IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.11.2021

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THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.NO.14126 OF 2020
AND
W.M.P.NOS.17538 & 17539 OF 2020

(Through Video Conferencing)

Virbac Animal Health India Pvt. Ltd.
Rep.by its Director-Supply Chain Mr. Manoj Kumar Roy
604, 6th Floor, Western Edge-1,
Megathane, Western Express Highway,
Borivali (E), Mumbai-400 066. ...Petitioner

Vs

1.The Union of India,
Rep.by its Secretary (Revenue)
Department of Revenue,
Ministry of Finance
North Block, New Delhi-110001

2.The Assistant Commissioner of Customs (Refunds-II)
Office of the Commissioner of Customs, Chennai-II,
Customs House, 60, Rajaji Salai,
Chennai-600 001. ...Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus, calling for the recrods relating to Order No. SR-490/2019-REFUNDS dated 06.12.2019 passed by Respondent No.2 and quash the same as it is passed against the principle of natural justice and unconstitutional and arbitrary and subsequently direct the Respondent No.2 to sanction and grant the Petitioner's refund of INR 3,01,01534/- along with the interest at the rate of 18 per cent per annum claimed vide application dated 26.08.2019 in the light of the Respondent's Notification 25/2019-Customs dated 06.07.2019 and thus render justice.

For Petitioner	:	Mr. Bharat Raichandani for Mr.A.K.Rajaraman
For Respondents No.2	:	Mrs. Hemalatha Sr. Standing Counsel

ORDER

The petitioner has challenged the impugned communication dated 06.12.2019, whereby the petitioner's refund claim has sought to be rejected on the ground that Directorate of Revenue Intelligence, Mumbai Zone, Unit (DRI/MZU/F/Enq-36/2019/1116) had stated that payment was made by the petitioner voluntarily after the petitioner admitted that concessional rate of duty was availed wrongly and accordingly based on the request of the petitioner to conclude the matter, was closed by the respondent under Section 22 of the Customs Act, 1962 by a letter dated 03.07.2019. The facts of the case is that the petitioner is an importer of Prawn feed shrimp larvae feed and fish feed in pellet form, powder form etc. It was the case of the petitioner that the import by the petitioner was exempted partly from duty vide serial No.107 of custom notification No.12/2012 dated 17.03.2012 as amended from time to time. It is the case of the petitioner long after the imports were made and payment of duty under the Customs Act, 1962, the DRI Mumbai issued summons to the petitioner under Section 108 of the Customs Act, 1962 and directed the petitioner to appear in person pursuant to which the petitioner appeared and paid amount as the amount as to pay the differential customs duty as per the proposal of the DRI. It is stated that while making payments, the petitioner stated that there should be a clarification regarding the notification. The petitioner also stated that it wished to approach authorities (Ministry of Commerce, Ministry of Agriculture and Ministry of Finance) or other bodies in this regard and seek their clarification. Thereafter, the petitioner appears to sent few representations. It is further the case of the petitioner that in the Finance Bill of 2019 certain amendments were made and under these circumstances. Which the petitioner thus clarified the position filed a refund claim before the respondents herein on 20.09.2019. Appearing on behalf of the petitioner, learned counsel for the petitioner submits that the impugned communication rejecting the refund claim was contrary to the provisions of Section 27 of the Customs Act, 1962 and in violation of principles of natural justice as no show cause notice was issued to show cause as to why a refund claim for a sum of Rs. 3,01,01534/- filed by the petitioner on 01.10.2019 should not be rejected. Learned counsel for the petitioner submits that the payments were made long after the imports were made and therefore, question of asking the petitioner to file an appeal against the assessment under the Bills of Entry does not arise. That apart, it is submitted that the petitioner had paid duty at 5 per cent the assessment were also completed based on the declarations in the Bills of Entry by the petitioner at the time of import and therefore, there is no question of filing any appeal against the assessments completed in the received Bills of Entry for which a sum of Rs. 3,01,01534/- has been paid.

2. Learned counsel for the petitioner, further submits that the amount paid by the petitioner in response to summons dated 08.02.2019 of the Directorate of Revenue Intelligence, Mumbai has to be construed as payment made under protest. In any event, the amount has to be appropriated in the manner known to law. Learned counsel for the petitioner, further submits that even otherwise as per the recent decision of the Hon'ble Supreme Court in Canon India Private Limited Vs. Commissioner of Customs, 2021 (376) ELT 3 (SC) the Directorate of Revenue Intelligence have been held to be having no authority to demand tax or appropriate amounts paid by the petitioner and therefore, question of insolvency Section 28 (2) of the Customs Act, 1962 does not arise.

3. Defending the impugned order, learned counsel for the respondents submits that the petitioner has not challenged the summons issued by the DRI Mumbai on 08.02.2019 and therefore, the writ petition is devoid of merits.

4. Learned counsel for the respondents further submits that assessments were completed at the time of import and therefore, in absence of an appeal against the respective Bills of Entry, the refund claim was correctly rejected, impugned communication. In this connection, the learned counsel for the petitioner, has drawn attention of this Court in the decision of the Hon'ble Supreme Court in ITC LIMITED Vs. COMMISSIONER OF CENTRAL EXCISE, KOLKATA IV (2019) 17 SCC 46 to Para 41 and 47 which reads as under:

> "41. It is apparent from provisions of refund that it is more or less in the nature of execution proceedings. It is not open to the authority which processes the refund to make a fresh assessment on merits and to correct assessment on the basis of mistake or otherwise.
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> 42. It was contended that no appeal lies against the order of self-assessment. The provisions of Section 128 deal with appeals to the Commissioner (Appeals). Any person aggrieved by any decision or order may appeal to the Commissioner (Appeals) within 60 days. There is a provision for condonation of delay for another 30 days. The provisions of Section 128 are extracted hereunder:
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> "128. Appeals to [Commissioner (Appeals)].
>
> (1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a [Principal Commissioner of Customs or Commissioner of Customs] may appeal to the [Commissioner (Appeals)] [within sixty days] from the date of the communication to him of such decision or order:

Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.

(1A) The Commissioner (Appeals) may, if sufficient cause is shown, at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing: Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.] (2) Every appeal under this section shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf."

43. As the order of self-assessment is nonetheless an assessment order passed under the Act, obviously it would be appealable by any person aggrieved thereby. The expression 'Any person' is of wider amplitude. The revenue, as well as assessee, can also prefer an appeal aggrieved by an order of assessment. It is not only the order of re-assessment which is appealable but the provisions of Section 128 make appealable any decision or order under the Act including that of self-assessment. The order of self-assessment is an order of assessment as per section 2(2), as such, it is appealable in case any person is aggrieved by it. There is a specific provision made in Section 17 to pass a reasoned/speaking order in the situation in case on verification, self-assessment is not found to be satisfactory, an order of re-assessment has to be passed under section 17(4). Section 128 has not provided for an appeal against a speaking order but against "any order" which is of wide amplitude. The reasoning employed by the High Court is that since there is no lis, no speaking order is passed, as such an appeal would not lie, is not sustainable in law, is contrary to what has been held by this Court in Escorts (supra).

44. The provisions under section 27 cannot be invoked in the absence of amendment or modification having been made in the bill of entry on the basis of which self-assessment has been made. In other words, the order of self-assessment is required to be followed unless modified before the claim for refund is entertained under Section 27. The refund proceedings are in the nature of execution for refunding amount. It is not assessment or re-

assessment proceedings at all. Apart from that, there are other conditions which are to be satisfied for claiming exemption, as provided in the exemption notification. Existence of those exigencies is also to be proved which cannot be adjudicated within the scope of provisions as to refund. While processing a refund application, re-assessment is not permitted nor conditions of exemption can be adjudicated. Re-assessment is permitted only under Section 17(3)(4) and (5) of the amended provisions. Similar was the position prior to the amendment. It will virtually amount to an order of assessment or re-assessment in case the Assistant Commissioner or Deputy Commissioner of Customs while dealing with refund application is permitted to adjudicate upon the entire issue which cannot be done in the ken of the refund provisions under Section 27. In Hero Cycles Ltd. v. Union of India 2009 (240) ELT 490 (Bom.) though the High Court interfered to direct the entertainment of refund application of the duty paid under the mistake of law. However, it was observed that amendment to the original order of assessment is necessary as the relief for a refund of claim is not available as held by this Court in Priya Blue Industries Ltd. (supra).

45. Reliance was also placed on a decision of Rajasthan High Court with respect to service tax in Central Office Mewar Palace Org. v. Union of India 2008 (12) STR 545 (Raj.). In view of the aforesaid discussion, we are not inclined to accept the reasoning adopted by the High Court, that too is also not under the provisions of the Customs Act.

46. The decision in Intex Technologies (India) Ltd. v. Union of India has followed Micromax (supra). The reasoning employed by the High Courts of Delhi and Madras does not appear to be sound. The scope of the provisions of refund under Section 27 cannot be enlarged. It has to be read with the provisions of Sections 17, 18, 28 and 128.

47. When we consider the overall effect of the provisions prior to amendment and post-amendment under Finance Act, 2011, we are of the opinion that the claim for refund cannot be entertained unless the order of assessment or self-assessment is modified in accordance with law by taking recourse to the appropriate proceedings and it would not be within the ken of Section 27 to set aside the order of self-assessment and reassess the duty for making refund; and in case any person is aggrieved by any order which would include self-assessment, he has to

get the order modified under Section 128 or under other relevant provisions of the Act."

5. Learned counsel for the respondents, submits the writ petition os therefore, liable to be dismissed.

6. By way of rejoinder, the Learned counsel for the petitioner, submitted that the decision of the Hon'ble Supreme Court in referred to supra cited by the learned counsel for the respondents is not applicable to the facts and circumstances of the case inasmuch as the assessment of respective Bills of Entry were as per the declaration of the petitioner and therefore, the argument that the Bills of Entry have to be amended by way of an appeal, does not arise.

7. Heard learned counsel for the petitioner and the respondents. I have perused the impugned communication, the notifications and the communications of the DRI which led to the petitioner paying the amount. At the outset it may be mentioned the impugned communication cannot be construed as an order. It was incumbent on the part of the respondent to issue a proper show cause notice to the petitioner to show cause as to why refund claimed should not be rejected under one of the grounds. The documents filed by the petitioner indicates that the imports were made by the petitioner long before the amounts were paid by the petitioner pursuant to DRI Investigation. The amounts paid by the petitioner during the investigation has to be treated as amount paid "under protest". Therefore, the question of filing an appeal against the respective Bills of Entry cannot be countenanced. In any event, merits of the refund claim of the petitioner would require a proper determination on facts and therefore, the second respondent was required to issue proper show cause notice to the petitioner giving the reasons why refund claim filed by the petitioner should not be rejected. Rejection of the refund claim of the petitioner merely based on a intra-departmental communication is not sufficient.

8. Under the circumstances, there is no other option to remit the case back to the second respondent to issue a proper show cause notice to the petitioner preferably within a period of 60 days from date of receipt of this order setting out the grounds as to why the refund claim of the petitioner should not be rejected. The show cause notice shall also call upon the petitioner to reply within such time which may be prescribed in the said show cause notice to be issued by the second respondent.

9. The petitioner shall reply to the show cause notice within such time or within extended time as may be granted by the second respondent. The second respondent shall thereafter call upon the petitioner for a personal hearing. The second

respondent shall thereafter proceed to pass appropriate orders on merits and in accordance with law preferably within 30 days after the conclusion of personal hearing.

Writ petition stands allowed with the above observations, consequently connected writ miscellaneous petitions are also closed There shall be no orders as to costs.

Sd/-
Assistant Registrar(CS-VIII)

// True Copy //

Sub Assistant Registrar

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To

1.The Secretary (Revenue)
The Union of India,
Department of Revenue,
Ministry of Finance
North Block, New Delhi-110001

2.The Assistant Commissioner of Customs (Refunds-II)
Office of the Commissioner of Customs, Chennai-II,
Customs House, 60, Rajaji Salai,
Chennai-600 001.

+1cc to M/s.R.Hemalatha, Advocate SR.No.60853

+2ccs to Mr.A.K.Rajaraman, Advocate SR.No.60851

W.P.No.14126 of 2020
and
W.M.P.Nos.17538 & 17539 of 2020

GPL(CO)
RVM(20/12/2021)