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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9212 OF 2011

M/s Tufropes Pvt Ltd., a Company)
Incorporated with the meaning of)
Companies Act, 1956 and having its)
Office at SY No.101, Plot No.6,)
Village Rakholi, Rakholi Indl Estate,)
Silvasa 396230, Dadra Nagar & Haveli) ….Petitioner

V/s.

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

2. Joint Secretary)
Department of Revenue, Ministry)
of Finance, 14, Hudco Vishala Bldg.)
B Wing, 6th floor, Bikaji Cama Place)
New Delhi 110 066)

3. The Commissioner of Customs)
(Exports), 5th Floor, Jawaharlal Nehru)
Custom House, Taluka-Uran,)
Nhava Sheva, Dist Raigad 400 707)
Maharashtra)

4. The Assistant Commissioner of)
Customs Drawback, Jawaharlal)
Nehru Custom House, Tal-Uran,)
Nhava Sheva, Dist Raigad 400707)
Maharashtra) …Respondents

Mr. Sriram Sridharan for Petitioner
Mr. Pradeep Jetly, Senior Advocate a/w Mr. J. B. Mishra for Respondents

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CORAM : K.R. SHRIRAM &
PRITHVIRAJ K. CHAVAN JJ
DATED : 24th JUNE 2022

(ORAL JUDGMENT PER K. R. SHRIRAM J.) :

1 This petition was admitted by an order dated 16th July 2012 and interim relief in terms of prayer clause (c) was granted. This petition has been filed under Article 226 of the Constitution of India challenging the legality and validity of order dated 18th May 2011 passed by respondent no.2.

2 The facts in brief are as under:

Petitioner was engaged in the manufacture of Twine/Ropes made of High Density Polyethylene (HDPE). Petitioner obtained four advance licenses in terms of Export Import Policy 2002-2007. In terms of these licenses, petitioner was permitted to import HDPE granules without payment of import duty. Petitioner was under obligation to export Twine / Ropes. Petitioner did not import the raw materials, i.e., HDPE against any of the aforesaid licences. Instead, petitioner got the licences invalidated and procured the HDPE from indigenous suppliers. Copies of corresponding invalidation letters are also annexed to the petition and this is an admitted fact.

3 On the basis of the invalidation letters, petitioner was entitled to obtain raw materials from domestic manufacturers without payment of excise duty. Suppliers, while effecting supplies, were entitled to avail the benefit of supply of the goods without payment of excise duty under

Notification No.44/01-CE (NT) dated 26th June 2001 issued under Rule 19(2) of Central Excise Rules 2002.

4 In the present case, however, petitioner procured HDPE from Reliance Industries Ltd on payment of excise duty without availing the benefit of Notification No.44/01-CE (NT), which was available in terms of the said invalidation letters. In fact, the invalidation letters expressly provides that the licences mentioned therein is made invalid for the direct import of relevant HDPE/P Granules Chips for CIF value mentioned therein and petitioner was allowed to procure the same indigenously from Reliance Industries Ltd., Mumbai in terms of paragraph 4.13 of Hand Book 2002-2007. The invalidation letters also provide that there was nil balance quantity and value against the said invalidated licences.

5 The fact that supplies made to petitioner by Reliance Industries Ltd, on which the excise duty has been paid by petitioner, because the granules were used in export of ropes and petitioner being entitled to draw back of excise duty, is not in dispute. Therefore, petitioner manufactured the resultant product mentioned in the licences by utilizing the duty paid raw materials procured from Reliance Industries Ltd and exported the resultant products out of India. In all the export documents, however, i.e., ARE-1 and shipping bills, petitioner erroneously indicated the numbers of advance licences and also indicated that shipping bills were filed under DEEC cum-Drawback shipping bills. This is an indication that the exports were made against the advance licences which was a factual error. Mr. Sridharan

submitted that the fact that it is a factual error also cannot be disputed because there were no advance licences in force, the same having been invalidated. Mr. Sridharan says that due to oversight of petitioner the error was not detected earlier and, therefore, no steps were taken within the time prescribed for correcting / amending the shipping bills. Mr. Sridharan says on a comprehensive reading of the show cause notice and impugned order, it is clear that the sole reason for issuance of show cause notice was this error.

6 It should be noted that the licences were cancelled for direct import of granules but were kept valid for procuring the same indigenously from Reliance Industries Ltd. In view thereof, petitioner submitted requisite documents to DGFT and obtained Export Obligation Discharge Certificate (EODC) in respect of the four licences. HDPE Twine / Ropes are specified under Sr. No.56.03 of the schedule of All Industry rate of drawback issued under Rule 3 of Customs and Central Excise Duties and Service Tax Drawback Rules 1995 (hereinafter referred to as Drawback Rules). As the exports were made under drawback claims, petitioner claimed drawback at the rate of Rs.4.80 per kg. under Sr. No.56.03 of All Industry Drawback Schedule. Mr. Sridharan states that this rate is prescribed as fixed rate irrespective of the actual excise duty paid. Petitioner, thus claimed drawback of Rs.34,19,258/- which was sanctioned to them.

7 Subsequently, a show cause notice dated 30th December 2003 was issued to petitioner seeking to recover the amount of Rs.34,19,258/- paid as

drawback to petitioner on the ground that the claims were sanctioned erroneously. In the show cause notice, reliance was placed upon Note 2(b) of General Notes to All Industry Rates of Drawback, wherein it is stipulated that All Industry Drawback is not available to export made in discharge of export obligation under advance licences and hence the drawback amount was paid erroneously to petitioner. The show cause notice proposed to recover drawback amount sanctioned to petitioner. Mr. Sridharan submitted that the General Notes speaks for itself but the fact in the case at hand is that export was not made in discharge of export obligation under advance licences because the advance licences for direct import had been made invalidated admittedly and petitioner was allowed to procure and admittedly procured the HDPE granules from Reliance Industries Ltd and used those granules in manufacturing of ropes which were exported. Therefore, what we have to only see is that whether petitioner correctly claimed the drawback.

Petitioner's submissions were rejected by respondent no.4 by an order dated 2nd February 2009 who confirmed the demand of Rs.32,55,509/- being the amount of drawback alleged to have been erroneously sanctioned as against the demand for Rs.34,19,258/-.

Impugning the said order dated 2nd February 2009 petitioner filed an appeal before the Commissioner of Customs. The Commissioner of Customs (Appeals) by an order dated 30th September 2009 upheld the findings in the order passed by respondent no.4.

Being aggrieved by the said order dated 30th September 2009, petitioner filed a Revision Application before respondent no.2 and respondent no.2 by an order dated 18th May 2011 confirmed the orders passed by the Lower Authorities. It is that order dated 18th May 2011, which is impugned in this petition.

8 We have heard the counsel and considered the petition, respondents reply dated 20th December 2011 and additional affidavit of petitioner dated 6th March 2011 and another affidavit of petitioner dated 9th July 2012.

9 One fact very clearly emerges from the documents annexed to the petition and the affidavits is that the advance licences of petitioner were invalidated for direct import of relevant HDPE/P Granules / Chips and petitioner was allowed to procure the same indigenously from Reliance Industries Ltd, Mumbai. The fact that the granules used in the ropes exported had been procured from Reliance Industries Ltd by paying excise duty also is not disputed. The fact that the shipping bills referred to advance licences and that was an error, is also not disputed. In fact in the affidavit in reply of one KGVN. Suryateja affirmed on 20th December 2011, it is mentioned *"it was also observed that in the present advance licences, against which the goods were exported, were issued under Notification No.43/02/Cus dated 19th April 2002 which exempted all duties of Customs on import of inputs used for the manufacture of export product. The exempted material in the present case for the export product is HDPE granules. As per the licence conditions direct import of inputs was not*

permitted and petitioner procured the inputs indigenously from Reliance Industries Ltd." Therefore, it is indisputable that petitioner did not use any HDPE granules procured under the advance licences by direct import but procured the granules from indigenous source, i.e., Reliance Industries Ltd. If that is the factual position, petitioner should be entitled for the drawback. Mr. Jetly in fairness submitted that locally procuring the products on which excise duty is paid and those products are used in manufacture for export goods, the excise duty paid can be claimed as drawback.

10 In view of the above, the factual position notwithstanding the error in the shipping bills, which an alert petitioner could have amended on time, petitioner will be entitled and should be granted the drawback as it was rightly granted earlier by the DGFT.

11 In the order impugned in this petition at paragraph 9, it is stated as under:

> *"After examining the entire factual records of the case, Government is of the opinion that although the applicant basically and solely relying on his submissions, that the said Advance Licences were never used and they did not import the raw material (HDPE Granules) against any of the foresaid Advance Licences, but the fact remains that as per records there is no legal documentary evidence in support of applicants claim that the relevant advance licences were actually invalidated and cancelled."*

12 In view of what is stated above, this observation of respondent no.2 is erroneous and we are satisfied that it is this erroneous presumption, that made respondent no.2 arrive at the conclusions that he arrived at.

13 In the circumstances, the impugned order is quashed and set aside.

The show cause notice impugned in the petition is also discharged. Any amount deposited with the authorities shall be refunded alongwith applicable interest if any, within 4 weeks of petitioner making the application for refund.

14 Rule accordingly made absolute with no order as to costs. Petition disposed.

15 All to act on authenticated copy of this order.

(PRITHVIRAJ K. CHAVAN, J.) (K.R. SHRIRAM, J.)