IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 22502 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE N.V.ANJARIA

and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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PERFECT IMPORTERS AND DISTRIBUTORS (INDIA) PVT. LTD.
Versus
UNION OF INDIA

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Appearance:
MR HASIT DAVE(1321) for the Petitioner(s) No. 1,2
MR NIKUNT K RAVAL(5558) for the Respondent(s) No. 1,2

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CORAM:**HONOURABLE MR. JUSTICE N.V.ANJARIA**
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 16/12/2022

CAV JUDGMENT

(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

1. Heard learned advocate Mr. Hasit Dave for the petitioners and learned advocate Mr. Nikunt Raval for the respondents.

2. By this petition under Article 226 of the Constitution of India, the petitioners have prayed for a direction to respondent no.2 – Assistant Commissioner of Customs, ICD Dashrath, Vadodara to refund the amount of Rs.23,62,796.00 with interest from the date of levy till final payment at the rate of 15% per annum.

3. Brief facts of the case are that the petitioners are engaged in trading of imported goods such as Cast Alloy Aluminum Wheels or Alloy Road Wheels used for Motor Vehicles.

3.1) The petitioners filed three Bills of Entry Nos. (1) 8195940 dated 4.2.2015, (2) 9212058 dated 12.5.2015 and (3) 9308623 dated 21.5.2015 for clearance of their imported goods.

3.2) On the above imported goods, a Provisional Anti Dumping Duty at specified rate was imposed under the Provisional Anti Dumping Duty Notification No.15/2014 dated 11.4.2014 which was valid for a period of six months as per the provisions of the law and as such, validity of the said notification expired on 11.10.2014.

3.3) Another Notification No.21/2015 dated 22.5.2015 was issued imposing Anti Dumping Duty at the same rate as specified in the Provisional Anti Dumping Duty Notification for a period of five years.

3.4) According to the petitioners, there was no Anti Dumping Duty leviable between the expiry of first Provisional Anti Dumping Duty Notification No.15/2014 dated 11.4.2014 and Notification No.21/2015 dated 22.5.2015. However, the petitioners were directed by the respondent authorities to pay Anti Dumping Duty of Rs.23,62,796.00 as per Notification No.21/2015 dated 22.5.2015 on the imported goods and accordingly, the petitioner paid such Anti Dumping Duty so as to take delivery of the goods.

3.5) The petitioners by letter dated 15.10.2015 requested the respondent authorities to refund the aforesaid amount as per the decision of the Apex Court in case of **CIT, Bangalore v. G.M. Exports** reported in 2015 (324) E.L.T. 209 (SC), wherein the Apex Court observed that if there is a gap between the Provisional Anti Dumping Duty

Notification and the regular final Anti Dumping Duty Notification in the intervening period, no Anti Dumping Duty is payable.

3.6) The respondent authorities by letter dated 17.12.2015 informed the petitioners that refund cannot be allowed as the Anti Dumping Duty was levied as per the provisions of Notification No.21/2015 dated 22.5.2015 with effect from 11.4.2014 and therefore, when the goods were imported by the petitioners, the Anti Dumping Duty was leviable as per the Notification No.21/2015.

3.7) The petitioners thereafter reiterated the request to refund the Anti Dumping Duty paid by the petitioners vide letter dated 25.12.2015 again relying upon the decision of the Apex Court in case of **G.M. Exports** (supra).

3.8) The petitioners received the show cause notice dated 10.2.2016 from the respondents calling upon to show cause as to why refund claim of Rs.23,62,796.00 should not be rejected under section 27 of the Customs Act, 1962 read with Notification No.21/2015 dated 22.5.2015.

3.9) The petitioners filed the written submissions dated 15.7.2016 reiterating that the petitioners are entitled to refund as per the decision of the Apex Court in case of **G.M. Exports** (supra).

3.10) However, the respondent authorities passed the order-in-original dated 30.08.2016 rejecting the refund claim of the petitioners.

3.11) The petitioners feeling aggrieved by the order dated 30.08.2016 preferred an

appeal before the Commissioner (Appeals), Customs, Ahmedabad who by order dated 1.05.2017 remanded the proceedings to the original adjudicating authority to pass a reasoned order after following the principles of natural justice and considering the decision of the Apex Court in case of **G.M. Exports** (supra).

3.12) The Assistant Commissioner again by order dated 15.03.2018 rejected the refund claim of the petitioners in the remand proceedings on the ground that the claim of the petitioners is not maintainable as the petitioners did not challenge the assessment order under three Bills of Entry and in absence of challenge to the assessment orders by which Anti Dumping Duty was levied as per the decision in case of **M/s. Priya Blue Industries Ltd.** reported in 2004 (172) ELT 145 (SC), refund cannot be granted.

3.13) The petitioners again challenged the order-in-original dated 15.03.2018 before the Commissioner (Appeals) who by order dated 22.01.2019 allowed the appeal and remitted the matter back to the adjudicating authority holding that issue of wrong levy of Provisional Anti Dumping Duty is covered by the decision of Apex Court in case of **G.M. Exports** (supra) and the decision in case of **M/s. Priya Blue Industries Ltd.**(supra) is distinguishable in view of further decision of the Delhi High Court in case of **Aman Medical Products v. Commissioner** reported in 2010 (250) ELT 30 (Del) and decision of Madras High Court in case of **Enterprise International Ltd. v. Commissioner of Customs, Chennai** reported in 2013 (295) ELT 659(Mad). The Commissioner (Appeals) therefore, directed the adjudicating authority to follow the principles of natural

justice and grant an opportunity of hearing to the petitioners before passing an order as per the observations made in the order.

3.14) It is the case of the petitioners that even after a passage of six months from the date of issuance of above directions by the Commissioner (Appeals), the adjudicating authority i.e. respondent no.2 – Assistant Commissioner of Customs did not undertake the remand proceedings though the claim of refund made by the petitioners is covered in favour of the petitioners.

3.15) The petitioners therefore, sent a reminder letter dated 30.07.2019 to respondent no.2 to take a decision for granting refund as per the decision of the Apex Court in case of **G.M. Exports** (supra). As the respondent no.2 has not taken any action after the remand of the matter by the

appellate authority vide order dated 22.01.2019, the petitioners have preferred this petition with a prayer to direct respondent no.2 to refund the amount claimed by the petitioners.

4. Learned advocate Mr. Hasit Dave for the petitioners submitted that the appellate authority in order dated 22.01.2019 has given directions to the respondent no.2 adjudicating authority to grant an opportunity of hearing to the petitioners and examine the available facts, documents, submissions and all relevant case laws and then pass proper legal speaking order afresh adhering to the legal provisions. It was submitted that inspite of such clear directions and observations made by the appellate authority, respondent no.2 has not passed any order since then.

4.1) It was submitted that the petitioners have time and again requested the respondent authorities to pass a fresh order on the second remand made by the appellate authority, however, respondent no.2 instead of passing the order has tried to justify in the affidavit in reply filed in this proceeding that unless and until the assessment order is modified in appeal or in review, the duty would be payable as per self assessment or assessment order passed by the proper officer and as the petitioners did not challenge the assessment of the Bills of Entry for which the petitioners are seeking refund claim, such claim is liable for rejection on the said ground alone.

4.2) It was submitted that on the same reasoning, the order-in-original dated 15.03.2018 was challenged before the Commissioner (Appeals) after the first remand

made in the original proceedings.

4.3) It was submitted that instead of passing the order-in-original upon remand made by the appellate authority, respondent no.2 has tried to justify the order which was already passed on 15.03.2018 which is now quashed and set aside by the appellate authority.

4.4) It was therefore, submitted that the respondent no.2 is required to grant the refund in view of the observations made by the appellate authority but instead thereof, respondent no.2 has filed an affidavit in reply justifying the stand of the adjudicating authority which was already taken in the year 2018 but such view is rejected by the appellate authority in the order dated 22.01.2019 and therefore, respondent no.2 is required to pass the order

of refund as per the directions of the appellate authority. It was submitted that respondent no.2 cannot ignore the directions of the appellate authority and continue to sit tight over the matter by not passing the order to grant refund of the claim of the petitioners.

4.5) It was further submitted that when the respondent authority has not passed any order of refund of claim of the tax collected without any authority of law, the writ petition is maintainable under Article 226 of the Constitution of India. It was also submitted that the refund is required to be granted to the petitioners along with interest and therefore, the petitioners are entitled to interest on the refund amount of Anti Dumping Duty which is paid in the year 2015 though the petitioners were not liable to pay the same as per the settled legal

position as held by the Apex Court in case of **G.M. Exports** (supra).

4.6) In support of his submissions, learned advocate Mr. Dave relied upon the following decisions :

1) In case of **Salonah Tea Company Ltd. Etc. v. Superintended of Taxes, Nowgong & Ors. Etc.** reported in 1988(33) ELT 249 (SC).

2) In case of **HMM Ltd. v. Administrator, Bangalore City Corporation** reported in 1997 (91) ELT 27 (SC).

3) In case of **New Kamal v. Union of India** reported in 2020(372) ELT 571 (Guj).

4) In case of **S.R. Polyvinyl Ltd. v. Commissioner of Cus. ICD, TKD, New Delhi** reported in 2020(371) ELT 283.

5) In case of **Sandvik Asia Ltd v. Commissioner of Income tax-I, Pune** reported in 2006 (196) ELT 257 (SC).

5. On the other hand, learned advocate Mr. Nikunt Raval for the respondents submitted that the petitioners are not entitled to any relief contrary to the policy decision of the Central Government to pay the required duties as per the norms prescribed from time to time.

5.1) It was submitted that the appellate authority while remanding the case back to the original adjudicating authority for *de novo* proceedings, has held that the applicability of the ratio of the Apex Court in case of **M/s. Priya Blue Industries Ltd.** (supra) is required to be re-examined in light of the said case law. It was however

pointed out that in refund case of the petitioner, the show cause notice was transferred to Call Book on the ground that judgment of High Court in case of **M/s. Micromax Informatic Ltd. v. Union of India** was challenged before the Supreme Court by the department in SLP(C) No.18145/2016. It was submitted that the Apex Court by order dated 28.09.2019 passed in Civil Appeal No.2960/2010 has held that claim of 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. It was therefore, submitted that in view of judgment of the Apex Court, refund claim is liable for rejection.

5.2) Learned advocate Mr. Raval thereafter relied upon the averments made in the affidavit in reply on filed on behalf of

respondent nos. 1 and 2 wherein in paragraph nos. 10 to 15, the respondents have tried to justify that the petitioners are not entitled to refund of the Anti Dumping Duty paid by the petitioners on merits. It was therefore, submitted that when the petitioners are not entitled to refund of the amount of the Anti Dumping Duty paid by the petitioners, the petition is not liable to be entertained.

6. Considering the above submissions, it appears that the petitioners paid the Anti Dumping Duty as per the directions of the respondent authorities to clear the goods imported on 21.05.2015. Admittedly on that date, Notification No.15/2014 dated 11.4.2014 levying Anti Dumping Duty for a period of six months was not applicable. The contention raised on behalf of the respondents that Notification No.21/2015 dated 22.5.2015 is issued with effect from 11.04.2014 is not

tenable in law in view of decision of the Apex Court in case of **G.M. Exports** (supra), wherein the Apex Court decided the question of law as to whether Anti Dumping Duty imposed with respect to imports made during the period between the expiry of the provisional Anti Dumping Duty and the imposition of the final Anti Dumping Duty is legal and valid or not and while deciding such a question of law, after considering the provisions in detail, the Apex Court held as under :

> "46. We also find force in the submission of learned counsel for the assessees that the revenue's construction of Rule 20 would achieve indirectly what cannot be achieved directly, having regard to the mandatory language contained in Rule 13 second proviso. Here again a simple example would suffice. Say the provisional duty is levied at the rate of Rs. 50/- PMT and comes to an end after 6 months. 6 months later, a final duty is imposed again at the same rate of Rs. 50/- PMT with effect from the date of levy of the provisional duty. If learned counsel for the revenue were right, Rs. 50/- PMT could be recovered under Rule 20(2)(a) for the interregnum period as well which would, in effect,

destroy the scheme of Rule 13 second proviso by extending the period of the provisional duty notification beyond a period of 6 months, which clearly cannot be done. We find therefore that on all these counts, the arguments of revenue cannot be countenanced."

7. After considering the aforesaid decision in case of **G.M. Exports** (supra) in order dated 22.01.2019, Commissioner of Customs (Appeals) held as under :

"05. I have carefully gone through the impugned order, the appeal submissions, and other records of the case. The impugned order has been issued in pursuance of Order-in-appeal No.AHD-CUSTM-000-APP-007-17-18 dated 01.05.2017 remanding the case back to the original adjudicating authority as no finding was given by the adjudicating authority as to whether the said anti-dumping (ADD) duty was leviable or not during the interregnum period from the expiry of the provisional levy of ADD to the issue of final order of ADD, in the light of the decision of Hon'ble Supreme Court in the case of Commissioner of Customs vs G.M. Exports - 2015 (324) E.L.T 209 (SC). However, even in the second round of adjudication, the refund claim has not been decided on the basis of Commissioner of Customs vs G.M. Exports- 2015 (324) E.LT 209 (SC) but the same has been decided applying the ratio of the judgment of Hon'ble Supreme Court in the case of M/s Priya Blue Industries Ltd.- 2004 (172) ELT

145 SC, whereby the refund claim has been rejected on the ground that the original assessment order has not been challenged in the present case.

06. The present case has not been examined in the light of law settled by Hon'ble Supreme Court in the case of Commissioner of Customs vs G.M. Exports-2015 (324) E.L.T 209 (SC). As regards the applicability of the ratio of another Supreme Court decision in the case of M/s Priya Blue Industries Ltd. -2004 (172) ELT 145 SC relied upon in the impugned order, the same has been challenged by the appellant by relying on the case law in the matter of Aman Medical Products v. Commissioner- 2010 (250) E.L.T. 30 (Del.) to contend that M/s Priya Blue Industries Ltd. - 2004 (172) ELT 145 SC is not applicable to the present case. Further, I find that in the case of Enterprise International Ltd. vs. Commissioner of Customs, Chennai-2013 (295) E.L.T. 659 (Mad), Hon'ble High Court has laid down that the facts of the case before the Supreme Court in Priya Blue Industries case stand entirely on a different footing as compared to matters of finalization of provisional anti-dumping duty in terms of Section 9A(2)(b) of the Customs Tariff Act, 1975. In the instant case also the matter pertains to refund arising out of finalization of provisional anti-dumping duty. However, in the impugned order, the above case laws were not considered or discussed while applying the ratio of the Apex Court decision in the case of M/s Priya Blue Industries Ltd. - 2004 (172) ELT 145 SC. Therefore, the applicability of the ratio of the Apex court decision in

M/s Priya Blue Industries Ltd. - 2004 (172) ELT 145 SC is required to be reexamined in the light of the said case laws. Further to this, specific findings are required to be given with regards to the applicability of the Apex Court decision in the matter of Commissioner of Customs vs G.M. Exports-2015 (324) E.L.T 209 (SC) to the facts of the impugned refund claim. In view of these facts, the impugned order is liable to be remanded to the adjudicating authority for de novo proceedings. In this regard, I rely upon the case of Prem Steels P Ltd-2012-TIOL-1317-CESTAT-DEL and the case of Hawkins Cookers Ltd. - 2012 (284) ELT 677(Tri-Del), which have also relied upon case of Medico Labs-2004(173) ELT 117 (Guj.), wherein it has been held that Commissioner (Appeals) continue to have power of remand even after the amendment of Section 35(A) of the Central Excise Act, 1944 by Finance Act, 2001 w.e.f 11.5.2001.

7. Accordingly, I remit the refund claim back to the adjudicating authority, who shall examine available facts, documents, submissions and all relevant case laws then pass proper legal speaking order afresh after following principles of natural justice and adhering to the legal provisions. While passing this order, no opinion/ views have been expressed on the merits of the dispute, which shall be independently considered by the assessing authority."

8. In view of the above findings of the

appellate authority, the stand taken by respondent nos.1 and 2 in the affidavit in reply for not passing the order granting or refusing the refund and sitting tight over the matter on the ground that the petitioners are not entitled to refund and justifying the same by filing affidavit in reply is nothing but an attempt to evade the directions issued by the appellate authority which is otherwise binding upon the adjudicating authority. The adjudicating authority cannot ignore the order of the higher authority and sit tight on the matter by not deciding the same.

9. Law on the subject is no more res integra as this Court as well as the Apex Court has time and again held that the directions given by the higher authority is binding upon the lower authority and therefore, such directions cannot be ignored on any count. Respondent no.2 was bound to pass the order-

in-original upon remand made by the appellate authority vide order dated 22.01.2019. The attempt on part of the respondent no.2 to justify that the petitioners are not entitled to refund in the affidavit in reply cannot be sustained.

10. The respondent no.2 in the affidavit in reply has disclosed the grounds for not granting refund to the petitioners justifying the stand of the respondents for not passing the order in original after remand and has reiterated that the order dated 15.03.2018 rejecting the refund claim was just and proper though the same order is quashed and set aside by appellate authority by order dated 22.01.2019. Such attitude and action of the respondent no.2 authority is required to be deprecated as the same is contrary to the judicial propriety.

11. The Apex Court in case of **Salonah Tea Company Ltd. Etc.**(supra) has held that under Article 226 of the Constitution of India, the High Court has power to direct the refund unless there has been avoidable laches on the part of the petitioners in a case where tax or money has been realised without the authority of law.

12. Similarly, in case of **HMM Ltd. v. Administrator, Bangalore City Corporation**(supra), the Apex Court held that when there is no question of "unjust enrichment", the petitioner is entitled to refund even if the question with regard to grant of refund was pending before the Constitution Bench of the Supreme Court. The issue before the Apex Court was pertaining to refund under section 98(2) of City of Bangalore Municipal Corporation Act, 1949 read with Rule 57A of the Central Excise

Rules, 1944 with regard to levy of octroi in respect of goods which are not used, consumed or sold within the municipal limits so as to become collection without any authority of law. It was held that the respondent authority had no authority to retain the amount which is refundable as there was no dispute on plea of unjust enrichment of the petitioner.

13. We are therefore of the opinion that as the respondent authority has not carried out the directions issued by the appellate authority and has tried to justify the order which is set aside by filing the affidavit in reply on merits in this proceeding, it would be a futile exercise to direct the respondent n.2 for passing the order as per the directions of the appellate authority.

14. The respondent no.2 is therefore

required to be directed to issue refund to the petitioners in view of the decision of the Apex Court in case of G.M. Exports(supra). In the facts of the case the ratio of the decision of Priya Blues(supra) would not be applicable as admittedly the levy of anti duty dumping duty was not in force when the petitioners imported the goods Hence, the assessment orders which are in form of bill of entries filed by the petitioners are not required to be modified or reassessed as the same are filed without inclusion of levy of anti dumping duty. The petitioners were compelled to pay such duty only after filling bill of entries so as to release the goods.

15. In view of the foregoing reasons, the petition succeeds and is accordingly allowed. The respondent authorities are directed to refund amount of Rs.23,62,796.00 with

interest at the rate of 6% per annum from the date of levy till final payment within eight weeks from the date of receipt of copy of this order.

16. Rule is made absolute to the aforesaid extent. No order as to costs.

(N.V.ANJARIA, J)

(BHARGAV D. KARIA, J)

RAGHUNATH R NAIR