for issuance of Writ of Certiorari calling for the records of the third Respondent ending with the communication F.No.609/124/2008-DBK 383 dated 02.03.2020 and quash the same. The prayer in WP.No.9859 of 2020 is for issuance of Writ of Mandamus directing the respondents to grant drawback to the petitioners in respect of 207 shipping bills more fully described in the annexure to the writ petition amounting to Rs.5,86,23,750/-.

3. The petitioner had been running a unit in a Special Economic Zone (SEZ). On 15.02.2007 a request has been made by it to the Development Commissioner, Madras Export Processing Zone for issuance of a no objection certificate for exiting the EOU Scheme and entry to the Export Promotion of Capital Goods Scheme (EPCG). In-principle approval was granted by the Development Commissioner on 10.04.2007. On the strength of the aforesaid, a letter was given on 13.04.2007 by the petitioner to Assistant Commissioner for Customs/R2 conveying its decision for switch-over from EOU to EPCG Scheme, effective from 01.07.2007. The purpose for the shift is itself to enable disposal of the existing stocks and raw materials in respect of which no duty had been paid.

4. The petitioner also sought, in its communication dated 13.04.2007, a quantification of the estimated duty liability. Permission was granted on 25.06.2007 by R2 to de-bond. An import export licence under the EPCG Scheme was issued on 10.07.2007. On 06.12.2007 a certificate had been issued by R2 confirming the position that there was nil-demand in regard to the petitioner and that all duties had been paid by it on de-bonding. On 19.12.2007, the petitioner sought conversion of EOU bills into drawback shipping bills. The petitioner wrote to the Commissioner of Customs, Sea Ports as well as to Commissioner of Customs (Airport) seeking conversion of EOU shipping bills into drawback shipping bills. On 27.12.2007 R2 writes back to the petitioner stating that the raw materials, consumables and capital goods that had been lying in bond had been de-bonded and stood discharged.

5. An application for EPCG authorisation has been made to the Joint Director of Foreign Trade thereafter and a final exit order passed by the Development Commissioner on 01.01.2008. On 22.07.2008, the petitioner made a representation before the Secretary (Revenue) reiterating its request for conversion of EOU shipping bills to drawback shipping bills enclosing all relevant details. This was followed by a reminder by R2 on 10.10.2008. On 16.10.2008, the Commissioner of Customs (Exports) rejected the request for conversion. Relevantly, the Commissioner of Customs (Airport) sanctioned the claim quantifying the customs drawback and central excise drawback to be refunded to the petitioner, by order dated 20.11.2008.

6. Internal communication dated 03.02.2009 inter se the Board and the Chief Commissioner of Customs, refers to the representation made by the petitioner seeking conversion. At paragraph 3 the communication noted the conflicting views taken by the Chennai Commissionerate that rejected the request and the Air cargo Commissioner, which permitted the conversion and sanctioned drawback. The Joint Secretary (Drawback) expresses concern and states that it would be unfair that, having collected the duty, the benefit of drawback is denied. On 02.03.2020, the authorities requested re-examination of the request of the petitioner for conversion and the petitioner continued to reiterate its request. In its communication dated 16.03.2009 after narrating the entire history, the petitioner had expressed its submission that its claim for drawback be settled at the earliest and has also referred to case law in support of its request.

7. On 05.05.2009, the Technical Officer (Drawback) rejected the request for allowance of drawback on exports prior to issuance of no-dues certificate dated 06.12.2007. Thus the rejection relates to shipping bills for the period 10.04.2007 to

31.12.2007. The petitioner has sought for and obtained various internal communications between the authorities under Right to Information Act, which sets the course that the discussion took as between the various Departments involved, culminating finally in the rejection of the petitioner's claim.

8. While this is so, on 31.07.2009, a demand styled as 'show cause notice' was issued by the Commissioner of Customs (Airport) seeking to reverse the drawback sanctioned earlier. A reply was filed on 24.08.2009 reiterating the claim for drawback granted originally. The Council for Leather Exports also issued communication dated 17.12.2009 to the Commissioner of Customs recommending the petitioner's case for drawback. This request was rejected on 24.12.2009 itself. The petitioner also relies on drawback granted not just in its case, in respect of an identical transaction by the Customs Department, but also to other entities in similar circumstances.

9. Since there was silence on the request made, Writ Petitions in W.P.Nos.3261 to 3264 of 2010 came to be filed by the petitioner seeking direction to the customs authorities to consider the request of the petitioner and grant drawback. Inter alia, the petitioner contended that the order passed by the Board on 05.05.2009 was cryptic and non-speaking and hence, unsustainable. The prayer made was accepted and an order passed for re-consideration of the matter afresh. In fine, order dated 25.10.2018 set aside communication dated 05.05.2009 and the Board was directed to decide the matter afresh after hearing the parties.

10. As regards the show cause notice issued by the Commissioner of Customs (Airport) the Court directed the authority to consider the petitioner's reply and decide the matter independently without being influenced by the directions of the Board that had been set aside.

11. A fresh representation thus came to be filed by the petitioner seeking sanction and detailed written submissions filed before the authorities on 25.12.2018 and 20.06.2019. The impugned order has come to be passed on 09.08.2019 rejecting the request of the petitioner.

12. The basis of rejection is reference to para 6.18 (e) of Foreign Trade Policy, 2004-2009, as per which, according to the respondents, the unit in question was continue to be treated as per its original status till the final exit order was passed by the Development Commissioner. Since the earlier order passed in April, 2007 was only an in-principle order, it would have little value till the final exit order was passed on 01.01.2008. A

representation was given by the petitioner seeking re-consideration of the matter that also came to be rejected on 02.03.2020. This order has been challenged in W.P.No.9858 of 2020.

13. The short point that arises in this matter is the effective date that has to be taken into account in deciding the cut-off point when the unit in question would cease to be an Export Oriented Unit and assume status of a unit under the EPCG Scheme and whether, for this purpose, the relevant date would be date of in-principle approval, being 10.04.2007 or final exit order, being 01.01.2008.

14. The respondents have filed a common counter and the facts are not in dispute. In support of the decision of the respondents to the effect that the petitioner would continue to hold the status of EOU between 10.04.2007 and 31.12.2007, the respondents would rely on the fact that the no-due certificate has been issued by the Central Excise Department only on 06.12.2007, after payment by the petitioner of all applicable duties. The issuance of no-due certificate was a pre-condition for the issuance of the final exit order and thus there was no infirmity in the stand adopted by the respondents.

15. It is not in dispute that the duties for the period 04.07.2007 to 23.11.2007 were paid by the petitioner only on 23.11.2007.

16. Circular No.4 of 2004 – Customs dated 16.01.2004 issued by the Board, touches upon the subject of 'conversion of free shipping bills into Advance Licence/DEPB/DFRC/Drawback shipping bills and from one export promotion scheme to another'. On the subject of conversion, clarifications had been sought for and the aforesaid circular has thus come to be issued answering the queries raised. Specific to the petitioner is clause 3.1, which is extracted below:

> Circular No.4/2004-Cus., dated 16-1-2004
> F.No.609/176/2002-DBK
> Government of India
> Ministry of Finance (Department of Revenue)
> Central Board of Excise & Customs, New Delhi.
>
> Sub : Conversion of free shipping bills into Advance License/ DEPB/DFRC/Drawback shipping bills and conversion of shipping bills from one export promotion scheme to another - regarding.
>
> Kind attention is invited to DOR Circular Nos.6/2003-Cus. dated 28.1.2003 and 40/2003-Cus. dated 12.5.2003 in terms of which conversion of free

shipping bills into Advance Licence /DEPB/DFRC/Drawback shipping bills and conversion of shipping bills from one export promotion scheme to another was permitted subject to specified conditions.

2. ……….

3. The issue has been re-examined in the Board.

3.1 In so far as the facility of permitting conversion of free shipping bill into drawback shipping bill is concerned, the same is governed by Chapter X of the Customs Act and Customs & Central Excise Duties Drawback Rules, 1995. Rule 12 of the Customs & Central Excise Duties Drawback Rules contain the details of statement/declaration to be made by the exporter at the time of export of goods for the purpose of availing drawback.

Proviso to Rule 12(1)(a) of ibid rules empowers the Commissioner to grant exemption from observance of the provisions of Rule 12(1)(a) for the purpose of availment of drawback. This necessarily implies that whereas the Commissioner may grant exemption from observing any of the provisions of Rule 12(1)(a) of ibid rules for the purpose of allowing drawback, which includes permitting drawback against a free shipping bill, no provision exists for permitting conversion of free shipping bill into drawback shipping bill.

In view of above, it is clarified that there is no need for allowing conversion. However, in terms of the proviso to Rule 12(1)(a) of the Customs and Central Excise Duties Drawback Rules 1995, the Commissioner may examine and consider individual requests on merits and facts in terms of the aforesaid provisions. The aforesaid relaxation shall only apply in respect of drawback claims pertaining to All Industry Rates of drawback and it would not apply to brand rate of duty drawback, where rate is claimed in terms of Rule 6 or Rule 7 of the Customs & Central Excise Duties Drawback Rules.

17. The entitlement of the petitioner to conversion is not in dispute in terms of the aforesaid circular. The relevant statutory provision relied upon is Rule 12 of the Customs and Central Excise Duties and Service Tax Drawback Rules, 1995 (in short 'Rules), which reads as follows:

12. Statements/Declarations to be made on exports other than by post.- (1) In the case of exports other than by post, the exporters shall at the time of export of the goods. -

(a) state on the shipping bill or bill of export, the description, quantity and such other particulars as are necessary for deciding whether the goods are entitled to drawback, and if so, at what rate and make a declaration on the relevant shipping bill or bill of export that

(i) a claim for drawback under these rules is being made :

(ii) the duties of Customs and Central Excise have been paid in respect of the containers, packing materials and materials used in the manufacture of the export goods on which drawback is being claimed and that in respect of such containers or materials no separate claim for rebate of duty under the Central Excise Rules, 1944 has been or will be made to the Central Excise authorities;

[Provided that if the Commissioner of Customs is satisfied that the exporter or his authorised agent has, for reasons beyond his control, failed to comply with the provisions of this clause, he may, after considering the representation, if any, made by such exporter or his authorised agent, and for reasons to be recorded, exempt such exporter or his authorised agent from the provisions of this clause]

(b) furnish to the proper officer of Customs, a copy of shipment invoice or any other document giving particulars of the description, quantity and value of the goods to be exported.

(2) Where the amount or rate of drawback has been determined under Rule 6 or Rule 7, the exporter shall make an additional declaration on the relevant shipping bill or bill of export that -

(a) there is no change in the manufacturing formula and in the quantum per unit of the imported materials or components if any, utilised in the manufacture of export goods; and

(b) the materials or components, which have been stated in the application under Rule 6 or Rule 7 to have been imported; continue to be so imported and are not being obtained from indigenous sources.

18. The aforesaid provision deals with the declarations to be made on shipping bills specifying the nature of the export transaction. In the present case, all shipping bills between April and end December, 2007 were free shipping bills for the reason that the petitioner had yet to receive the final order of exit. In any event, the proviso to Rule 12 states that the Commissioner of Customs, if satisfied that the exporter or authorised agent has failed to comply with Rule 12 for reasons beyond its control, might well exempt the exporter/authorised agent from the rigour of the clause. According to the petitioner, had the authorities taken it upon themselves to issue the final exit order well in time, then the petitioner would have ensured compliance with provisions of Rule 12 and there would have been no necessity to file free shipping bills as against EPCG bills.

19. Reliance is also placed on the Handbook of procedure to state that the petitioner has been diligent in adhering to the procedures stipulated in the matter of exit from one scheme and availment of another. Appendix 14-I-L of the Hand book sets out guidelines for the exit of EOU/EHTP/STP units and there is no violation alleged of any of the prescribed guidelines.

20. Though Rule 12 (1) clearly vests discretion in the Commissioner to grant exemption by way of duty drawback even in respect of free shipping bills, such discretion must be extended by way of a reasoned speaking order.

21. In my considered view, neither of the impugned orders dated 09.08.2019 and 02.03.2020 satisfy this requirement.

22. Very relevantly, such discretion has been exercised by the authorities at Tuticorin and by the Commissioner Airport, though pursuant to the impugned order, the latter order is now under re-consideration. The discretion originally exercised by Assistant Commissioner of Customs (Export), Tuticorin has attained finality and is not under review.

23. The Customs Act, 1962 is a central enactment and there must thus, be uniformity in the exercise of discretion by officers in different stations. If an officer in a particular station has thought it fit to accept an assessee's claim in an identical circumstance, then any variation from this point of view only be after a process of detailed reasoning to justify the difference in stand.

24. I am of the considered view that the dichotomy in the stand adopted by the different authorities as well as the fact that there is no reasoning to support the conclusion in the impugned order, is fatal to the respondents' case.

25. The impugned orders are set aside. The order of stay granted in W.P.No.9853 of 2020, challenging the show cause notice issued by the Commissioner, Sea Port is vacated. Proceedings shall be taken/continued afresh, the petitioner heard in both matters and detailed orders be passed on the petitioners' claim to exemption by both the authorities. It is expected that the orders passed will reflect due application of mind to all submissions of the petitioner and that a consistent and unified approach will be taken by the Commissionerates. Let this exercise be completed within a period of sixteen weeks from today. These writ petitions are disposed in the aforesaid terms. No costs. Connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

Sl/ska

To

1.The Commissioner of Customs (Exports),
Office of the Commissioner of Customs (Exports),
No.33, Customs House,
Rajaji Salai, Chennai-600 001.

2.The Assistant Commissioner of Customs (Exports),
No.33, Customs House,
Rajaji Salai, Chennai-600 001.

3.Central Board of Indirect Taxes & Customs,
(Drawback Division),
Ministry of Finance, Department of Revenue,
New Delhi.

+1cc to M/s.K.Krishnamoorthy, Advocate Sr No.29597
+1cc to M/s.Hema Muralikrishnan, Advocate Sr No.29504

W.P. Nos.9853, 9858 & 9859 of 2020
and WMP Nos.11972 and 11974 of 2020
and WMP No.22550 of 2020

SJ (CO)
PR (13/09/2021)