(2020) 09 BOM CK 0040

In the Bombay High Court

Case No : Writ Petition (ST.) No. 5666, 5669, 5670 Of 2020

Boxster Impex Pvt. Ltd And Ors APPELLANT

Vs

Union Of India And Ors RESPONDENT

Date of Decision : 22-09-2020

Acts Referred:

Central Goods And Services Tax Act, 2017 — Section 16, 41
Customs Act, 1962 — Section 110, 110(5)
Constitution Of India, 1950 — Article 226

Citation : (2020) 09 BOM CK 0040

Hon'ble Judges : Ujjal Bhuyan, J;Abhay Ahuja, J

Bench : Division Bench

Advocate : Brijesh Pathak, Anand Sachwani, P.S.Jetly, J.B.Mishra

Final Decision : Allowed

Judgement

1. This order will dispose of the above noted three writ petitions.

2. We have heard Mr.Anand Sachwani alongwith Mr.Brijesh Pathak, learned counsel for the petitioners; and Mr.P.S.Jetly, learned senior counsel alongwith Mr.J.B.Mishra, learned counsel for the respondents.

3. In Writ Petition (St.) No.5670 of 2020 M/s Dunox Trading and Exports Private Limited, a private limited company having its registered office at Andheri (W), Mumbai is the petitioner and has filed the writ petition seeking the following reliefs:-

(i) To unfreeze bank account of the petitioner bearing No. 10025372568 with IDFC Bank, Andheri (E) Branch;

(ii) To set aside the alert imposed on the Import Export Code of the petitioner;

(iii) To set aside any direction(s) of the respondents for withholding refund of Integrated Goods and Services Tax (IGST).

4. In Writ Petition (St.) No.5669 of 2020 M/s Boxster Impex Private Limited, a

private limited company having its registered office at Ballard Estate at Mumbai is the petitioner and by filing this petition under Article 226 of the Constitution of India has prayed for identical reliefs; its account number being 172011100002306 with Andhra Bank, Lokhandwala Branch and 811230139267 with DBS Bank, Andheri Branch.

5. In Writ Petition (St.) No.5666 of 2020 petitioner is Elantra Exports Private Limited, a private limited company having its registered office at New Link Road, Andheri (W), Mumbai. In this petition under Article 226 of the Constitution of India the reliefs sought for are identical save and except, the bank account numbers which are as under :-

Account No.03800200001461 of Bank of Baroda, S.V.Branch and 916020048013860 of Axis Bank, Airoli Branch.

6. In the course of hearing, learned counsel for the parties advanced their arguments treating Writ Petition No.5670 of 2020 as the lead case as pleadings have been exchanged in this case. Therefore, all references to facts and pleadings will be in respect of Writ Petition (St.) No.5670 of 2020.

7. According to the petitioner he is engaged in the business of imports and exports and is duly registered with the Directorate General of Foreign Trade having Importer and Exporter Code (IEC) No.AAGCD7568P.

8. Petitioner has stated that it buys handicraft items from various sellers in India for the purpose of export out of India. Petitioner has paid Goods and Services Tax (GST) while purchasing the goods; petitioner has also ensured that the sellers are registered with GST authorities too and have paid GST. Therefore, it is contended that petitioner is entitled to take input credit or refund under Section 16 of the Central Goods and Services Tax Act, 2017 when the goods are exported out of India by the petitioner. Petitioner has complied with all the requirements of the said Act and therefore, entitled to refund.

9. Petitioner's further claim is to refund of Integrated Goods and Services Tax (IGST) on the exported goods.

10. Grievance has been expressed by the petitioner that since the year 2018 the bank account of the petitioner has been frozen; besides refund claim of IGST has not been entertained for more than one year. That apart, an alert has been put on the IEC of the petitioner as a result of which its business has come to an standstill.

11. Petitioner has stated that officers of respondent No.1 has carried out certain investigation pursuant to which director of the petitioner was summoned to the office of respondent No.1 in the month of March, 2019, whereafter his statement was recorded. Thereafter, he was summoned several times which he had compelled with. However, till date no seizure of any goods belonging to the petitioner has been made nor any show cause notice has been issued to the petitioner.

12. Petitioner wrote letters dated 15th May, 2019, 20th May, 2019, 4th February, 2020 and 12th February, 2020 to the office of respondent No.1 for removal of alert against the IEC of the petitioner. Petitioner also wrote to the office of respondent No.1 on the said dates for unfreezing the bank account of the petitioner as well as to allow refund of GST/ IGST. However, no decision has been taken.

13. Aggrieved, present writ petition has been filed seeking the reliefs as indicated above.

14. An affidavit has been filed by Mr.Raghavendra Singh, Joint Commissioner of Customs (Preventive) on behalf of respondent No.1. Stand taken in the affidavit is that petitioner is a fictitious and bogus company. Specific intelligence was received that M/s Ronera Overseas Private Limited and related firms are involved in circular trading by exporting cheap quality glass bangles on highly inflated value by mis-declaring description for claiming ineligible IGST refund and other government benefits. On examination of export consignments of M/s Ronera Overseas Private Limited it was found that the goods contained therein were ordinary glass bangles, many of which were already in broken state and not fit for market sale. During the same period on examination of import consignments drawn at M/s Ashte Ligistics Private Limited belonging to M/s Alan Impex and M/s Serco Import and Export Private Limited, it was observed that the goods appeared to be plain glass bangles out of which many were in broken state. Some were wrapped in Hindi newspapers of Firozabad. On that basis an inference was drawn that there was circular trading of glass bangles to avail ineligible government benefits in the form of IGST etc.

15. Following the above, a search was conducted in the premises of Mr.Uzair Basar, a resident of Tardeo, Mumbai, on 25th February, 2019 wherein 129 stamps of various companies were found including M/s Dunox Trading and Export Private Limited i.e., petitioner in Writ Petition (St.) No.5670 of 2020, M/s Ronera Overseas Private Limited, M/s Boxster Impex Private Limited i.e., petitioner in Writ Petition (St.) No.5669 of 2020, M/s Serco Import and Export Private Limited and M/s Elantra Exports Private Limited i.e., petitioner in Writ Petition (St.) No.5666 of 2020.

16. It is stated that the activities of the above companies are being investigated.

17. That apart, information was received from the Joint Commissioner of State Tax on 12th July, 2019 that petitioner had obtained GST registration on the basis of forged documents. Partner of the supplier of glass bangles M/s Raja Bangles Store was examined and the partner made a statement that the business of bangles was totally GST free and no GST was paid to the government.

18. Statement of Mr.Uzair Basar was recorded wherefrom it appears that he was exporting the goods on behalf of all the above mentioned companies.

19. No goods of the petitioner have been seized under section 110 of the

Customs Act, 1962 (briefly "the Customs Act" hereinafter). Therefore, there is no question of any provisional release. However, export goods of some of the companies like M/s Ronera Overseas Private Limited and import goods of M/s Alan Impex and M/s Serco Import and Export Private Limited were put on hold and seized by the department. Subsequently, even those goods were granted provisional release on furnishing bond and bank guarantee though the export goods could not be handed over to the concerned exporting party due to failure to comply with the conditions imposed which should not be a cause of concern for the petitioner.

20. It is stated that by his activities Mr.Uzair Basar has created a complex maze of various fictitious firms to defraud government revenue for which detailed investigation needs to be carried out. However, Mr.Uzair Basar has not cooperated with the investigation for which investigation could not be completed on priority basis. That apart, ownership of the goods has not yet been established.

21. Unfreezing of the frozen bank account of the petitioner would cause huge loss to the department. In so far claim to IGST and other dues are concerned, it is stated that Mr.Uzair Basar has already obtained benefits to the tune of Rs.9.86 crores fraudulently. Petitioner is a fake entity which has never presented itself before the department to evade scrutiny. The affiant has described the petitioner as hardened criminal who has carried out the illegal activities of circular trading with the sole objective to loot government revenue.

22. Petitioner has filed rejoinder affidavit. In the rejoinder affidavit all the above allegations have been denied and averments made in the writ petition have been reiterated. It is stated that petitioner is carrying on the business activity of exports of handcrafts being manufactured in various parts of India which has a huge demand in the foreign market. After identifying overseas purchases of handicraft items, petitioner procured the goods from various manufacturers / traders under proper GST paid invoices. Payments were made through banking channels which have been duly accounted for in the books of account maintained by the petitioner. All the previous exports of the petitioner were allowed clearance by following the due process. Merely on obtaining one rubber stamp from the premises of Mr.Uzair Basar cannot lead to any adverse inference that the petitioner is engaged in circular trading. Allegations against the petitioner are based on presumptions and assumptions. Petitioner has cooperated in the investigation. Regarding freezing of bank account, reference has been made to sub-section (5) of Section 110 of the Customs Act and it is submitted that freezing of the bank account of the petitioner could not have been carried out under the said provision which came into effect subsequently on 1st August, 2019.

23. Learned counsel for the petitioner submits that the impugned action of the respondents is wholly illegal and arbitrary. Section 110(5) of the Customs Act could not have been invoked to freeze the bank account of the petitioner. Even if

the said provision is applied, conditions precedent for invoking the same have not been complied with by the respondents and therefore, freezing of the bank account and continuing with the same is without any authority of law. In so far putting of alert on IEC of the petitioner is concerned, learned counsel for the petitioner submits that merely on the basis of suspicion such an alert cannot be placed on the petitioner's IEC thereby completely restraining the petitioner from carrying on its legitimate business activities of export and import. Likewise, he submits that under Section 41 of the Central Goods and Services Tax Act, 2017 petitioner is entitled to refund of the tax paid. Withholding of the same is wholly unjustified and liable to be appropriately interfered with by the court.

24. Mr.Jetly, learned senior counsel for the respondents on the other hand supports the action taken by the respondents. He submits that it is a case of circular trading and by such unlawful activity petitioner has defrauded government revenue substantially and in the process has made unlawful gain. By continuing such action possibility of further defrauding the government revenue cannot be ruled out.

25. Submissions made by learned counsel for the parties have received the due consideration of the court.

26. From the pleadings and submissions it is seen that three grievances have been raised by the petitioner, viz,

(i) Freezing of its bank account;

(ii) Putting an alert on its IEC;

(iii) Issuing directions for withholding GST / IGST dues.

27. We take up the first grievance for consideration at the outset. Ex.A to the writ petition is a letter dated 1st March, 2019 issued from the office of the Principal Commissioner of Customs(P) to the Branch Manager, IDFC Bank, Mumbai stating that office of the Principal Commissioner of Customs was investigating a case of misuse of export documents to claim inadmissible dues, drawback and IGST refund by M/s Dunox Trading and Export Private Limited. Reference was made to the current account of the petitioner in the said bank. While the Branch Manager was called upon to provide certain details of the bank account he was also requested not to allow any withdrawal from the said account and operation of locker without prior permission. This is the only document on record on the basis of which the bank account of the petitioner has been effectively frozen. In the affidavit in reply filed on behalf of respondent No.1 the only statement made in respect of freezing of the bank account is in paragraph 26 wherein it is stated that unfreezing the frozen bank account would cause huge loss to the department.

28. Section 110 deals with seizure of goods, documents and things. Sub-section (5) was inserted in Section 110 by the Finance (No.2) Act, 2019 with effect from 1st August, 2019. Sub-section (5) of Section 110 reads as under :-

"Where the proper officer, during any proceedings under the Act, is of the opinion that for the purposes of protecting the interest of revenue or preventing smuggling, it is necessary so to do, he may, with the approval of the Principal Commissioner of Customs or Commissioner of Customs, by order in writing provisionally attach any bank account for a period not exceeding six months.

Provided that the Principal Commissioner of Customs or Commissioner of Customs may, for reasons to be recorded in writing, extend such period to a further period not exceeding six months and inform such extension of time to the person whose bank account is provisionally attached, before the expiry of the period so specified."

29. From the above it is evident that the said provision was inserted in the statute with effect from 1st August, 2019. Besides, from the tone and tenor of the sub-section it is apparent that it is not a procedural provision per se; rather it is coercive in nature, though the procedure is also laid down for giving effect to the said provision. Being a coercive provision, there has to be strict compliance to the procedure laid down. In such circumstances and having regard to its very nature, such a provision can only have prospective operation and not retrospective operation. Infact, the concerned Finance Act makes it explicit by making the provision effective from a prospective date i.e. from 1st August, 2019.

30. Letter from the office of the Principal Commissioner of Customs to the Branch Manager of IDFC Bank was issued on 1st March, 2019 for freezing of the bank account of the petitioner. This was prior to insertion of sub-section (5) in Section 110 with effect from 1st August, 2019. Therefore, it is quite clear that this provision could not have been invoked for freezing the bank account of the petitioner.

31. Even otherwise, we find that the above provision can only be invoked in the manner provided therein which can be culled out as under :-

(i) The order of attaching the bank account provisionally shall be passed in writing by a proper officer;

(ii) Such an order can be passed during any proceedings under the Customs Act;

(iii) Before passing such an order the proper officer must form an opinion that such attachment of bank account is necessary for the purposes of protecting the interest of revenue or for preventing smuggling;

(iv) Before passing such an order the proper officer must obtain prior approval of the Principal Commissioner of Customs or of Commissioner of Customs; and

(v) Such provisional attachment shall be for a period not exceeding six months.

32. As per the proviso the Principal Commissioner of Customs or Commissioner of Customs can extend such provisional attachment for a further period not exceeding six months; but he must record reasons for such extension and such extension of period has to be informed to the person whose bank account is

provisionally attached before expiry of the period so specified.

33. Thus from a careful reading of sub-section (5) of Section 110 it is noticeable that several pre-conditions and procedures are mandated. It may not be necessary for an elaborate deliberation of the same in view of the fact that respondents in their affidavit have not placed on record any order passed by the Principal Commissioner of Customs or Commissioner of Customs under sub-section (5) of Section 110. Suffice it to say that an order in writing for provisional attachment of a bank account is a must before such an account can be attached. In the absence of such an order in writing respondents could not have provisionally attached the bank account of the petitioner and continued with such attachment even beyond the permissible extended period.

34. Learned counsel for the respondents could not show any other provision in the Customs Act which empowers or authorizes the customs department to freeze the bank account of a person other than sub-section (5) of Section 110. Such attachment of bank account of the petitioner on 1st March, 2019 and its continuation thereafter being in breach of Section 110(5) is therefore, without any authority of law.

35. Coming to the second and third grievance of the petitioner, we are of the view that alert has been placed on the IEC of the petitioner on the basis of materials which are presently under investigation of the customs department. For the said reason, refund of IGST/GST dues has also been held up. However, we feel that the investigation needs to be expedited and taken to its logical conclusion one way or the other because extreme measures such as placing of alert on IEC and withholding of IGST/GST dues can not be continued for an indefinite period. The same cannot be continued ad-infinitum merely on the basis of suspicion, howsoever strong such suspicion may be.

36. Before issuing the final directions and parting with the record, we may make an observation on the averments made in the affidavit-in-reply filed on behalf of respondent No.1. The affiant in the said affidavit has described the petitioner as a hardened criminal with the sole objective of looting government revenue. We find that nothing has been mentioned in the affidavit about any conviction of the petitioner in any criminal case or charge-sheeting of the petitioner in any criminal case nor naming of the petitioner as an accused in any first information report. In the absence of such material, referring to any person as a hardened criminal that too in a sworn affidavit filed before the High Court is not proper. The affiant or for that matter any one swearing affidavit before the court should be careful in making averments which in any event should be restrained. We say this and no further.

37. Thus, having regard to the discussions made above, we are of the view that the following directions will meet the ends of justice:-

(i) Respondents are directed to unfreeze the bank account of the petitioner bearing No.10025372568 with IDFC Bank, Andheri (E) Branch forthwith;

(ii) Respondents are also directed to complete the investigation into the allegations against the petitioner within a period of three months from the date of receipt of a copy of this order;

(iii) Placing of alert on Import Export Code of the petitioner or claim of refund of IGST/GST would be subject to outcome of such investigation.

38. Ordered accordingly.

39. The above directions would be equally applicable in the case of the petitioners in Writ Petition (St.) Nos.5669 of 2020 and 5666 of 2020.

40. All the writ petitions are accordingly allowed in the above terms. However, there shall be no order as to cost.

41. This order will be digitally signed by the Private Secretary/Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

