IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 28-9-2012

CORAM

THE HONOURABLE MR.JUSTICE M.JAICHANDREN

Writ Petition No.19649 of 2012

M/s.Arunachala Gounder Textile
Mills Private Limited,
No.5, Bye-Pass Road,
Pallipalayam, Erode-638 006,
Rep. By its Director. .. Petitioner.

Versus

1.Commissioner of Central Excise, Salem,
Foulks Compound, Anaimedu,
Salem 636 001.

2. Assistant Commissioner of Central Excise,
Erode-II Division,
81, Bharathi Nagar, Veerappan Chatram Post,
Soolai, Erode 638 004. .. Respondents.

Prayer: Petition filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorarified Mandamus, calling for the records of the second respondent culminating in his communication bearing reference C.No.V/55/18/78/2012-RF dated 13.6.2012 along with Orders-in-Original Nos.108 to 113/2012 (R) AC/Erode II issued by the 2nd respondent, to the extent to that the sanctioned rebate of Rs.18,32,782/- has been appropriated towards the amounts not recoverable in this manner from the petitioner and direct the 2nd respondent to refund the said balance of the sanctioned rebate of Rs.47,00,094/- without any deduction, along with interest.

For Petitioner : Ms.L.Maithili for
M/s.Maithili Associates

For Respondents : Mr.V.Sundareswaran

O R D E R

Heard the learned counsel for the petitioner, as well as the learned counsel appearing on behalf of the respondents.

2. It has been stated that the petitioner is a private limited company incorporated under the Companies Act, 1956. The petitioner is engaged in the business of manufacturing different varieties of yarns, including acrylic, polyester and viscose yarns, meant for the domestic market, as well as for exports.

3. It has been further stated that the Central Government has issued a number of notifications providing export benefits, as a matter of policy, with a view to encourage exports. Such an exercise has been undertaken for the locally manufactured goods to be competitive in the markets. Rules 18 and 19 of the Central Excise Rules, 2002, provide certain reliefs, with regard to the levy of central excise duty on raw materials. Rule 18 of the Central Excise Rules, 2002, provides for the grant of the rebate of duty paid on excisable goods which are exported and with regard to the duty paid on the raw materials used in the manufacture of the exported goods. Rule 19 of the Central excise Rules, 2002, permits clearance of excisable goods, under bond, without payment of duty. Accordingly, Rule 18 provides for the refund of the central excise duty already paid on raw materials or final products cleared for export. Rule 19 facilitates duty clearance of excisable raw materials and final products meant for export. As such, the petitioner company had been making rebate claims with the second respondent, in terms of Rule 18 of the Central Excise Rules, 2002.

4. It has been further stated that the petitioner had made a rebate claim, relating to its export, in view of Rule 18 of the Central Excise Rules, 2002, before the second respondent. However, the respondents had been withholding the rebate amounts, due to the petitioner, by adjusting the same against the amounts said to be due from the petitioner relating to the amount of service tax leviable, in respect of business auxiliary services, on the procurement of export orders by overseas commission agents, in spite of the stay applications pending before the Courts of law.

5. It has been further stated that the service tax is also being administered under the Central Excise Department and is governed by the provisions of the Finance Act, 1994, read with the rules framed thereunder. Accordingly, periodical show cause notices had been issued by the officers concerned demanding the payment of service tax

by the petitioner. Orders had been passed by the second respondent holding the petitioner liable to service tax, under the category of business auxiliary services, on the procurement of export orders by overseas commission agents. Most of the demands made against the petitioner had been confirmed on adjudication by the second respondent.

6. It has also been stated that appeals had been filed against the orders passed by the second respondent before the Commissioner of Central Excise (Appeals), Salem. The appeals filed against such orders had been rejected and the demands made against the petitioner had been confirmed, even though the penalty had been set aside in some cases. Second Appeals had been preferred against the said orders before the Customs, Excise and Service Tax Appellate Tribunal, under Section 86 of the Finance Act, 1994. The adjudged demands were to be deposited before the appeal is taken up for disposal by the Customs, Excise and Service Tax Appellate Tribunal, unless the pre-deposit is waived by the Tribunal, pursuant to the applications for stay filed under Section 35 of the Central Excise Act, 1944. The stay applications filed by the petitioner, under Section 35 of the Central Excise Act, 1944, had been allowed by the Tribunal, by granting unconditional waiver of pre-deposit amounts, as prayed for by the petitioner. However, the applications filed by the petitioner, relating to certain identical orders passed by the Appellate Commissioner, pertaining to the subsequent periods had been made infructuous due to the adjustment of the rebate amounts which were due to the petitioner towards the alleged Central Excise Arrears, by way of the impugned orders. The adjustment of the amounts made by the second respondent, from the amounts due to the petitioner, as rebate on exports, is arbitrary and contrary to the relevant provisions of law. No notice had been given to the petitioner before such adjustments had been made. In fact the petitioner had filed 15 rebate claims, vide its letter, dated 13.2.2012, for a total rebate amount of Rs.47,00,094/-, before the second respondent, along with the supporting documents. Instead of allowing the same, the second respondent had adjusted the substantial portion of the said amounts for the alleged central excise dues of the petitioner. In view of the appropriation of the amounts, by the second respondent, the stay petition filed by the petitioner in the appeal pending on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench at Chennai, in Appeal No.ST/217/2010, had become infructuous.

7. The learned counsel appearing on behalf of the petitioner had submitted that the adjustment of the amounts said to be due from the petitioner, as excise duty arrears, while the rebate claims made by the petitioner were pending and when the stay petitions in the appeals filed before the Tribunal were also pending adjudication, is arbitrary and illegal. The learned counsel appearing on behalf of the

petitioner had submitted that it would suffice if the rebate claims made by the petitioner are decided by the second respondent, independently, and if such rebates are allowed, without adjustment of the amounts due to the petitioner and if the Tribunal is directed to dispose of the appeals, on merits, within a specified time. The learned counsel appearing on behalf of the petitioner had also submitted that the action of the second respondent in adjusting the amounts due to the petitioner, for the alleged central excise arrears said to be due from the petitioner, cannot be sustained in the eye of law in view of the following decisions:

1) Mahindra & Mahindra Ltd. Vs. Union of India, 1992 (59) E.L.T. 505 (Bom.)

2) K.M.Subaida Beevi Vs. Tahsildar, 1995(80) E.L.T. 485 (Mad.)

3) National Steel Industries Ltd. Vs. Union of India, 2001(134) E.L.T. 616 (M.P)

4) Lanco Kondapalli Power Private Ltd. Vs. Union of India, 2009(242) E.L.T. 340 (A.P.)

5) Bonfiglioli Transmissions Private Limited Vs. Commissioner of Central Excise, 201-TIOL-670-HC-MAD-CX

6) Vinyllora Industries Pvt. Ltd. Vs. Commr.(A)-III, C.E & S.T., Hyderabad (2012(281) E.L.T. 40 (A.P).

8. The learned counsel appearing on behalf of the petitioner had also submitted that though all efforts had been taken by the petitioner to move the stay petitions before the Customs, Excise and Service Tax Appellate Tribunal, it could not be taken up, as the Tribunal was not sitting, regularly, for a long time. In such cirucsmtnaes, this Court had also granted certain orders protecting the interest of the petitioner. One such order had been passed, by this Court, on 3.12.2004, in W.P.No.6361 of 2012.

9. It has been further stated that the second respondent had been informed about the pendency of the appeal before the Tribunal and that favourable orders had been passed by the Tribunal in similar matters. However, the second respondent had issued the impugned communication, dated 13.6.2012, stating that certain amounts had been adjusted in view of the Central Excise Arrears payable by the petitioner. The second respondent had issued the impugned communication, dated 13.6.2012, enclosing a cheque for a sum of Rs.28,67,312/-, after adjusting the alleged dues of Rs.18,32,782/-, against the total rebate claim made by the petitioner for a sum of Rs.47,00,094/-. In such circumstances, this Court may be pleased to set aside the communication of the second respondent, dated 13.6.2012, and to direct the second respondent to consider the rebate

claim of the petitioner, dated 13.2.2012, and to pass appropriate orders thereon. This Court may also be pleased to direct the Customs, Excise and Service Tax Appellate Tribunal to dispose of the appeal pending before it, in Appeal No.ST/217/2010, on merits and in accordance with law, within a specified period.

10. A counter affidavit had been filed on behalf of the respondents denying the averments and allegations made by the petitioner in the affidavit filed in support of the writ petition. It has been stated that the prayer in the writ petition is not maintainable, as the petitioner had filed a single writ petition challenging the orders-in-Original Nos.108 to 113 of 2012, dated 12.6.2012. It has been further stated that the petitioner is a manufacturer of `cotton lycra core spurn yarn', classified by the petitioner, as falling under Central Excise Tariff heading No.5205.90. According to the Revenue it is classifiable under Entry 5205.11/5606.00.

11. It has been further stated that, in Civil Appeal No.2088 of 2011, filed by the petitioner before the Supreme Court of India, an order of stay had been granted only in respect of the recovery of interest, by an order, dated 8.5.2012. As such, the petitioner is liable to pay the entire duty due from it. While so, in view of the Finance (Amendment) Act, 2006, which had come into effect from 18.4.2006, the service commission paid by the petitioner to the agents abroad becomes taxable under the Finance Act, 1994, as service tax. Since the petitioner had failed to remit the same an Order-in-Original No.18 of 2009, had been passed resulting in a demand of Rs.9,75,134/-, for the period, from October, 2007 to September, 2008, and an Order-in-Original No.13 of 2010, dated 30.9.2010, had been passed relating to the period, from April 2009 to June, 2009. The amendment inserting Section 66A had been held to be valid. Therefore, the petitioner had become liable to pay the service tax on the agency commission payable abroad, on and from 18.4.2006. The appeal filed by the petitioner before the first appellate authority had been dismissed. Challenging the said orders the petitioner had filed appeals before the Customs, Excise and Service Tax Appellate Tribunal. As per Section 35F of the Act, the amount that remained unpaid should be paid by the person preferring the appeal before the Tribunal. Only in cases of undue hardship the petitioner can approach the Tribunal for the waiver of the pre-deposit amount. Even though the petitioner had filed the appeal before the Tribunal during the year 2010, no order of stay had been obtained against the respondents, with regard to the recovery of the amounts due from the petitioner. Further, as per Section 87(a) of the Finance Act, 1994, any amount `payable' by a person, under the provisions of the said Act, is not paid, the Central Excise Officer shall proceed to recover the amount due, by one or more of the modes mentioned therein.

Accordingly, the rebate earned by the petitioner, by way of refund of excise duty paid by it, had been adjusted towards the amount of service tax due to the government, under the power conferred by Section 87(a) of the Finance Act, 1994, read with Section 11 of the Central Excise Act, 1944.

12. It had also been stated that before the action had been initiated, under Section 87 of the Finance Act, 1994, a notice had been issued to the petitioner in compliance with the principles of natural justice. Even though the appeal filed by the petitioner had been numbered in the year, 2010, no steps had been taken by the petitioner to pursue the stay petition, by listing it for an early hearing of the same. Even if there are vacancies in the Tribunal in its South Zonal Bench at Chennai, it is always open to the petitioner to get the appeal, along with the stay petition, transferred and listed for hearing to another bench, for an early disposal. However, the petitioner has moved the present writ petition before this Court, without taking the necessary steps for an early disposal of the stay petition and the appeal filed by the petitioner before the Customs, Excise and Service Tax Appellate Tribunal. As such, the writ petition filed by the petitioner is devoid of merits and therefore, it is liable to be dismissed.

13. In view of the submissions made by the learned counsels appearing on behalf of the petitioner, as well as the respondents, and on a perusal of the records available and on considering the decisions cited supra, it is noted that the appropriation of the amounts, to the extent of Rs.18,32,782/-, towards the alleged service tax dues said to be payable by the petitioner, from the amount of Rs.47,00,094/- said to be due to the petitioner as export duty rebate, cannot be sustained in the eye of law. The petitioner ought to have been given a reasonable opportunity of hearing before the second respondent had appropriated the said amount towards the alleged excise duty liability of the petitioner. Even though an appeal had been preferred by the petitioner before the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench at Chennai, in Appeal No.ST/217/2010, along with the stay petition, the second respondent had appropriated the amount of Rs.18,32,782/- from the export duty rebate, which was refundable to the petitioner, arbitrarily. The stay petition filed by the petitioner along with the appeal, in Appeal No.ST/217/2010, had been dismissed by the Tribunal, as infructuous, only due to the fact that the amount said to be due from the petitioner had been appropriated by the second respondent. However, it is noted that the Tribunal had granted an interim order of stay in other similar cases, in its order, dated 15.6.2012. As such, the requirement of pre-deposit had also been waived. It had also fixed the date of the hearing of the appeals as 16.8.2012. In such circumstances, this Court finds it appropriate to set aside the

appropriation of the amount of Rs.18,32,782/-, by the second respondent, towards the alleged liability of the petitioner, from the amount of Rs.47,00,094/- refundable to it, as export duty rebate. It is for the second respondent to consider and pass appropriate orders, with regard to the rebate claim of the petitioner, dated 5.3.2012, without undue delay. It is for the Customs, Excise and Service Tax Appellate Tribunal, Chennai, to hear and dispose of the appeals filed by the petitioner, on merits and in accordance with law, as expeditiously as possible. The writ petition is ordered accordingly. No costs.

sd/-

Assistant Registrar

True Copy/-

Sub Assistant Registrar

csh

To

1.Commissioner of Central Excise, Salem,
Foulks Compound, Anaimedu,
Salem 636 001.

2. Assistant Commissioner of Central Excise,
Erode-II Division,
81, Bharathi Nagar, Veerappan Chatram Post,
Soolai, Erode 638 004.

+1 CC to M/s. V.D. Sundareswaran, Advocate SR No 61185

+1 CC to M/s. L. Maithili, Advocate SR No 61042

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RJ-CO
KV - 09/11/2012