

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.01.2021

CORAM:

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.22441 of 2018

and

M.P.No.26299 of 2018

M/s Ruchi Soya Industries Ltd,
Rep by its Authorized Signatory
Mr.R.Venkatraman,
having its Registered Office at
Ruchi House, Survey No.169,
Royal Palms, Aarey Colony, Goregaon (East),
Mumbai - 400 065. Petitioner

Vs.

- 1.Union of India,
represented by its Secretary,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi - 110 001.
- 2.The Commissioner of Customs (Imports),
In the office of Commissioner of Customs (Imports),
Customs House,
No.60, Rajaji Salai,
Chennai - 600 001.
- 3.The Deputy Commissioner of Customs (Group 7H),
In the office of Commissioner of Customs (Imports),
Customs House,
No,60, Rajajai Salai,
Chennai - 600 001. Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India praying for the issuance of Writ of Certiorarified Mandamus, to call for the records pertaining to re-assessment of the subject Bill of Entry No.5409602 dated 01.03.2018 done by the Respondents asking the petitioner to pay higher rate of duty for clearance of the subject goods and quash the same; consequently direct the Respondents to pay and place at the disposal of the petitioner an amount of Rs.73,84,192/- with interest paid by the petitioner from the date of deposit till the date of payment.

For Petitioner : Mr.Rajesh Rawal

For Respondents : Mr.V.Sundreswaran

O R D E R

The present Writ Petition has been filed for a writ of mandamus to direct the respondent to refund the excess amount of tax paid by the petitioner amounting to Rs.73,84,192/- against assessment in Bill of Entry No.5409602 dated 01.03.2018.

2.The petitioner had imported 6,000 metric tons of RBD Palm Oil pursuant to a contract with the supplier on 15.01.2018. In respect of the aforesaid consignments, three bill of lading dated 24.01.2018 were issued by the shipper.

3.In this Writ Petition, we are concerned with clearance of 1000 metric tons of RBD Palm Oil cleared vide bill of entry No.5409602 dated 01.03.2018. By Notification No.50/2017- Customs dated 30.06.2017 RBD Palm Oil was subject to customs duty at 40%. This duty was sought to be enhanced to 54% vide customs Notification No.29/2018-Cus dated 01.03.2018 from 40% vide serial No.65 to Notification No.50/2017-Customs dated 30.06.2017.

4.The petitioner filed the aforesaid bill of entry dated 01.03.2018 to clear 1000 metric tons of RBD Palm Oil. Earlier, the consignment vide Bill of Entry No.5071127 dated 05.02.2018 and bill of entry No.5409602 dated 01.3.2018. The Notification No.29/2018-cus dated 01.03.2018 which enhanced the rate of customs duty from 40% to 54% was digitally signed and published by the Central Government on 06.03.2018 at 19:15:13+05'30'.

5.Since, the rate of duty was sought to be enhanced vide notification No.29/18-Cus dated 01.03.2018, the petitioner filed multiple writ petitions challenging the notification enhancing the rate of customs duty from 40% to 54% before the Hon'ble Andhra High Court and before this Court in W.P.No.21207 of 2018. The Andhra High Court by its order dated 28.09.2019 interpreted Section 25(1) and 25(4) of the Customs Act, 1962 and concluded as follows:-

76.In view of the law declared by the Courts with regard to interpretation of taxing statutes, it is clear that when the amended provision or any provision of the statute creates serious inconvenience, serious absurdity, confusion or friction, contradiction and conflict between its various provisions, the same is illegal and amendment of sub-section (4) of Section 25 giving effect to the notification from the date of its issue for publication in the Gazette is an arbitrary exercise of power by the

Legislature and it is totally contrary to the purport of sub-section (1) and sub-section (2-A) of Section 25 of the Act, which mandates publication of notification in the official Gazette. Therefore, to avoid inconvenience, serious absurdity, confusion or friction, contradiction and conflict between various provisions, amended provisions of sub-section (4) of Section 25 which is enacted by arbitrary exercise of power by the Legislature, is liable to be struck down.

77. The notification was published on 06.03.2018 which is impugned in these writ petitions, published electronically on 06.03.2018. In view of the decision taken by the Government of India in terms of Section 8 of the Income Tax Act, to avoid physical printing of Gazette notification to publish the same exclusively by electronic mode, so as to attribute knowledge to the public at large. The notification was signed by Rakesh Sukul on 06.03.2018 at 19:15:13 + 05'30'. When notification needs to be signed digitally and only when the notification was uploaded and published in the Official Gazette, the same is made available for public. Perhaps, to avoid such contingency to give effect to the notification on the date of publication, the Government of India amended sub-section (4) of Section 25 of Customs Act, 1962. But, sub-section (1) and sub-section (2-A) of Section 25 were not suitably amended and they remained as it is. Therefore, sub-sections (1), (2-A) and (4) of Section 25 are running contra to one another, creating confusion in the minds of public at large, atleast to the person who is dealing with the department. Thus, it is evident from the record that the notification was not signed atleast by the competent authority on the date of presentation of ex-bond bill of entry before the competent authority for release of imported goods for human consumption in accordance with Section 15(1)(b) read with Section 68 of the Customs Act for clearance of the goods for human consumption and the relevant date for determination of the duty is the date of presentation of ex-

bond bills of entry for release of the goods which is explicit from Section 15 (1)(b) of the Act. But the respondents collected the customs duty initially @ 30%, but later by the time of release, customs duty was enhanced @ 44% and demanded the variation of 14%.

78. As discussed above, sub-section (4) of Section 25 created absurdity, confusion and friction. The very collection of customs duty @ 44% on the imported goods belonging to these petitioners prior to the publication of notification in electronic mode is an illegality. Therefore, the petitioners are entitled to claim refund of the amount paid in excess of 30% of the original rate of customs duty as on the date of presentation of ex-bond bills of entry for clearance of import goods for human consumption. Therefore, the respondents are liable to repay the excess amount which they collected from the petitioners beyond 30% of customs duty.

79. One of the contentions raised by the learned counsel for the respondents, when a remedy by way of appeal under Section 128 and 129(A) of the Customs Act is available, the petitioner is disentitled to claim relief under Article 226 of the Constitution of India. But, the said contention cannot be accepted for the simple reason that the appellate authority or Tribunal cannot declare any provision in the statute as illegal or arbitrary. Therefore, we find no force in the argument of the learned counsel for the respondents and the same is rejected.

80. In view of our foregoing discussion, Section 25(4) of the Customs Act is declared as arbitrary and contrary to Section 25(1) and (2-A) of the Customs Act, 1962 and that the respondents are liable to repay the amount collected from the petitioners for clearance of imported goods for home consumption beyond the original rate prevailing on the date of prior to date of publication of notification i.e., Rs.2,88,16,200/- with interest paid by the petitioner from the

date of deposit till the date of payment.

81.In the result, writ petitions are allowed.''

6.A similar writ petition was filed by the petitioner in W.P.No.21207 of 2018. In the aforesaid writ petition, the petitioner had prayed for writ of declaration to declare Section 25 (4) of the Customs Act, 1962 as amended by Finance Act, 2016 is arbitrary, illegal, ultra vires and unconstitutional and to strike down the same accordingly and consequently declare Notification No. 29/2018-Customs dated 1.3.2018 as illegal, arbitrary, ultra vires and infringing the fundamental right of the petitioner to trade an otherwise bad in law. As per sub-section 25 (4) of the Customs Act, 1962 every notification issued under sub-section (1) and sub-section (2A) shall, unless otherwise provided, come into force on the date of its issue by the Central Government for publication in the official Gazette.

7.The 1st bench of this court after considering the above 2 cited decisions of the the Andhra Pradesh and Telangana High Court and the Delhi High Court allowed the writ petition by its order dated 14.7.2020. While allowing the writ petition, the 1st court also directed the respondents to refund the entire amount of excess duty paid by the petitioner "under protest" within a period of 2 months from the date of the order.

8.It is therefore submitted that the respondent were duty bound to refund the amount in terms of the above decision of this court in W.P.No.212017 of 2018.

9.I have considered the arguments advanced by the learned counsel for the petitioner.

10.Facts are not in dispute. The petitioner had imported a consignment of RBD Palm Oil and had filed a Bill of Entry No.5409602 dated 01.03.2018. On the same date, i.e. on 01.03.2018, the effective rate of duty for RBD Palm Oil was sought to be increased from 40% to 54% by issuance of Notification No.29/2018-Customs dated 01.03.2018. However, the said Notification was published in the official website by the respondents only on 06.03.2018.

11.The Government had taken a decision to do away with the physical printing of the notification in their Office Memorandum dated 30.09.2015. In the said Memorandum, it was stated that it had been decided in consultation with Department of Legal Affairs to switch over to exclusive e-publishing of the Government of India Gazette Notification on its website with effect from 01.10.2015 and to do away with physical printing of Gazette Notification. It was further

stated that the date of publishing shall be the date of e-publication on the official website by way of electronic gazette in respect of Gazette Notifications. The Gazette Notification can be accessed and downloaded/printed from the official e-Gazette on free of cost. The Ministries were also directed to give wide publicity to the above Office Memorandum. The said Office Memorandum of the Ministry of Urban Development has been considered both by this Court in the petitioner's own cases in W.P.No.21207 of 2018 and by the Andhra Pradesh and Telangana High Court in W.P.Nos.4533 and 4534 of 2019.

12. Thus, the Notification No.29/2018 - Customs dated 01.03.2018 came into effect from the date of its publication in the official website of the respondent as per the Office Memorandum.

13. There is no dispute that the Notification was uploaded in the official website on 06.03.2018. Therefore, the rate of duty, as was in existence prior to the said publication of the Notification No.29/2018 - Customs dated 01.03.2018 in Notification No.50/2017-Customs, dated 30.06.2017, was applicable for assessment of the above Bill of Entry No.5409602 dated 01.03.2018.

14. The Hon'ble Supreme Court in para 92 in Mafatlal Industries Vs UOI, 1997 (89) ELT 247 : (1997) 5 SCC 536 has observed as follows:-

92.Now, where a person proposes to contest his liability by way of appeal, revision or in the higher courts, he would naturally pay the duty, whenever he does, under protest. It is difficult to imagine that a manufacturer would pay the duty without protest even when he contests the levy of duty, its rate, classification or any other aspect. If one reads the second proviso to sub-section (1) of Section 11-B along with the definition of "relevant date", there is no room for any apprehension of the kind expressed by the learned counsel.

15. Again in para 91, the Hon'ble Supreme Court in Mafatlal Industries Vs UOI, 1997 (89) ELT 247 : (1997) 5 SCC 536 has also observed as follows:-

"All claims for refund, arising in whatever situations (except where the provision under which the duty is levied is declared as

unconstitutional), has necessarily to be filed, considered and disposed of only under and in accordance with the relevant provisions relating to refund, as they obtained from time to time. We see no unreasonableness in saying so."

16.The Hon'ble Supreme Court in Mafatlal Industries Ltd Vs. Union of India, 1997 (89) ELT 247 : (1997) 5 SCC 536 has also observed as follows:-

"We do not think it is possible to agree. Such a holding would run against the very grain of the entire philosophy underlying the 1991 Amendment. The idea underlying the said provisions is that no refund shall be ordered unless the claimant establishes that he has not passed on the burden to others. Sub-section (3) of the amended Section 11-B is emphatic. It leaves no room for making any exception in the case of refund claims arising as a result of the decision in appeal/reference/writ petition. There is no reason why an exception should be made in favour of such claims which would nullify the provision to a substantial degree. So far as "lack of incentive" argument is concerned, it has no doubt given us a pause; it is certainly a substantial plea, but there are adequate answers to it. Firstly, the rule means that only the person who has actually suffered loss or prejudice would fight the levy and apply for refund in case of success. Secondly, in a competitive market economy, as the one we have embarked upon since 1991-92, the manufacturer's self interest lies in producing more and selling it at competitive prices – the urge to grow. A favourable decision does not merely mean refund; it has a beneficial effect for the subsequent period as well. It is incorrect to suggest that the disputes regarding classification, valuation and claims for exemptions are fought only for refund; it is for more substantial reasons, though the prospect of refund is certainly an added attraction. It may, therefore, be not entirely right to say that the prospect of not getting the refund would dissuade the manufacturers from agitating the questions of exigibility, classification, approval of price lists or the benefit of exemption notifications. The disincentive, if any, would not be significant. In this context, it would be relevant to point out that the position was no

different under Rule 11, or for that matter Section 11-B, prior to its amendment in 1991. Sub-rules (3) and (4) of Rule 11 (as it obtained between 6-8-1977 and 17-11-1980) read together indicate that even a claim for refund arising as a result of an appellate or other order of a superior court/authority was within the purview of the said rule though treated differently. The same position continued under Section 11-B, prior to its amendment in 1991. Sub-sections (3) and (4) of this section are in the same terms as sub-rules (3) and (4) of Rule 11; if anything, sub-section (5) was more specific and emphatic. It made the provisions of Section 11-B exhaustive on the question of refund and excluded the jurisdiction of the civil court in respect of all refund claims. Sub-rule (3) of Rule 11 or sub-section (3) of Section 11-B (prior to 1991) did not say that refund claims arising out of or as a result of the orders of a superior authority or court are outside the purview of Rule 11/Section 11-B. They only dispensed with the requirement of an application by the person concerned which consequentially meant non-application of the rule of limitation; otherwise, in all other respects, even such refund claims had to be dealt with under Rule 11/Section 11-B alone. That is the plain meaning of sub-rule (3) of Rule 11 and sub-sections (3) and (4) of Section 11-B (prior to 1991 Amendment). There is no departure from that position under the amended Section 11-B.

17. If the petitioner wants relief, in terms of the decision of the Hon'ble Division Bench in W.P.No.21207 of 2018 it is open to the petitioner to approach the Hon'ble Division Bench and file appropriate application for enforcing the said order and also for punishing the respondent for non-compliance with the said order as the respondents are duty bound to refund the amount paid by the petitioner "under protest" in terms of the decision of the Hon'ble Supreme Court in Union of India Vs. Kamalakshi Finance Corporation Ltd., 1995 (55) ELT 445.

18. Therefore, such a remedy cannot be granted to petitioner in the present writ petition for the relief sought for in the present writ petition straight away.

19. The respondents will have to pass an reassessment order in terms of Section 149 of the Customs Act, 1962 and thereafter the petitioner has to file a refund claim in terms of Section 27 of the Customs Act, 1962 and have the refund claim examined in terms of the decision of the Hon'ble Supreme

Court in Mafatlal industries Vs; Union of India,1997 (89) ELT 247.

20.Thus, the petitioner is required to satisfy with the requirements of unjust enrichment. The petitioner is therefore also directed to file a refund application before the respondents, within a period of one month from the date of receipt of a copy of this order.

21.It is noticed that the time limit prescribed in order dated 14.07.2020 is only for two months in W.P.No.21207 of 2018 pursuant to which the petitioner is entitled to refund. Therefore it is for the respondents herein to seek extension of time for refunding the amount.

22.In case the respondents are not able to get any further extension of time for the Hon'ble Division Bench of this Court in W.P.No.21207 of 2018 for passing appropriate orders of refund, the respondents shall refund the amount within reasonable time.

23.Accordingly, this Writ Petition stands partly allowed with the above observations. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS-VII)

//True Copy//

Sub Assistant Registrar

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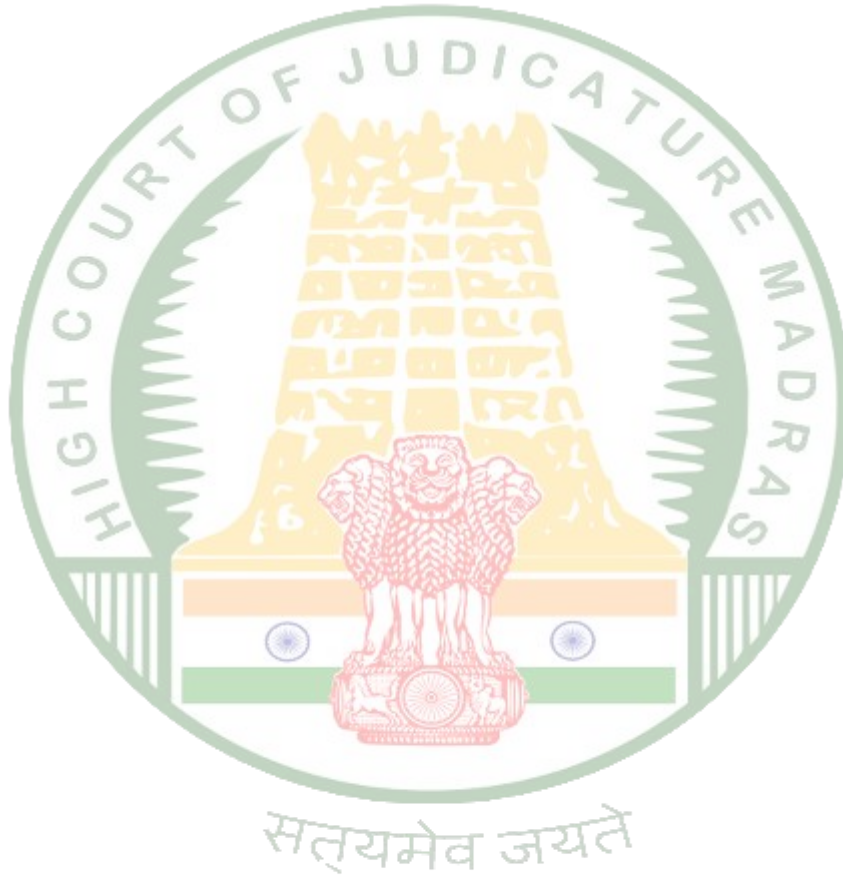
To

- 1.Union of India,
represented by its Secretary,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi - 110 001.
- 2.The Commissioner of Customs (Imports),
In the office of Commissioner of Customs (Imports),
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No.60, Rajaji Salai,
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+1cc to Mr.V.Sundareswaran, Advocate SR.2550

W.P.No.22441 of 2018
and
M.P.No.26299 of 2018

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