

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/SPECIAL CIVIL APPLICATION NO. 17063 of 2019**

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DEVHARSH INFOTECH PRIVATE LIMITED

Versus

UNION OF INDIA

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Appearance:

MR DHAVAL SHAH(2354) for the Petitioner(s) No. 1

MR. S S IYER(6553) for the Petitioner(s) No. 1

MR DHAVAL D VYAS(3225) for the Respondent(s) No. 3

NOTICE SERVED(4) for the Respondent(s) No. 1,2

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CORAM: HONOURABLE MS. JUSTICE SONIA GOKANI

and

HONOURABLE MS. JUSTICE SANGEETA K. VISHEN**Date : 09/02/2021****ORAL ORDER****(PER : HONOURABLE MS. JUSTICE SONIA GOKANI)**

1. In this petition under Articles 226 and 227 of the Constitution of India, the petitioner – company is seeking the refund from the respondents of special additional duty of customs with interest paid towards the special additional duty of customs after the sale of imported materials into the domestic tariff area by the unit of petitioner – company in the Surat Special Economic Zone.

2. Lucky Forms Private Limited amalgamated with the petitioner – company as per the approval of the Bombay High Court on 8.3.2013, which had its unit in Surat Special Economic Zone, which had imported 6 consignments of thermal paper reels in its unit from the domestic tariff area unit on payment of 4% of special additional duty of customs.

2.1 This was resold to the domestic tariff area unit without



passing on the burden of 4% special additional duty of customs paid by Lucky Forms Private Limited. The claim was made for the refund of special additional duty of customs in relation to the goods imported through 6 bills of entries by filing necessary refund applications before the Specified Officer of the Surat Special Economic Zone in wake of the Customs Notification No.102/2007-Cus.

3. This was rejected by the Specified Officer of the Surat Special Economic Zone vide his Order in Original dated 24.8.2011 on the ground that there are no provisions in the Special Economic Zone Act, 2005 and the Special Economic Zone Rules, 2006 for refund of the customs duty paid.

4. The appeal was preferred before the Appellate Commissioner of Central Excise, Surat-I which vide his order dated 30.10.2012, annulled the Order in Original and held that the Specified Officer could not have adjudicated the refund claim and should have referred to the Development Commissioner or the Board of Approval or the Central Government for removal of difficulties under Section 56 of the Special Economic Zone Act, 2005.

5. After the Bombay High Court approved amalgamation of Lucky Forms Private Limited with the petitioner – company – Devharsh Infotech Private Limited, the company wrote to the Surat Special Economic Zone as well as to the Development Commissioner, Surat Special Economic Zone seeking refund vide its communication dated 4.7.2013.

6. A serious grievance is ventilated by the petitioner that there was a complete silence and inaction on the part of the



Specified Officer and therefore, once again, a communication was shot on 28.3.2015 inviting the attention of decision of this Court in case of DIC Fine Chemicals Ltd. reported in 2014 (304) ELT 332 (Guj.), wherein the officers of the Department of Commerce were held to be adjudicating authorities for refund claims of 4% special additional duty by SEZ units.

7. Orally it was conveyed to the petitioner by the respondent No.3 that appeal was preferred before the CESTAT against the order in appeal dated 30.10.2012 and therefore, petitioner obtained the copy of memo of appeal and filed an appeal before the CESTAT. However, the CESTAT had disposed of on 16.8.2016 the appeal of the department holding that vide amendment dated 5.8.2016, the jurisdictional Central Excise and Customs authorities have been empowered to deal with the refund cases and accordingly, it remanded the matter to the original adjudicating authority to decide the refund claims, offering the opportunity of personal hearing to the party.

8. The petitioner has lamented the fact that pursuant to the said order of 16.8.2016, the company followed up with the respondents by writing on 1.11.2018 again, giving reference of the order of the CESTAT and sought the refund. This also has not been responded to and therefore, it approached this Court on 24.4.2019 with the following reliefs:-

“19..

A. Your Lordships be pleased to admit this Special Civil Application and issue notice to the respondents at the earliest.

B. Your Lordships be pleased to issue a writ of mandamus or certiorari or writ in the nature of mandamus or any other appropriate writ, order or direction that the refund claims filed in the year 2011 and remanded back by CESTAT by its order dated 16.08.2016 to Respondent No. 3 for re-adjudication be directed to be immediately adjudicated in there interests of justice, fair play and equity with consequential relief to the Petitioner company.

C. Your Lordships be pleased to hold that while granting refund of



special additional duty of Rs.6,33,533/- (rupees six lakhs thirty-three thousand five and thirty-three only) in accordance with law, Respondent No.3 be directed to consider and grant the interest claim of the petitioner company for the period of delay commencing from 3 months after the filing of the refund claims to the date of issue of the refund cheque.

D. Cost of this petition be awarded to the petitioner company.

E. Such further reliefs as deemed fit and proper may be granted to the petitioner company.”

9. This Court issued a notice for final disposal on 4.10.2019 (Coram: S.R. Brahmbhatt & V.P. Patel, JJ.).

10. Till date, no reply has been filed. There was a specific direction issued by this Court on 9.3.2020 to file affidavit-in-reply if the respondent so chooses and the affidavit-in-rejoinder also to be filed a week thereafter. In absence of any reply on the part of the respondent, obviously, no rejoinder is on record.

11. Today, learned advocate Mr. S.S. Iyer with learned advocate Mr. Dhaval Shah appearing for and on behalf of the petitioner, has argued along the line of the memo of petition. Mr. Iyer has also emphasised as to how the petitioner is sent from post to pillar and his emphatic urge for refund of the amount has fallen on deaf ears. He also further has urged that when the respondent itself had sought the direction from CESTAT, it needed to abide by the directions issued in its own appeal and therefore, non-observance of those directions should be deprecated by the Court and also has urged for interest and imposing of heavy cost.

12. Learned Central Government Standing Counsel Mr. Dhaval D. Vyas for the respondent No.3 has fairly submitted that, according to him, because of non-clarity till 2016, such request was not acceded to and thereafter, because of the change of the officers, request on the part of the petitioner



could not be acceded to. According to him, there was no ill intent on the part of the officers. It was just that in absence of any provisions and absence of clarity in this regard, had led to this impasse.

13. In rejoinder, it is urged by the learned advocate for the petitioner Mr. Iyer that there is a specific statutory provision being Rule 47(5) of the Special Economic Zone Rules as well as the order of CESTAT dated 16.8.2016, which made it absolutely clear as to whom these applications are needed to be dealt with. Therefore, the non-observance of these provisions and the directions issued by the CESTAT would amount to judicial indiscipline and the Court needs to interfere exercising its powers under Articles 226 and 227 of the Constitution of India.

14. On having heard both the sides and also having noticed chronology of events, we are at pain to notice as to how a litigant party is being sent from pillar to post by the respondent authority. It is quite apparent from the material, which has been produced that it is not the merit which is being questioned by the authority as the claim is of the refund of special additional duty of customs in respect of goods imported through 6 bills of entries by preferring refund application before the Specified Officer of the Surat Special Economic Zone. We notice that the Order in Original denied it on the ground that there were no provisions in the Special Economic Zone Act, 2005 and the Special Economic Zone Rules, 2006.

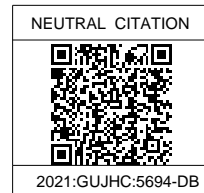
15. The Appellate Commissioner's order also is on account of the fact that there was no certainty with regard to the adjudicatory officer. However, the appeal which had been preferred by the respondent authority before the CESTAT,



resulted into the directions from the CESTAT, relevant paragraph 3 of the order dated 16.8.2016, reads thus:-

“3. The issue involved in this appeal is that in absence of any specific provisions in Special Economic Zone Act, 2005 and Special Economic Zone Rules, 2006 for sanction of the refund whether the special officer of Special Economic Zone is competent authority or otherwise. It is brought to my notice that by issuance of necessary amendment on 05.08.2016 to Special Economic Zone Rules, 2006, the jurisdictional Customs & Central Excise Authorities have been empowered, inter alia, to deal with refund cases. In view of the said amendment, the matters are remitted to the original authority of Customs & Central Excise to consider the refund afresh on merit. Needless to mention a reasonable opportunity of hearing be allowed to the Appellant.”

16. We also notice that this is delivered on 16.8.2016. Attempt was made by the petitioner to prefer an appeal so that in a pending appeal before CESTAT, it can throw some light. However, this was decided in absence of the petitioner. Thereafter also, it made all possible attempts to once again reiterate its request for refund on 1.11.2018 and that too, has not been responded. Attention is drawn to the Circular No.11/2017-Cus. dated 31.3.2017 of Government of India, Ministry of Finance, regarding the amendment in Special Economic Zone Rules, 2006 in Rule 47, which clarifies that representations have been received from field formations requesting clarification regarding amendments made in the Special Economic Zone Rules, 2006 by way of inserting a new Rule 47(5) brought vide Department of Commerce (DoC) Notification No. GSR 772(E) dated 5.8.2016, wherein the functional operations like Refund, Demand, Adjudication, Review and Appeal are directed to be made by jurisdictional Customs and Central Excise authorities in accordance with the relevant provisions contained in the Customs Act, 1962 & Central Excise Act, 1944 and the Finance Act, 1994. Certain doubts raised regarding operationalization of these functions,



appropriate authority and time limitation in respect of these functional operations, especially refund claims filed prior to the date of coming into effect of the said notification, i.e. 5.8.2016 it clarified the same. Since it was asked as to who would be the appropriate authority it names, the Development Commissioner or the jurisdictional Customs Authority to raise the demand of duty, if need arises, in respect of unutilized capital goods by a unit in case it exits. After examining the same, it has noted thus:-

“3.2 The standard operating procedures in respect of these functional operations would be as provided in the table below:

Sl.No.	Functional Operation	Standard Operating Procedure (SOP)
1	Refund	<p>i. The SEZ unit/ Developer shall file the refund application addressed to the Deputy Commissioner/ Assistant Commissioner of policy or technical, as it may be called, in the Office of Jurisdictional Commissioner of Customs, Central Excise, Service Tax or GST as the case may be.</p> <p>ii. If required, DC/AC (Policy/ Technical or as they may be called in the GST regime) would seek comments from the office of the concerned Development Commissioner on admissibility, limitation including aspects of unjust enrichment of this refund claim under Customs law.</p> <p>iii. The office of the Development Commissioner must provide comments within a maximum period of 2 weeks from the date on which such communication is received from the office of the DC/ AC (Policy/ Technical).</p> <p>iv. DC/AC (Policy/ Technical) will issue a Speaking Order while sanctioning such refund claims.</p>
2	Demand	<p>i. The draft demand/ show cause notice shall be prepared by the Specified Officer/ Authorized Officer in the concerned office of the Development Commissioner and should</p>



		<p>be transferred to the DC/AC (Policy or Technical or as they may be called in the GST regime) in the office of the jurisdictional Customs/ Central Excise/ Service Tax or GST Commissioner at least 8 weeks before the demand becomes time barred along with all Relied Upon Documents (RUDs)</p> <p>ii. DC/ AC (Policy or Technical) will be at liberty to examine all aspects with respect to the demand, and if necessary, may seek further inputs/ information from the office of the concerned Development Commissioner before putting up to the appropriate authority based on the monetary limits prescribed for issuance of the Show Cause Notice from time to time.</p> <p>iii. Demand for the past period will be issued by the office of the jurisdictional Commissioner of Customs/ Central Excise/ Service Tax/ GST if it is duly sponsored by the Specified Officer/ Authorized Officer and the demand confirms to the time limitation under Customs, Central Excise, Service Tax or GST laws and procedure prescribed under (i) & (ii) above.</p>
3	Adjudication	All pending demands shall be adjudicated by the appropriate authority as prescribed under the Customs, Central Excise, Service Tax or GST laws and the rules made there under including demands issued prior to 05.08.2016 because the act of adjudication is prospective in nature.
4	Review & Appeal	Same as provided under the Customs, Central Excise, Service Tax or the GST laws and rules made there under. In case, a demand gets confirmed, the realization there of must be initiated by the jurisdictional Customs/ Central Excise/ Service Tax/ GST authority. However, the office of the Development Commissioner will assist the Customs authority in such realization as they have the BLUT (Bond cum Letter of Undertaking) signed by the unit/ developer and they are administratively under their jurisdiction."

17. Thus, from March 31, 2017 even this issue as to who could adjudicate in the matter of refund, also had been



unequivocally clarified without any semblance of doubt. There was no earthly reason as to why thereafter also, when the request was made in the year 2018, the same has not been considered by the authority concerned, when the officer had been provided with the legal backing they needed for discharging their statutory obligations. It is unfathomable as to why the litigant be tossed from one office to another and wait for their legitimate dues only because, there was initial uncertainty in the minds of officers. There is no semblance of reason why that has not happened in post judgment period of CESTAT. This can surely amount to judicial indiscipline when appeal was of the department and not challenged further.

18. Resultantly, this petition is allowed. We direct the respondents to decide refund claim of the petitioner without any further delay within six weeks of receipt of copy of this order and the same shall be once decided, paid with interest. It shall also regard disbursement by electronic mode through NEFT.

19. Noticing the apathy and carelessness on the part of the officers in dealing with this issue, we deem it appropriate that the erring persons need to be identified for recovery of the cost, which the Court contemplated to impose. At this stage, learned Standing Counsel Mr. Dhaval Vyas has prayed earnestly not to impose the cost. According to him, many officers have changed and this lack of clarity, was the result of delay. We have noticed unfailingly that from 2016 when the CESTAT decided the issue and clarified the authority, thereafter, the Circular of 2017 came to be issued, it was not the case at all of the respondents that in the merit of the matter, is manner eyebrows were raised. However, in absence



of any other allegations of moral turpitude, we accede to the request of learned Standing Counsel Mr. Dhaval Vyas and direct the officer at the helm of affairs to contemplate the stringent actions against erring officers who attempt to shirk their responsibilities at the cost of the citizens. Henceforth, let there be promptness in attending to these issues by the officers.

20. With the above directions and observations, the petition is, therefore, disposed of.

(SONIA GOKANI, J)

(SANGEETA K. VISHEN, J)

BINOY B PILLAI