IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.09.2021

CORAM

THE HON'BLE Mr.JUSTICE M.SUNDAR

W.P.Nos.14776, 14779, 18513 and 18517 of 2021
and
W.M.P.Nos.15662, 15663, 15664, 15665, 19748, 19749, 19750, 19752, 19753 and 19754 of 2021

M/s.Pioneer Wincon Energy Systems Private Limited,
Represented by its Managing Director,
Shri M.Pradeepsankar
Tamarai Tech Park, 7th Floor,
16-20A, (SP) Developed Plots,
Jawaharlal Nehru Salai, Industrial Estate,
Guindy, Chennai 600 032.

...Petitioner in W.P.Nos.14776 & 18513 of 2021

-Vs.-

1. The Additional Commissioner of Customs (Group 5),
Custom House, No.60, Rajaji Salai,
Chennai 600 001.

... 1st Respondent in W.P.No.14776 & 18513 of 2021

2. The Deputy Commissioner of Customs,
(Group-5), Customs House, No.60,
Rajaji Salai, Chennai – 600 001.

... R2 in W.P.No.18513 & 18517/2021 (both W.A's)

2. The Assistant Commissioner of Customs (Group 5),
Custom House, No.60, Rajaji Salai,
Chennai-600 001.

...R2 in W.P.No.14776/2021

3. The Deputy Commissioner of Customs, Import,
Group-5, Custom House,
Mundra 370 421. ... 3rd respondent in W.P.No.18513/2021

M/s.Para Enterprises Private Limited,
Represented by its Director,
Shri.M.Pradeepsankar

Tamarai Tech Park, 7th floor,
16-20A, (SP) Developed Plots,
Jawaharlal Nehru Salai,
Industrial Estate, Guindy,
Chennai-600 032.

...Petitioner in WP.Nos.14779 & 18517 of 2021

-Vs.-

1. The Additional Commissioner of Customs (Group 5),
Custom House, No.60, Rajaji Salai,
Chennai 600 001.

... R1 in W.P.No.14779/2021

2. The Assistant Commissioner of Customs (Group 5),
Custom House, No.60, Rajaji Salai,
Chennai-600 001.

... R2 in WP.No.14779/2021

3. The Deputy Commissioner of Customs, Import,
Group-5, Custom House,
Mundra 370 421. ... 3rd respondent in W.P.No.18517/2021

Prayer in WP.No.14776 of 2021:

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, to call records pertaining to the reassessment made in the bill of entry No.3170149 dated 16.03.2021 by the 2nd respondent and quash the same as illegal and violative of the provisions of Section 17 of the Customs Act, 1962.

Prayer in WP.No.14779 of 2021:

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, to call records pertaining to the reassessment made in the bill of entry No.3168741 dated 16.03.2021 by the 2nd respondent and quash the same as illegal and violative of the provisions of Section 17 of the Customs Act, 1962.

Prayer in WP.No.18513 of 2021:

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, to call for the records pertaining to the impugned Order-in-Original No.MCH/1116/DC/AAA/Gr.V/2021-22 dated 30.07.2021 by the 3rd respondent and quash the same as illegal and violative of the provisions of Section 17(5) of the Customs Act, 1962 and further direct 2nd and 3rd respondents to clear the goods covered by Bill of Entry No.3170149 dated 16.03.2021 after levying and collecting Anti-Dumping Duty only on the castings and not on the entire gear box.

Prayer in WP.No.18517 of 2021:

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, to call for the records pertaining to the impugned Order-in-Original No.MCH/1115/DC/AAA/Gr.V/2021-22 dated 30.07.2021 by the 3rd respondent and quash the same as illegal and violative of the provisions of Section 17(5) of the Customs Act, 1962 and further direct 2nd and 3rd respondents to clear the goods covered by Bill of Entry No.3170149 dated 16.03.2021 after levying and collecting Anti-Dumping Duty only on the castings and not on the entire gear box.

For Petitioner in all WPs : Mr.Hari Radhakrishnan

For Respondents in all WPs : Ms.K.G.Usha Rani
Junior standing counsel
for Customs and Excise.

COMMON ORDER

This common order will govern the captioned four writ petitions.

2. In this order, for the sake of convenience and clarity 'WP.No.14776 of 2021' shall be referred to as 'I WP'; 'WP.No.14779 of 2021' shall be referred to as 'II WP'; WP.No.18513 of 2021 shall be referred to as 'III WP' and 'WP.No.18517 of 2021' shall be referred to as 'IV WP'.

3. Mr.Hari Radhakrishnan, learned counsel for writ petitioner in all the four writ petitions and Ms.K.G.Usha Rani, learned Junior standing counsel for Customs and Central Excise [hereinafter 'Revenue counsel' for the sake of convenience and clarity] on behalf of all the respondents in all the four captioned writ petitions are before this Virtual Court.

4. The entire matter turns on a very narrow compass and therefore, short facts shorn of elaboration will suffice. It will suffice to say that there are two writ petitioners in the four captioned writ petitions. Writ petitioners imported gear boxes for what is known as 'WoEG' and this Court is informed that 'WoEG' stands for 'Wind Operated Electricity Generator'. Writ petitioners filed Bills of Entry for clearance and Anti-Dumping duty was imposed. Therefore, I WP and II WP were filed assailing Bills of Entry wherein Anti-Dumping duty had been

imposed. However, as this is a case of self assessment and as according to respondent, self assessment has not been done correctly, speaking orders were passed and these speaking orders are under Section 17(5) of 'Customs Act, 1962 (52 of 1962)' [hereinafter 'said Act' for the sake of convenience and brevity]. To be noted, re-assessment is under Section 17(4) of said Act. As the speaking orders came to be passed pending I WP and II WP. III WP and IV WP were filed assailing the speaking orders. Therefore, I WP and II WP have worked themselves out and have become infructuous is learned counsel's say. This submission is recorded.

5. Adverting to III WP and IV WP, learned counsel for writ petitioners, notwithstanding very many averments and very many grounds in the writ affidavit made one focused submission and that one focused submission is, it is imperative to give an opportunity to the writ petitioners i.e., personal hearing on a video conferencing platform. In support of his contention, learned counsel pressed into service a circular being circular No.55/2020-Cus., dated 17.12.2020 issued by 'Central Board of Indirect Taxes and Customs' [hereinafter 'CBIT&C' for the sake of convenience and clarity]. It may not be necessary to extract and reproduce the entire circular and it will suffice to reproduce paragraph No.2(a) of the circular which reads as follows:

> '2. After a series of consultations with various stakeholders, such as the NACs, trade and industry associations, it is felt that there is a need to further enhance the efficiency of the process involved in Faceless Assessment. With a view to achieve this objective, certain key areas, which require immediate attention, have been identified and the following instructions/guidelines are being hereby issued so as to smoothen the process of Faceless Assessment by the field formations.
>
> (a) Re-assessment in accordance with the Principles of Natural Justice: Despite several Board instructions on the issue, it has been observed that many a times the importers are not being afforded an opportunity of being heard before re-assessment of the goods. Such a practice is not in conformity with the provisions of law and needs to be accordingly discontinued, forthwith. It is emphasised that the process of re-assessment must be in accordance with the provisions of sub-sections (4) and (5) of Section 17 of Customs Act, 1962. In order to lend clarity and streamline this process, the procedure to be adopted by the FAGs for carrying out re-assessment, wherever required, is delineated as follows:

(i) During verification of the assessment, if there are reasons to believe that the self-assessment is not done correctly, or additional details are required to complete the verification, necessary clarifications should be sought from the importer/Customs Broker through the query module of ICES.

(ii) While raising the query, all the aspects of additional information required for finalisation should be covered and clearly worded. Also, as far as possible, multiple queries need to be avoided and all the information may be solicited in one-go and not in a piece-meal manner. Further, in the event that the officer concerned is required to raise a second (or more) query/ies on the same Bill of Entry, approval shall be taken from the respective Additional Commissioner/Joint Commissioner, with full justification thereof. Needless to say, this approval should be given only as an exception and not as a matter of routine. Pr. Commissioners/ Commissioners across the NACs may ensure that minimal queries are raised by the concerned FAGs and may devise their own mechanism to regularly monitor the same, in a manner that needless and repeated queries, which have the effect of delaying assessments, are avoided.

(iii) Based on the reply to the query, the FAG may either accept the self-assessment or proceed to re-assess the Bill of Entry.

(iv) While re-assessing the Bill of Entry, it must be ensured that the importer is given an opportunity to justify the self-assessment either in writing or in person through video Conferencing. The importer, can, if he so desires, waive off this requirement in writing. No re-assessment, which would lead to change in classification, valuation and/or applicability of notification etc, should be carried out, unless an opportunity is provided to the importer for presenting his/her viewpoint.

(v) Where the assessing officer re-assesses the Bill of Entry and where the importer does not accept the change in assessment in writing, through the query module in ICES, the proper officer shall mandatorily issue a speaking order without delay and in accordance with sub-section (5) of Section 17 of Customs Act, 1962.'

6. Learned counsel drew the attention of this Court to clauses (iii) and (iv) of 2(a) of the aforementioned circular, read the same in the context of 2(a) which is in the nature of prelude and submitted that personal hearing in case of reassessment is imperative.

7. In response to the above, learned Revenue counsel drew the attention of this Court to an earlier circular being circular No.9/2020-Cus., dated 05.06.2020 and more particularly, paragraph No.5.4 thereat which says that in Faceless Assessment Group (FAG), an opportunity to be heard is to be given to an importer before proceeding with re-assessment only, if personal hearing is sought by importer. Paragraph No.5.4 of the aforementioned circular captioned 'Speaking Order' reads as follows:

> '5.4 Speaking Order:
>
> (i) For any re-assessment done by the Faceless Assessment Group, which is at variance with the self-assessment done by the importer and in cases other than those where the importer confirms his acceptance of the said re-assessment electronically in reply to the query raised by the assessing officer, the Faceless Assessment Groups shall pass a speaking order on the re-assessment, within fifteen days from the date of re-assessment of the bill of entry, as prescribed in section 17(5).
>
> (ii) The Faceless Assessment Groups shall provide an opportunity to be heard to the importer, in accordance with the principles of natural justice, before proceeding with the re-assessment of the bill of entry. In the event a personal hearing is sought by the importer, the same can be conducted through video conferencing or other reliable technological means at the option of the importer, in this regard, the Board's guidelines vide F.No.390/Misc/3/2019-JC, dated 27th April 2020 may also be referred to.'

8. This Court carefully examined the aforementioned circulars as the captioned writ petitions turn on this lone point of personal hearing. It is clear that the CBIT&C has issued circulars from time to time. Whether circular No.9 dated 05.06.2020 stood revised/improvised vide circular No.55 dated 17.12.2020 can be left open in this order as in the cases on hand, writ petitioners have sought for personal hearing. Prelude to paragraph No.2 of Circular No.55 dated 17.12.2020 makes it clear that revision has become necessary as the CBIT&C observed that many times the importers have not been afforded personal hearing of being heard in case of reassessment and that such a practice is not in confirmity with provisions of law. This

circular also makes it clear that it has been issued by the Board reading the language in which Sub-Sections (4) and (5) of Section 17 of said Act is couched. This is clear from paragraph No.2(a) of the circular dated 17.12.2020 (extracted and reproduced supra).

9. The writ petitioner has sought for personal hearing vide communication dated 31.03.2021. Therefore, the question as to whether personal hearing has to be granted in case of re-assessment, only in cases where the importer asks for personal hearing is left open in this case. In other words, the question whether circular No.9/2020 dated 05.06.2020 is subsumed by circular No.55/2020 dated 17.12.2020 qua personal hearing is left open.

10. Learned Revenue counsel also submits that alternate remedy is available to writ petitioner by way of statutory appeal under Section 128 of said Act. Exceptions have been carved out by Hon'ble Supreme Court in Commercial Steel Limited case [Civil Appeal No 5121 of 2021, The Assistant Commissioner of State Tax and Others Vs. M/s Commercial Steel Limited] rendered recently on 03.09.2021. Law in this regard i.e., law regarding exceptions has been captured in paragraph No.11 which reads as follows:

> '11. The respondent had a statutory remedy under section 107. Instead of availing of the remedy, the respondent instituted a petition under Article 226. The existence of an alternate remedy is not an absolute bar to the maintainability of a writ petition under Article 226 of the Constitution. But a writ petition can be entertained in exceptional circumstances where there is: (i) a breach of fundamental rights; (ii) a violation of the principles of natural justice; (iii) an excess of jurisdiction; or (iv) a challenge to the vires of the statute or delegated legislation.'

11. This will fall under paragraph No.11(ii) of Commercial Steel case law, as it would be violation of principles of natural justice which is ingrained in reassessment proceedings vide the aforementioned circulars. In any event no elucidation is requied to say that alternate remedy rule is not an absolute rule, it is discretionay and it is a self-imposed rule qua writ jurisdiction. I have repeatedly held that alternate remey rule has to be applied with utmost rigour in fiscal law Statutes by following Dunlop India case [Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd., and others reported in (1985) 1 SCC 260], Satyawati Tandon [United

Bank of India Vs. Satyawati Tondon and others reported in (2010) 8 SCC 110] and K.C.Mathew [Authorized Officer, State Bank of Travancore and another Vs. Mathew K.C. reported in (2018) 3 SCC 85]. In the light of personal hearing being imperative (in the cases on hand) exception qua NJP [paragraph 11(ii) of Commercial Steel case law] becomes a strong as steel and brings it out of the rigour of alternate remedy rule.

12. Before concluding, it is necessary to record that the learned counsel for writ petitioner submitted that provisional assessment and re-export may please be permitted and writ petitioner is willing to provide 100% security by way of bank guarantee. It is open to writ petitioner to make this plea before third respondent, if the writ petitioner chooses to do so and the third respondent shall consider the same on its own merits and in accordance with law. To be noted, the learned counsel for writ petitioner made this plea on the ground that he has to meet the dead line/time line qua a project for which imported gear boxes are required.

13. The impugned orders in III WP and IV WP fail to pass muster owing to personal hearing not being afforded and therefore, the following order is passed:

(a) Impugned speaking orders being orders bearing reference Nos.MCH/1116/DC/AAA/Gr.V/2021-22 and MCH/1115/DC/AAA/Gr.V/2021-22 both dated 30.07.2021 are set aside solely on the ground that personal hearing has not been granted to the importers/writ petitioners though importers/writ petitioners have sought for one qua re-assesment;

(b) As the importers/writ petitioners have sought for personal hearing, third respondent in III WP and IV WP shall afford personal hearing as expeditiously as possible and in any event within a fortnight from today, i.e., on or before 12.10.2021 and pass speaking orders afresh i.e., de novo within another fortnight therefrom i.e., on or before 26.10.2021;

(c) Though obvious, it is made clear that no view or opinion has been expressed on merits of the matter in the instant order as the impugned orders are being set aside solely on the ground of personal hearing not being afforded;

14. I WP and II WP i.e., W.P.No.14776 of 2021 and W.P.No.14779 of 2021 are disposed of as closed having become infructuous. III WP and IV WP i.e., WP.No.18513 of 2021 and WP.No.18517 of 2021 are disposed of in terms of the

aforementioned directives. Consequently, writ miscellaneous petitions are also disposed of as closed. There shall be no order as to costs.

Sd/-
Assistant Registrar(CS-VIII)

//True Copy//

Sub Assistant Registrar

mk/nsa

To

1. The Additional Commissioner of Customs (Group 5),
   Custom House, No.60, Rajaji Salai,
   Chennai 600 001.

2. The Assistant Commissioner of Customs (Group 5),
   Custom House, No.60, Rajaji Salai,
   Chennai-600 001.

3. The Deputy Commissioner of Customs, Import,
   Group-5, Custom House, Mundra 370 421.

+1cc to M/s.K.G.Usha Rani, Advocate, S.R.No.50301

+1cc to M/s.Hari Radhakrishnan, Advocate, S.R.No.50370

W.P.Nos.14776, 14779, 18513 and 18517 of 2021
and
W.M.P.Nos.15662, 15663, 15664, 15665,
19748, 19749, 19750, 19752, 19753 and 19754 of 2021

BS(CO)
SU(18/10/2021)