**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

DATED : 21.08.2024

CORAM

**THE HONOURABLE MR.JUSTICE C.SARAVANAN**

W.P.No.24813 of 2021
and
W.M.P.No.26096 of 2021

M/s.Nittan India Tech Pvt. Ltd.,
Represented by its Managing Director,
Mr.Young Oh Ko, aged 58 years,
S/o Mr.Ko Mun Kyu,
Survey Nos.329, 338, 339 & 495,
Benjamin Road, Chilamathur,
Sector 24, Sricity Vardaiah Palem,
Mandal, Chittor District,
Andhra Pradesh – 517 588. ... Petitioner

Vs

The Deputy Commissioner of Customs (Refund),
Customs House,
60, Rajaji Salai,
Chennai – 600 001. ... Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India, for issuance of a Writ of Certiorarified Mandamus, to call for the records pertaining to the Impugned Order No.84145/2021 dated 28.04.2021 on the file of the respondent and quash the same, and consequently directing the respondent to grant refund of EDD deposited by the petitioner, along with interest and such further or other orders.

For Petitioner : Mr.Harish Bindumadhavan

For Respondent : Mr.G.Meganathan
Standing Counsel

**ORDER**

In this writ petition, the petitioner has challenged the impugned Order-in-Original No.84145 of 2021 (JOB No.83144/2021) dated 28.04.2021 passed by the respondent rejecting the Extra Duty Deposit (EDD) of Rs.1,16,71,430/- paid by the petitioner as refund claim.

2. By the impugned order dated 28.04.2021, the request of the petitioner for refund of the Extra Duty Deposit (EDD) made by the petitioner during the pendency of the Special Valuation Branch (SVB) proceedings pursuant to a Circular No.11/2001-Cus dated 23.02.2001 of the Central Board of Indirect Taxes has been rejected with the following observations:-

"02. I have carefully gone through the refund application and relevant documents filed in support of the claim and the evidences available on record. I find that the finalization of the subject Bills of Entry was completed by the appraising groups between 2016 to 2018, whereas the refund application has been filed by the claimant only on 17.12.2020.

03. I find that the claimant had failed to file the refund claim within one year from the date of finalisation of duty for the subject Bills of Entry. Therefore, the refund claim is barred by limitation in terms of Section 27(1) of the Customs Act, 1962.

04. I find that in order to follow the principles of natural justice, a virtual Personal Hearing was offered to the claimant on 26.04.2021 which was also attended by the authorised representative of M/s.Nittan India Tech Pvt. Ltd.

05. I also find that as per Section 27(1)(1B)(c) of Customs Act, 1962, "where any duty is paid provisionally under Section 18, the limitation of one year shall be computed from the date of adjustment of duty after the final assessment thereof or in case of re-assessment from the date of such re-assessment."

06. Hence, I find that the claim is hit by limitation of time and the refund amount of Rs.1,16,71,430/- (Rupees One Crore Sixteen Lakh Seventy One Thousand Four Hundred Thirty Only) claimed on extra duty deposit is liable for rejection. Accordingly, I pass the following order:

ORDER

I order for rejection of extra duty deposit of Rs.1,16,17,430/- (Rupees One Crore Sixteen Lakh Seventy One Thousand Four Hundred Thirty Only) paid by M/s.Nittan India Tech Pvt. Ltd., as the refund claim is barred by limitation in terms of Section 27(1) of Customs Act, 1962."

3. The specific case of the petitioner is that the impugned order

dated 28.04.2021 is contrary to the law settled by this Court in **Commissioner of Cus.(Export), Chennai** Vs. **Sayonara Exports Pvt. Ltd.**, 2015 (321) E.L.T.583 (Mad.) and that of the Karnataka High Court in **Commissioner of Customs, Bangalore** Vs. **Hitachi Koki India Pvt. Ltd.**, 2012 (281) E.L.T.207 (Kar.).

4. It is submitted that the petitioner imported goods from its parent Company namely M/s.Nittan Valve Company Limited, Japan (Nittan Japan). Since the goods were imported by the petitioner from its related parent Company, the imports were investigated by the Special Valuation Branch (SVB), Chennai and that during June 2014, proceedings were initiated by the Special Valuation Branch (SVB), Chennai.

5. It is submitted that as was required under Board Circular No.11/2001-Cus dated 23.02.2001, the petitioner started to pay 1% of the value as Extra Duty Deposit (EDD) on the imports made by the petitioner.

6. It is further submitted that the Special Valuation Branch (SVB),

Chennai, passed an order on 20.01.2017 whereby, in response to the questions raised by the petitioner, the Special Valuation Branch (SVB), Chennai vide Investigation Report No.02/2017 bearing Ref.F.No.S50/40/2014-SVB dated 20.01.2017, ultimately concluded that the imports made by the petitioner from its parent Company "Nittan Japan" had no impact on the transaction value of the goods, as declared in the invoices. In this connection, a reference was made to Paragraph c of the aforesaid Investigation Report. It reads as under:-

> "c. <u>Payments other than invoice value of imported goods:</u>
>
> The importer has submitted copy of Technical Collaboration Agreement dated 01.12.2014 entered into between M/s.Nittan India Tech Private Limited, Chittoor and M/s.Nittan Valve Co. Limited, Japan. As per the agreement, the importer has to pay royalty to the related foreign supplier. The salient portion of the agreement is scanned and appended below:
>
> 3. PAYMENTS:
>
> LICENSE shall pay NITTAN the following sums;
>
> (a) Initial payment of fifty million (50,000,000) Japanese Yen as consideration for the license to use NITTAN TECHNICAL INFORMATION and PATENTS pursuant to Article 2.1(a) and (b);
>
> (b) A royalty equal to three percent (3%) of the NET REVENUES accruing for all LICENSED PRODUCTS which are sold as further consideration for licenses granted LICENSEE pursuant to Article 2.1(a) and (b); and
>
> (c) A royalty equal to one percent (1%) of the NET

REVENUES accruing for all LICENSED PRODUCTS which are sold as consideration for a license granted LICENSEE pursuant to Article 2.1(c).

The definition of "Net Revenue" as per the agreement is furnished below:

1.4. "NET REVENUES" as used herein shall mean the aggregate sums invoiced by LICENSEE for any and all sales of LICENSED PRODUCTS, less actual returns, applicable discounts, sales commission, freight allowances, packing and crating costs, insurance costs, local sales or turnover taxes, if any, and direct import from NITTAN in which raw material, semi-proposed products, finished products, from NITTAN and its expenses such as import duties, shipping charge, banking charge are included. Such sums shall accrue to LICENSEE at the time the LICENSED PRODUCTS are invoiced, shipped, or paid for, whichever occurs first. Provided, however, export sales to NITTAN is excluded.

From the foregoing, it is seen that royalty is payable on net revenue and the price of imported goods as well as import duties is excluded for calculation of net revenue. The royalty payment is not related to the imported goods. Hence, royalty payment is not addable to the transaction value in terms of CVR, 2007.

There is no evidence on record of payment over and above the invoice value of the imported goods to make any addition under the provisions of Rule 10 (1) (a) to (e) of the Customs Valuation Rules, 2007.

Thus, all the pending assessment may be finalised considering the above report and all report of the Goods from the related overseas supplier may be assessed at invoice value adjusted in accordance with Rule 10 of the Customs Valuation (Determination of Valuation of Imported Goods) Rules, 2007 read with Section 14(1) of the Customs Act, 1962. However, if any contemporary imports at higher prices are noticed or there exists reasons other than the influence of relationship to doubt the value, assessing groups may evaluate the value of the imported goods under appropriate provisions of the Customs Valuation (Determination of Valuation of Imported Goods) Rules, 2007.

This is issued with approval of the Principal Commissioner.

This is forwarded for necessary action as per CBEC Circular No.05/2016 dated 09.02.2016."

7. Learned counsel for the petitioner would further submit that for the imports made between April 2014 to March 2016, refund application filed by the petitioner was also sanctioned by the Assistant Commissioner of Customs (Refunds) vide Order-in-Original No.71064 of 2019.

8. As far as the refund claim made by the petitioner on 17.12.2020 for the goods imported between April 2016 to July 2017, the respondent has taken a contra view stating that the petitioner refund claim was time barred in terms of Section 27 of the Customs Act, 1962.

9. It is further submitted that the Extra Duty Deposit (EDD) is merely a deposit and not customs duty payable on the importation of goods in terms of Section 12 of the Customs Act, 1962. It is further

submitted that this very aspect was considered by this Court in **Commissioner of Customs, Chennai** Vs. **Aristo Spinners Pvt. Ltd.**, 2008 (226) E.L.T.42 (Mad.), wherein, it was held as under:-

> ***"As the amount in question relates to encashed Bank Guarantee, the same cannot be considered as Customs duty and hence section 27 of the Customs Act, 1962, which provides for refund of any duty and interest, if any, paid on such duty in pursuance of an order of assessment, cannot be invoked as there is no payment of duty in pursuance of an order to safeguard the interest of the revenue in the event of the importer committing default in performing the export obligation cast upon him for the purpose of availment of concession in importing the capital goods."***

10. It is therefore submitted that since the issue is covered in favour of the petitioner, the respondent ought to have taken a different stand. It is further submitted that the impugned order is without authority of law and is therefore liable to be quashed.

11. Learned counsel for the petitioner also drew attention to the following decisions of the Hon'ble Supreme Court, Gujarat High Court and that of this Court:

***(i) Commissioner of Income Tax** Vs. **Excel Industries Limited, (2014) 13 SCC 459**.*

***(ii) Bharat Sanchar Nigam Limited and another** Vs. **Union of India and others, (2006) 3 SCC 1**.*

***(iii) East India Commercial Company Limited, Calcutta** Vs. **Collector of Customs, Calcutta, 1983 (13) E.L.T. 1342 (S.C.)**.*

***(iv) Tvl.Sri Sabari Tex** Vs. **The Commissioner of Commercial Taxes, Chennai and another**, **2021 (3) TMI 288**.*

***(v) Vadilal Gases Limited** Vs. **Union of India, 2016 (332) E.L.T. 625 (Guj.)***

***(vi) Global United Shipping India Pvt. Ltd.,** Vs. **Assistant Commissioner of Cus. (Refund), Chennai, 2019 (368) E.L.T. 1041 (Mad.)***

***(vii) Commissioner of Central Excise, Chennai-II** Vs. **UCAL Fuel Systems Limited, 2014 (306) E.L.T. 26 (Mad.)***

***(viii) Assistant Commissioner of State Tax and others** Vs. **Commercial Steel Limited, 2021 SCC Online SC 884.***

***(ix) TVS Srichakra Limited** Vs. **Commissioner of CGST & Central Excise, Madurai, 2018 (15) G.S.T.L. 182 (Mad.)***

***(x). Assistant Commissioner, Commercial Tax Department, Works Contract and Leasing, Kota** Vs. **Sukhla and brothers, (2010) 4 SCC 785.***

12. In the Counter Affidavit, the respondent has referred to a decision of the Tribunal (CESTAT) and has referred to paragraph 9 from the aforesaid Board Circular wherein, it has been stated as follows:-

"9. The Amount of extra duty presently kept at 1%

> will be continued. Board has however decided that if the importer does not furnish complete reply to the questionnaire within 30 days of receipt of the 'Questionnaire' by the importer, the extra duty deposit will be increased to 5% till date of receipt of reply by the Department. It should therefore be impressed upon the concerned importers (in the public note that is issued) to ensure timely replies being sent to the Questionnaire to avoid any higher deposit being insisted."

13. In the Counter Affidavit, it is stated that the Extra Duty Deposit (EDD) is collected at the time of provisional assessment of the Bills of Entry and the same is adjusted towards duty payable if any, at the time of finalization of assessments for the provisionally assessed Bills of entry. It is therefore submitted that the refund claims arising out of the payment of Duty Deposit ought to be processed only under Section 26 of the Customs Act, 1962 and therefore, the refund claim made by the petitioner on 17.12.2020 for the imports made by the petitioner between April 2016 to July 2017 is time barred. A reference was also made to the decision of the Tribunal (CESTAT) in **GMMCO Ltd.** Vs. **Commissioner of Customs, Chennai**, rendered in Appeal Nos.C/65-67/2003 vide Final Order Nos.797-799/2004 wherein, the Tribunal had rejected the revision claim under similar circumstances.

14.Learned Standing Counsel for the respondent would submit that the petitioner has an alternate remedy before the Appellate Commissioner under Section 128 of the Customs Act, 1962. That apart, it is submitted that the petitioner who have filed a refund claim under Section 27 of the Customs Act, 1962 within the stipulated time therein and since no such application was filed by the petitioner and hence, the prayer of the petitioner is liable to be rejected.

15. By way of rejoinder, the learned counsel for the petitioner would submit that the respondent cannot take a contra view for different period.

16. Having considered the arguments advanced by the learned counsel for the petitioner and the learned Standing Counsel for the respondent.

17. In my view, there is no justification in the impugned order passed by the respondent rejecting the request of the petitioner for refund of the amount paid by the petitioner pursuant to Circular No.11/2001-Cus dated 23.02.2001 of the Central Board of Indirect Taxes. Content of

which has been extracted in Paragraph No.2 of this order.

17(A). The amount that was collected by the Assessing Officer in view of the Special Valuation Branch (SVB) proceedings are nothing to deposit and not a customs duty as is contemplated under Section 12 of the Customs Act, 1962, although such deposit were eligible to be appropriated towards the duty liability of the petitioner after final assessment of the Bill of Entry.

17(B). As such, amount that has been calculated over and above the tax duty payable by the petitioner is to be refunded back only after the Bill of Entries filed are finally assessed and assessment is completed. Needless to state, such refund will be subject to the petitioner satisfying that there will be no unjust enrichment on account of refund in terms of Section 27 of the Customs Act, 1962.

18. That apart, it is submitted that the impugned order is also in gross violation of principles of natural justice as the petitioner's reply dated 22.04.2021 has not been considered while passing the impugned

order.

19. Under these circumstances, the impugned order is set aside with consequential relief. The respondents are directed to complete the proceedings within a period of six months from the date of receipt of a copy of this order.

20. This writ petition stands allowed with the above observations. No costs. Consequently, the connected writ miscellaneous petition is closed.

**21.08.2024**

Index : Yes/No
Internet : Yes/No
Speaking Order/Non-Speaking Order
Neutral Citation : Yes/No
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To

The Deputy Commissioner of Customs (Refund),
Customs House,
60, Rajaji Salai,
Chennai – 600 001.

**C.SARAVANAN, J.**

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