

(2017) 04 BOM CK 0204
In the Bombay High Court
Case No : 9 of 1999

Jindal Drugs Limited

APPELLANT

Vs

Union of India & Ors.

RESPONDENT

Date of Decision : 17-04-2017

Acts Referred:

Constitution of India, Article 226 -
Power of High Courts to Issue certain writs
Customs Act, 1962, Section 25, Section 61 -
Foreign Trade (

Citation : (2017) 04 BOM CK 0204

Hon'ble Judges : S.C. Dharmadhikari, Prakash D. Naik

Bench : DIVISON BENCH

Advocate : V. Sridharan, Indruj Singh, A.S. Rao, Prashant Kamble

Judgement

1. By this writ petition under Article 226 of the Constitution of India, the petitioners are seeking a writ of mandamus or any other appropriate writ, order or direction directing the respondents to apply Notification No.104/95 and Public Notice No.150/95 in respect of exports effected by the petitioners, as mentioned in AnnexureF to the petition and to give to the petitioners a credit in accordance therewith.

2. The petitioners are also seeking a writ so as to restrain and forbear the respondents from applying Notification No.24/97 and Public Notice No.34/97 on the premise that the petitioners completed these exports prior to 1431997.

3. On account of subsequent developments and noted after the writ petition was filed, by the amended prayers, the petitioners seek a writ of certiorari or any other appropriate writ, order or direction calling for the records pertaining to the Orders dated 2291998 and 30121998, Annexures "M" & "K" respectively to the petition and on a scrutiny as to their legality and validity, to quash and set aside the same.

4. The petitioners are then praying for a direction to the respondents to pay to them a sum of Rs.2,53,34,229/as per the particulars of claim at AnnexureN to the writ petition, with further interest at the rate of 24% per annum.

5. The petitioners have pointed out in the petition as to how they are aggrieved and dissatisfied with the action of the respondents who are the Union of India and the Officers exercising powers under the Customs Act, 1962 (for short "the Act").

6. The petitioners are a Company duly registered under the Indian Companies Act, 1956 and are exporters of certain chemicals and natural essential oils. They are recognised as a Trading House under the Export and Import Policy (for short "the EXIM Policy") for the year 19921997/ 19972002. The petitioners have exported various goods and described in para 1 of the petition.

7. The petitioners state that the action of the respondents in applying, with retrospective effect, an amendment to Public Notice No.150/95, dated 2191995, is being challenged because the petitioners were the beneficiaries of a scheme. It was known as the Pass Book Scheme. The petitioners were eligible, as far as the claim made for the relief vide Chapter VII of the Export and Import Policy. That was in effect from 141992 to 3131997, though it was amended from time to time. It is stated that the import of raw materials, intermediates, components, etc., required for the products to be exported is permitted duty free. The Competent Authority issues licences in terms of Chapter VII.

8. The para 54 of the Policy provides that a Pass Book Scheme shall be available for some categories of exporters as set out therein. The Pass Book Scheme applies only for the export of products where Standard Input Output Norms (SION) have been published. The seventh respondent is the designated authority appointed in the Customs House in respect of these matters. Upon the export of goods by a Pass Book holder, respondent No.7 should calculate, on the basis of these standard norms, the import contents of the export and determine the basic customs duty payable on such exports. He has to credit this amount in the Pass Book. After imports being made by the Pass Book holder, the credit has to be utilised to pay the basic and additional customs duty on the imported goods. The payment is to be made by a debit entry, to be made in the Pass Book by the designated authority. The export goods are not then eligible for Page 5 of 48 :: Uploaded on - 09/05/2017 :: Downloaded on - 10/07/2017 17:13:00 :: suresh 37-WP-9.1999.doc drawback on the inputs for which credit in the Pass Book is taken. The import and export are to be made through the same Port.

9. The petitioners have set out in para 4 of the petition as to how from time to time the norms were published, Public Notice was issued and the contents thereof. The petitioners have also set out the procedure and which they claim to have complied with. That is how they earned the credit. It is stated that the export obligation had been completed prior to 1431997, on which date Public Notice No.34/97 was published. The petitioners state that when their applications

in respect of exports in terms of the aforesaid scheme and prior to the said date were being processed, this Public Notice No.34/97 came to be issued. That is why the petitioners were not granted the benefit. The petitioners rely upon a communication whereby the application for supplementary credit was rejected.

10. The petitioners then state that there was a followup with the Department. In the sense that the matter was referred to respondent No.2. The petitioners were awaiting response from this respondent. They addressed a communication and calling upon the said respondent to comply with the requisitions contained therein.

11. There is also reliance placed on a policy circular by the petitioners.

12. It is stated that during the pendency of this writ petition and when the inaction of the respondents was brought to this Court's notice, at the hearing of this petition for admission on 821999, the counsel for the respondents pointed out to the Court that the petitioners have made a representation to the Central Board of Excise and Customs (for short "CBEC") on 17121998 which is pending. The CBEC should be allowed to dispose of this representation. Assurance was given to this Court that the representation would be duly considered and disposed of. This Court, therefore, accepted this statement of the counsel and postponed the hearing. However, On 1121999, the petitioners received a communication stating that their representation was examined but the Board has rejected it.

13. On the returnable date, the petitioners made a grievance before this Court that the representation was disposed of by a nonspeaking order. It is in these circumstances that the petitioners pointed out that there are several aspects of the matter which have to be considered.

14. The petitioners also pointed out that in pursuance of oral directions given by a Division Bench of this Court on 1031999, the fourth and the fifth respondents have duly given credits which have been entered in the petitioners' Pass Book. However, the sixth respondent is refusing to grant that credit on the ground that an adjudication order, dated 30121998, signed on 31121998, has been passed by respondent No.6 and no appeal was preferred against this order to the Customs, Central Excise and Gold Control Appellate Tribunal. The petitioners pointed out that the order itself was communicated during the pendency of this petition. Therefore, the question of it being known to the petitioners does not arise. Apart therefrom, the Central Board itself was to consider the applicable Notification and the Public Notice. It has not taken a decision. That decision was merely communicated by the sixth respondent. Therefore, an appeal would lie not to the Tribunal but to the Commissioner (Appeals). In the meanwhile, the Assistant Commissioner of Customs had passed an order and all this has been done during the pendency of the petition. Therefore, filing of an appeal is not an efficacious remedy.

15. From the records it appears that later on the Board reversed its stand and

communicated to the petitioners that they are agreeable to grant credits, as claimed by the petitioners. The petitioners pointed out that the credits have to be given in the Pass Book issued to the petitioners. Once the earlier stand was incorrect and the petitioners were deprived of the credits without adherence to the law, the credits are in terms of money. They being entitlement for payment of customs duty can therefore be safely equated with money. The money was not released or paid in terms of the entitlement of the petitioners. That was delayed. The wrongful deprivation of this money, therefore, should attract interest. That is how after the writ petition was filed, post filing developments, the surviving claim is now only of interest.

16. An affidavit in reply has been filed to this petition prior amendment and postamendment. We are concerned with the affidavit of the respondents postamendment to the petition.

17. It has been pointed out by the Assistant Commissioner of Customs, in his affidavit in reply filed on behalf of respondent Nos.4 to 6 that the earlier order was passed in accordance with law; the order passed on 30121998 was challenged by way of an appeal being Appeal No.355 of 1999. The Commissioner (Appeals) rejected the appeal on 3131999. A further appeal was preferred before the Customs, Excise and Gold (Control) Appellate Tribunal, West Regional Bench at Mumbai and the Tribunal allowed it. The Tribunal held that the petitioners are entitled to avail of the credit in the Pass Book on the basis of Public Notice No.150/95, dated 2191995. The Tribunal's order is dated 2551999. However, the Tribunal's order was challenged. It is conceded that the Hon'ble Supreme Court of India rejected the Special Leave Petition.

18. Yet, these respondents maintain that under the provisions of the ImportExport Policy or under the Notifications issued, there is no provision for payment of interest on credits required to be given to the exporter. The respondents state that the Customs Department is charging interest at the specified rate on the duty amount inter alia for default in complying with the export obligations and that is referable to para 127 of the Hand Book of Procedure and that is prevalent from 19921997. The respondents further state that they charged the interest at the specified rates where the Policy itself provides for the same. In this case, neither the Policy nor the Notifications provide for payment of interest. That is why the claim for interest made by the petitioners is untenable in law. The other argument is that the interest cannot be claimed simply by invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India.

19. The amendment of the petition is to claim interest on the alleged delay in giving credits. In the Policy there is no provision for payment of interest. This is not a case of delayed payment of the amount of refund. It is in these circumstances, the respondents deny that the petitioners are entitled to any interest.

20. This stand raised is specifically controverted in the additional affidavit in reply.

21. Though the petitioners initially claimed interest at the rate of 24%, they revised and restricted it to 15% and that is in accordance with the Notification issued under the powers conferred by Section 27A of the Act. That is an interest on the delayed refund. Further, it is explained by the petitioners that their claim for interest arises on account of the credit in the Pass Book. That is claimed in terms of the Customs Notification No.104/95 r/w Public Notice No.155/95 and the Board's Circular No.62 of 1995. The Tribunal's order is relied upon to urge that the petitioners claim the Pass Book credit of Rs.20,41,382/in respect of one shipping bill, dated 321997. The Customs Department initially allowed a credit of Rs.12,49,825/and after passing of the order by the Tribunal, the balance credit of Rs.7,91,557/was given. The earlier credit is dated 1141997 and the balance is dated 2861999. Thus, the credit has been subsequently given by the respondents to the petitioners by effecting entries in the Pass Book of the petitioners. It is in these circumstances that the petitioners have filed an additional affidavit explaining as to how the Pass Book of the petitioners contained details of the credits given under the Scheme and the amounts used by the petitioners towards the payment of the customs duty utilised from the aforesaid credits. It is in these circumstances that the petitioners submit that their claim for interest is based on the statutory provisions.

22. As already detailed above, this is a surviving claim.

23. Mr. Sridharan, learned Senior Counsel appearing on behalf of the petitioners, after referring to the background facts, would submit that the Customs Notification No.104/95, dated 3051995 r/w the Export Import Policy 19921997, issued by the Central Government under Section 5 of the Foreign Trade Development Regulation Act, 1992 (for short, "FTDR Act") envisages Duty Exemption Scheme. The petitioners have duly explained as to how the Scheme operates. The Notification No.104/95 was issued on 3051995 by invoking Section 25(1) of the Act. The Central Government granted exemption from customs duty for imports made under the Pass Book Scheme, issued under para 54 of the Policy. By explaining to us as to how para 54 operates, it is submitted by Mr. Sridharan that as and when export is made, the import content of the goods used in export production will be calculated based on the standard inputoutput norm. Thereafter, the basic customs duty payable on such import would be determined. The amount of customs duty so determined is credited to the Pass Book issued to the exporter.

24. After inviting our attention to the conditions in the Customs Notification No.104/95, Mr. Sridharan submits that the petitioners had obtained a Pass Book from the designated authority in terms of para 54. That para 54 of the Policy, therefore, is rightly invoked by the petitioners. The petitioners also applied to the customs authorities for calculating the customs duty on the import content in the export product. This was duly verified and approved by the customs authorities from time to time. The petitioners thus earned the credits.

25. On 631997, Customs Notification No.24/97 was issued under Section 25 of the Act, amending the earlier Notification No.104/95. The issue that arises is, whether the petitioners' entitlement has to be computed in terms of the earlier Notification or this new Notification. The issue that the petitioners raised was that this new Notification or the amended Notification would not apply as far as their entitlement is concerned.

26. Mr. Sridharan submits that after the issue was settled by the Board and later on by the Tribunal, the respondents have raised a completely untenable defence. Mr. Sridharan invited our attention to the position prevailing with regard to interest for delayed refund or drawback of duty. In that regard, he invites our attention to Section 75A of the Act. He would submit that, that relates to interest on drawback. This section was inserted by Act 22 of 1995 (Section 62) with effect from 2651995. Inviting our attention to this provision, Mr. Sridharan would submit that if the drawback is not paid to a claimant within three months, then, interest would be payable after the expiry of that period. Mr. Sridharan has invited our attention to Section 27 of the Act and he has outlined the difference between the refund of duties of customs paid and drawback to urge that these are essentially of the same character. If customs duties paid on inputs used in goods exported is called drawback, then, in exercise of the powers conferred by Section 75, the Central Government has enacted the Customs and Central Excise Duties Drawback Rules, 1995. After inviting our attention to these Rules, it is submitted that the amount is credited in terms of para 54 of the Policy and proviso (iii)(a) and (b) of the Customs Notification No.104/95, then, that partakes the character of drawback. It is in these circumstances that he would submit that the contention of the Revenue that drawback is paid in cash and credit is not paid in cash and hence credit is not drawback, is entirely incorrect. In that regard, he relied upon an extract from the work of Kanga and Palkhivala's "Law and Practice of Income Tax", Eight Edition, at page 210. It is contended that the rationale underlying payment of interest under Section 27A applies to the present case. The Revenue's stand is completely untenable and incorrect. It is submitted that both sections being part of machinery provisions in a taxing statute, they should be construed reasonably to make them workable. The Revenue, therefore, cannot contend that no interest is due and payable.

27. It is submitted that reliance placed by the Revenue on a Judgment of the Supreme Court in the case of Union of India Vs. Orient Enterprises, reported in 1998 (99) E.L.T. 193 (SC) is misplaced because that applies to pre 1995 period. There was no right of interest on delayed refund until Act 22 of 1995 was introduced and inserting both Section 27A and Section 75A. It is in these circumstances that it is urged that the liability to pay the interest arises.

28. It is clarified by Mr. Sridharan that the petitioners are not claiming interest for the delay, if any, in granting of the initial credit by the Department. The petitioners are claiming interest only for the delay in grant of supplementary credit in respect of exports made prior to 631997. Initially, the claim of the

petitioners was for a higher amount. The Revenue initially granted a lower amount and later on, after delay, granted the balance claim as supplementary credit. It is not a case where the petitioners initially claimed a lower amount of credit which was granted and subsequently enhanced it and that is how the supplementary credit was obtained. Throughout the petitioners maintained that they were entitled to credit of the sum claimed. The petitioners are seeking interest only for the period of delay beyond three months from the date of the original claim. They are not seeking interest for a period of three months from the date of the original claim in accordance with the principles contained in Section 27A r/w Section 75A of the Customs Act, 1962.

29. They are claiming interest as notified by the Central Government under Section 27A. Thus, Mr. Sridharan, on instructions, states that the petitioners may be granted interest at the respective rates for the period after expiry of three months from the date of the original claim till the date of grant of credit by the Revenue. The amount of the claim was initially withheld by the Revenue but later on granted. According to him, the interest on this amount at such rate, as may be specified by this Court, would suffice.

30. In support of all these contentions, the petitioners relied upon Sections 27 and 27A of the Act. They relied upon the copy of the General Exemption No.84C of the Customs Tariff of India 199798, as in operation on 131997. They have also relied on the Customs and Central Excise Duties Drawback Rules, 1995. The petitioners have also pointed out as to how the claim of interest was recognised by this Court and in that regard the attention of this Court is invited to the Judgment in the case of Shri Balaji Automobiles Vs. Union of India, reported in 2002 (140) E.L.T. 367 (Bom.), that is for awarding interest on delayed refund.

31. Mr. Rao, appearing on behalf of the respondents, on the other hand, submitted that the petitioners have filed claims between December, 1996 to February, 1997 in the prescribed format for credit in accordance with Public Notice No.150/95, dated 2191995. The Customs Department granted credit based on the amended Notification No.24/97, dated 631997. There was a bona fide dispute raised by the Customs Department that the amendment was made on 631997 and that would apply even to pending applications, though exports have been made prior to 631997. However, the credit, as claimed by the petitioners, was ultimately granted by the Bombay Customs House on 1931999/ 2431999/ 2861999. Mr. Rao would submit that there is no provision for payment of interest in the FTDR Act or the Policy. There is no provision for payment of interest in terms of the Customs Notification No.104/95. The petition does not relate to delayed payment of amount of refund. Therefore, invocation of writ jurisdiction for the claim of interest simplicitor is not permissible. In other words, Mr. Rao would submit that in the exercise of this Court's powers under Article 226 of the Constitution of India, it would not be permissible for us to grant relief and of payment of interest. There is no foundation for it in the statute as well.

32. Mr. Rao has tendered written submissions as well and has submitted that

there is a Judgment to that effect and rendered by the High Court of Judicature at Madras and which Judgment has been upheld by the Hon''ble Supreme Court. Then there is a Judgment of the Hon''ble Supreme Court itself in the case of Union of India Vs. Orient Enterprises (supra) which also clinches this issue. Our attention is invited by Mr. Rao to this Judgment. Our attention was also invited to the Judgment of the Hon''ble Supreme Court in the case of Suganmal Vs. State of Madhya Pradesh and others, reported in AIR 1965 SC 1740.

33. For properly appreciating the rival contentions, we have to make a reference to the relevant Notification.

34. The petitioners have annexed a copy of this Notification No.104/95. That Notification has been issued by the Competent Authority, namely, the Central Government. That Notification grants an exemption. The ingredients of Section 25(1) of the Act are satisfied and it is pointed out that in public interest the Central Government exempts goods imported into India from the whole of the duty of customs leviable and which is specified in the First Schedule to the Customs Tariff Act, 1975 and the whole of the additional duty leviable thereon under Section 3 of the Customs Tariff Act, subject to the conditions mentioned in this Notification.

35. The conditions are, that the importer has been issued a Pass Book by the designated authority under para 54 of the Export and Import Policy, that is referred to as the Pass Book. The importer has been permitted credit entries of the amounts equal to basic customs duties on the inputs used in the products exported by the importer as verified by an Assistant Commissioner of Customs; provided that credit shall not be allowed by the designated authority in respect of goods exported under a claim for drawback or in discharge of export obligation against a licence issued under Duty Exemption Scheme contained in Chapter VI of the Export and Import Policy where export was from a port other than the port of jurisdiction of the designated authority. The said Pass Book is produced before the designated authority for debit of the duties leviable on the goods but for exemption contained therein. A proviso is inserted to condition No.3 which contemplates that exemption from duty shall not be admissible if there is insufficient credit in the said Pass Book for debiting the duty leviable on the goods but for this exemption. The said Pass Book shall be valid for credits by the designated authority for two years from the date of issue thereof and any credit in the said Pass Book, if not utilised within three years from the date of its issue, shall lapse. Then, there is an explanation which is inserted so as to define what is "Export and Import Policy". This Notification, dated 3051995, was amended on 631997. That amendment reads as under:- CUSTOMS NOTIFICATION No. 24/97 Dated 6th March 1997 In exercise of the powers conferred by subsection (1) of Section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest to do so, hereby makes the following further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue) No.104/95Customs dated the

30th May 1995, namely: In the said notification, in condition (2), the second proviso, in clause (iii), for subclause (b), the following subclause shall be substituted, namely:-(b) where duties of customs are chargeable on any input by reference to its value, such value shall be determined by proceeding sequentially through the following methods, namely:(I) the value shall be deemed to be the price at which the same or similar inputs known to be usable in the export product were imported at the place of exportation of such export product within 90 days prior to such export, or (II) the price at which inputs of like kind were imported anywhere in India within 180 days prior to the export by the pass book holder himself or by any other person, or (III) the price at which such inputs were exported from India within 90 days prior to the date of exports, or (IV) the price published in a contemporary reputed journal which regularly publishes international prices of such inputs, or (V) the price arrived at by following and other reasonable method which the Assistant Commissioner of Customs may deem fit. Sd/(K. Chopra) Under Secretary to the Government of India Issued by: Ministry of Finance Department of Revenue New Delhi- 36. The petitioners addressed a communication to the Board on 17121998 stating that they are being denied credits to the old Pass Book Scheme by the Customs, Mumbai. This is being done by retrospective application of Public Notice No.34/97, dated 1431997. This amends the earlier Notification No.104/95. However, the exports which have already been effected prior to this period, namely, November and December, 1996 and January and February, 1997 would not be governed by this amended regime. The petitioners referred to several representations made to the concerned Department to first grant credits on time, and secondly, had the grant of credit been processed on time, there would not have been any issue of the applicability of the amended regime. The representations point out as to how the Departments have also understood the issue and problems raised by the petitioners.

37. The petitioners, therefore, requested that the Board should direct the Customs to apply Notification No.104/95 as applicable and admitted by them and grant a supplementary credit at the earliest.

38. Then, the petitioners relied upon Policy Circular No.52, dated 18111998. The petitioners were first informed on 121999 that their request contained in the representation to the Board dated 17121998 was examined and rejected.

39. We need not refer to the orders passed by the authorities for the simple reason that after the matter was directed to be reexamined by the Board, the Board has made an order. The Board's order, dated 30121998, has been communicated to the petitioners during the pendency of this petition. The relevant portion thereof reads thus:Page -ORDER I have carefully gone through the case records and submissions made by the exporter. I order, the claim for supplementary pass book credit may not be acceptable hence it is rejected.-

40. The ExhibitL to the petition reads as under:- From: Sukumar Shankar, Member (Customs), C.B.E.C. To: Shri G.S. Tampi, Chief Commr. (Cus), Mumbai.

P. No.606/40/99DBK Under letter F.No.COO3801/ 99 dated 4.3.99 of the CC(EP), Mumbai regarding the Writ Petition No.9 of 1999 filed by M/s Jindal Drugs Limited in the Mumbai High Court for denial of full credit under Old Pass Book Scheme by Mumbai Custom House (.) Attention is also invited to letter F.No.605/6/99DBK dated 1.2.99 of Drawback Directorate intimating that the representation dated 17.12.98 made by M/s Jindal Drugs Limited to Member (Customs) in this regard has been rejected (.) On reexamination of the representation, it is seen that in this case the dispute is about the method of valuation of inputs used in the export goods under Pass Book Scheme in respect of exports made during November, 1996 to February 1997 by M/s Jindal Drugs Limited.(.) The facts of the case and the practice followed in this regard have been rechecked.(.) Prior to 6.3.1997 the parameters of valuation laid down in Notification No.104/95Cus. dated 30.5.1995 read with Notification No.155/95Cus dated 27.10.1995 and Board's Circular No.62/95Cus dated 7.6.1995 provide that for the purpose of allowing credit the value of input shall be which are comparable with the international prices of such inputs as on the date of exports.(.) Thus the value may be determined on the basis of normal price of inputs prevalent in the international market for import at Mumbai as on the date of exports of the export product.(.) In view of the aforesaid provisions, it is not proper to apply the method of valuation prescribed in Notification No.24/97 which was issued on 6.3.1997 for exports which have been effected prior to 6.3.1999.(.) It has therefore been decided that for the purpose of allowing credit to M/s Jindal Drugs Limited in the Pass Book vide their representation dated 17.12.98, the value shall be determined on the basis of parameters laid down in Customs Notification No.104/95 read with Notification No.155/95 and Board's Circular No.62/95. Sd/(Sukumar Shankar)? A bare perusal of this order would indicate that the Board reexamined the representation of the petitioners. The dispute was about the method of valuation of inputs used in the exported goods under the Pass Book Scheme in respect of exports made during November, 1996 to February, 1997. The facts of the case and the practice followed was rechecked. Prior to 6.3.1997, the parameters of valuation laid down in Notification No.104/95, dated 30.5.1995 r/w Notification No.155/95, dated 27.10.1995 and the Board's Circular No.62/95, dated 7.6.1995 were applicable. They provide that for the purpose of allowing credit, the value of input shall be comparable with the international prices of such inputs. Thus, the value may be determined on the basis of normal price of inputs prevalent in the international market for import at Mumbai as on the date of exports of the export product.

41. In view of this, it was not proper to apply the method of valuation prescribed in Notification No.24/97 which was issued on 6.3.1997 for exports which have been effected prior to 6.3.1997. Therefore, the Board decided to allow credits to the petitioners in the Pass Book as per their representation, and the value shall be determined on the basis of parameters laid down in the very Notification and the Board's Circular No.62/95.

42. The petitioners, therefore, were held entitled to the supplementary credit.

43. The petitioners, therefore, amended the petition and as has been admitted by the respondents that the surviving claim is of interest. However, according to the respondents, we must scrutinise this claim of interest strictly in terms of Notification No.104/95 whereunder there is no provision for payment of interest on credit required to be given to the exporter. The Customs Department is, therefore, not obliged to pay interest. Even under the EXIM Policy, there is no provision for payment of interest. This is not a claim for interest on delayed refund as well. That is how the Revenue would approach the matter.

44. The Section 27A of the Act follows Section 27. The Section 27 provides for refund of duty and how the claim has to be laid for that. The provision for interest on delayed refunds is to be found in Section 27A, which was inserted with effect from 2651995.

45. A bare perusal of Section 27A would indicate that, if any duty ordered to be refunded under subsection (2) of Section 27 to an applicant is not refunded within three months from the date of receipt of application made under subsection (1) of Section 27, then, there shall be paid to that applicant interest at such rate, not below five per cent and not exceeding thirty per cent per annum as is for the time being fixed by the Central Government, by Notification in the Official Gazette.

46. We have before us also Chapter X in the very enactment which is titled - Drawback". Chapter X contains Section 74, which provides for drawback allowable on reexport of duty paid goods. The Section 75 provides for drawback on imported materials used in the manufacture of goods which are exported. The Section 75A reads as under:" 75A. Interest on drawback.(1) Where any drawback payable to a claimant under section 74 or section 75 is not paid within a period of one month from the date of filing a claim for payment of such drawback, there shall be paid to that claimant in addition to the amount of drawback, interest at the rate fixed under section 27A from the date after the expiry of the said period of one month till the date of payment of such drawback. (2) Where any drawback has been paid to the claimant erroneously or it becomes otherwise recoverable under this Act or the rules made thereunder, the claimant shall, within a period of two months from the date of demand, pay in addition to the said amount of drawback, interest at the rate fixed under section 28AA and the amount of interest shall be calculated for the period beginning from the date of payment of such drawback to the claimant till the date of recovery of such drawback."

47. Where any drawback payable to a claimant under Section 74 or Section 75 is not paid within a period of one month from the date of filing of the claim for payment of such drawback, there will be paid to that claimant in addition to the amount of drawback, interest at the rate fixed under Section 27A from the date of expiry of the said period of one month till the date of payment of such drawback.

48. The petitioners rely on the rules in that behalf.

49. In the compilation handed over by the petitioners, there is a copy of the Customs and Central Excise Duties Drawback Rules, 1995. The term "drawback" is defined therein. The Rule 2(a), which is a part of the definition, contains the definition of the term "drawback". That reads as under:Page "(a) "drawback", in relation to any goods manufactured in India, and exported, means the rebate of duty chargeable on any imported materials or excisable materials used in the manufacture of such goods;" A bare perusal of the same would indicate that in relation to any goods manufactured in India, and exported, the drawback means the rebate of duty chargeable on any imported materials or excisable materials used in the manufacture of such goods.

50. The term "imported material" is defined to mean {see Rule 2(d)} any material imported into India and on which duty is chargeable under the Customs Act, 1962. The Rule 3 provides for drawback and that is subject to the Customs Act, 1962 and the Rules thereunder.

51. Thus, drawback is a rebate on duty chargeable on any imported materials or excisable materials used in the manufacture of such goods. The duty that is chargeable on the imported materials is referable to the Customs Act, 1962. That is how the law establishes an equivalence as far as the refund of duty paid, styled as customs duty and when that refund has not been granted, there is a provision for claiming that refund in terms of Section 27. When that refund is granted but the payment thereof is delayed, then there is a provision for interest and incorporated in Section 27A of the Act.

52. As far as drawback is concerned, by subsection (1) of Section 74, it has been clarified that when any goods capable of being easily identified which have been imported into India and upon which any duty has been paid on importation are, then, within the meaning of clause (i) of subsection (1) entered for export and the officer makes an order permitting clearance and loading of the goods for exportation under Section 51, then, by subsection (2) of Section 74 it has been clarified that notwithstanding anything contained in subsection (1), the rate of drawback in the case of goods which have been used after the importation thereof shall be such as the Central Government, having regard to the duration of use, depreciation in value and other relevant circumstances may, by Notification in the Official Gazette, fix. The Central Government can make rules for the above purpose and by subsection (3) of Section 74 that has been taken care of. By subsection (4) of Section 74, it is clarified that the goods shall be deemed to have been entered for export on the date with reference to which the rate of duty is calculated under Section 16; in the case of goods assessed to duty provisionally under Section 18, the date of payment of the provisional duty shall be deemed to be the date of payment of duty.

53. By Section 75, drawback on imported materials used in the manufacture of goods which are exported is taken care of. Therefore, we have two categories of

drawbacks, the first being allowable on reexport of duty paid goods and the second being drawback on imported materials used in the manufacture of goods which are exported. The petitioners' claim refers to the second category, falling in Section 75. The Section 75 reads as under:" 75. Drawback on imported materials used in the manufacture of goods which are exported.(1) Where it appears to the Central Government that in respect of goods of any class or description manufactured, processed or on which any operation has been carried out in India, being goods which have been entered for export and in respect of which an order permitting the clearance and loading thereof for exportation has been made under section 51 by the proper officer, or being goods entered for export by post under section 82 and in respect of which an order permitting clearance for exportation has been made by the proper officer, a drawback should be allowed of duties of customs chargeable under this Act on any imported materials of a class or description used in the manufacture or processing of such goods or carrying out any operation on such goods, the Central Government may, by notification in the Official Gazette, direct that drawback shall be allowed in respect of such goods in accordance with, and subject to, the rules made under subsection (2): Provided that no drawback shall be allowed under this subsection in respect of any of the aforesaid goods which the Central Government may, by rules made under subsection (2), specify, if the export value of such goods or class of goods is less than the value of the imported materials used in the manufacture or processing of such goods or carrying out any operation on such goods or class of goods, or is not more than such percentage of the value of the imported materials used in the manufacture or processing of such goods or carrying out any operation on such goods or class of goods as the Central Government may, by notification in the Official Gazette, specify in this behalf: Provided further that where any drawback has been allowed on any goods under this subsection and the sale proceeds in respect of such goods are not received by or on behalf of the exporter in India within the time allowed under the Foreign Exchange Management Act, 1999 (42 of 1999), such drawback shall, except under such circumstances or such conditions as the Central Government may, by rules, specify, be deemed never to have been allowed and the Central Government may, by rules made under subsection (2), specify the procedure for the recovery or adjustment of the amount of such drawback. (1A) Where it appears to the Central Government that the quantity of a particular material imported into India is more than the total quantity of like material that has been used in the goods manufactured, processed or on which any operation has been carried out in India and exported outside India, then, the Central Government may, by notification in the Official Gazette, declare that so much of the material as is contained in the goods exported shall, for the purpose of subsection (1), be deemed to be imported material. (2) The Central Government may make rules for the purpose of carrying out the provisions of subsection (1) and, in particular, such rules may provide(a) for the payment of drawback equal to the amount of duty actually paid on the imported materials used in the manufacture or processing of the goods or carrying out any operation

on the goods or as is specified in the rules as the average amount of duty paid on the materials of that class or description used in the manufacture or processing of export goods or carrying out any operation on export goods of that class or description either by manufacturers generally or by persons processing or carrying on any operation generally or by any particular manufacturer or particular person carrying on any process or other operation, and interest, if any, payable thereon; (aa) for specifying the goods in respect of which no drawback shall be allowed; (ab) for specifying the procedure for recovery or adjustment of the amount of any drawback which had been allowed under subsection (1) or interest chargeable thereon; (b) for the production of such certificates, documents and other evidence in support of each claim of drawback as may be necessary; (c) for requiring the manufacturer or the person carrying on any process or other operation to give access to every part of his manufactory to any officer of customs specially authorised in this behalf by the Assistant Commissioner of Customs or Deputy Commissioner of Customs to enable such authorised officer to inspect the processes of manufacture, process or any other operation carried out and to verify by actual check or otherwise the statements made in support of the claim for drawback. (d) for the manner and the time within which the claim for payment of drawback may be filed; (3) The power to make rules conferred by subsection (2) shall include the power to give drawback with retrospective effect from a date not earlier than the date of changes in the rates of duty on inputs used in the export goods." A perusal thereof would indicate as to how drawback shall be allowed in respect of such goods, namely, imported materials used in the manufacture of goods which are exported in accordance with and subject to the rules made under subsection (2) of Section 75. The Central Government has to make the rules and the power in that behalf is to be found in subsection (2) of Section 75. 54. There is, therefore, a provision made for interest on drawback. Where any drawback payable to any claimant under Sections 74 or 75 is not paid within the period set out under subsection (1) of Section 75A, then, there is an obligation to pay interest. That interest is to be paid at the rate fixed under Section 27A. The entitlement for interest is from the date after the expiry of the period of one month till the payment of such drawback. At the relevant time, it was three months.

55. We have no hesitation in our mind, when we read this provision carefully that what is contemplated is payment of drawback. If the payment has to be computed in terms of money and that is how the claim for that is made and processed, then, the interest on delayed drawback can be claimed. That is precisely what is claimed in the present case.

56. The petitioners have restricted their claim of interest to the amount of supplementary credit. They have found that an issue was raised and by the Revenue itself about whether the petitioners' claim for drawback can be considered in the light of the unamended provisions, or Notifications, or the amended one.

57. The petitioners were forced to come to this Court though the provisions were crystal clear. They were forced to even approach the Board because it was the respondents who made the statement before this Court that the matter would be examined by the Board. We have no doubt, therefore, that it is the respondents who took the stand that the petitioners are not entitled to such interest which is clearly referable to Section 75A. They were continuously of the opinion that the claim for drawback made by the petitioners, though styled as supplementary credit under the Pass Book Scheme, was not tenable until the matter went to the Board, but the Board did not issue a speaking order until this Court directed it to do so. It is entirely the respondents who have delayed the matter. Once the clarification came from the Board, then, there was no substance in the contention and the stand of the respondents. Thus, from inception the petitioners were entitled to those credits but which were released in part. The supplementary credit was obtained by the petitioners only after the Board clarified the matter.

58. It is, therefore, not possible to agree with Mr. Rao that for such delayed release of the supplementary credit, though in terms of money, there is no obligation to pay interest. Mr. Rao's reliance on the Policy or the Notifications cannot be of any assistance. What we have found is that there was a clear stipulation in the law. One cannot read the Notifications and to be fair to Mr. Rao, in the manner indicated by him. Mr. Rao would read Notification No.104/95 and particularly the proviso to Condition No.2.

59. According to Mr. Rao, there is a condition that the importer has been issued a Pass Book by the designated authority under para 54 of the Export and Import Policy. The further condition is that the importer has been permitted credit entries of the amount equal to basic/customs duties on the inputs used in the products exported by the importer as verified by the Assistant Commissioner of Customs. However, the proviso says that credit shall not be allowed by the designated authority in respect of goods exported under a claim for drawback or in discharge of export obligation against a licence issued under the Duty Exemption contained in Chapter VI of the Export and Import Policy or where export was from a port other than the port of jurisdiction of the designated authority.

60. It is based on this proviso that distinction is sought to be made, but without pointing out as to how this proviso is attracted as far as the claim for drawback laid by the petitioners is concerned. If that is not attracted, then, we need not go into the proviso and an issue arising out of the application of this proviso.

61. We have to only consider the argument of Mr. Rao that just as for a delayed refund of payment of duty there is a provision for interest, there is no such stipulation as far as drawback is concerned. That is belied by the statutory scheme itself and as demonstrated in the foregoing paragraphs.

62. The reliance placed by Mr. Rao on the Judgment of the Hon''ble Supreme

Court in the case of Orient Enterprises (supra) is entirely misplaced.

63. The Orient Enterprises was a case arising out of the payment of interest on delayed refund. The issue was right to such interest conferred for the first time by insertion of Section 27A of the Customs Act, 1962 and by Section 11BB of the Central Excise Act, 1944. These two sections were inserted in these two enactments by Finance Act, 1995 with effect from 26.5.1995. A writ petition filed praying for award of such interest for earlier period was therefore rightly not maintainable. The Hon'ble Supreme Court held that the claim arose not for enforcement of legal right available under any statute. That is how, applying *Suganmal* (supra) the writ petition, seeking relief of interest in respect of the amount deposited towards redemption charges under an adjudication order and which amount had been refunded after the said order was set aside, could not be maintained under Article 226 of the Constitution of India. That is how the allowing of such a writ petition by the High Court was faulted by the Hon'ble Supreme Court. That Judgment of the High Court was set aside.

64. This Judgment is, therefore, clearly distinguishable and once the statutory scheme has been duly referred and explained by us in the foregoing paragraphs.

65. The issue before the High Court of Judicature at Madras in the matter of *Tanfac Industries Ltd. Vs. Asstt. Commr. of Cus., Cuddalore*, reported in 2009 (240) E.L.T. 341 (Mad.) was whether, adjustment of credit granted by the Government on export of goods in the DEPB towards import duty payable but for the exemption is equivalent to payment of duty in cash" The appeal before the High Court of Judicature at Madras arose because the appellant *Tanfac Industries Limited* was holder of private bonded warehouse licences. It received certain goods covered by the Customs Tariff Act, 1975 at the Customs Bonded Warehouse situated at Cuddalore under the cover of a Transfer Bond. Subsequently, the warehoused goods were cleared on payment of duty/DEEC/DEPB through Exbond Bills of Entry. The importers have effected clearance of DEPB scrips. The Bills of Entry were assessed under Section 18 of the Customs Act and the importers were called upon to show cause why interest should not be demanded from them, since they had effected clearance beyond the interest free warehousing period of 90 days as per Section 61 of the Customs Act.

66. The reply was that the clearances were effected under the DEPB licence under the Notification issued under Section 25 of the Customs Act and that the Notification refers to exemption from payment of duty and so the liability to pay interest cannot arise on a nonexisting duty. The Order in Original held that debit in DEPB scrip tantamounts to payment of duty in cash, since the importer will be entitled to avail Cenvat credit of additional duty leviable under Section 3 of the Customs Tariff Act against the amount debited in DEPB. Therefore, whether the duty was paid by way of cash or by DEPB scrip, if there is delay in clearance from the warehouse, interest must be paid. The Appellate Authority confirmed the demand and the Tribunal also dismissed the appeal filed by the appellant *Tanfac*.

67. The only argument was that the debit entries and the DEPB scrips are treated as payment of duty only for the purpose of availment of Cenvat credit and as far as liability to pay duty under the Customs Act is concerned, one should look at Section 25 of the Act and the relevant Notification issued thereunder, which provides for exemption from duty. Once that is a power conferred in the Central Government and by which exemption from payment of duty is granted, the Duty Entitlement Pass Book/Customs Duty Exemption Notification, which deals with DEPB refers to exemption from payment of duty as well as additional duty under subsection (3) of the Customs Tariff Act. Therefore, so long as there is no duty, there is no obligation to pay interest.

68. That is how the question of duty on the drawback is equivalent to payment of duty arose before the Tribunal and equally before the High Court of Judicature at Madras. Explaining the whole scheme in paras 8 and 9, the High Court of Judicature at Madras concluded eventually in para 12 that the debit of any amount under the DEPB Scheme is a mode of payment of duty on the imported goods and cannot be treated as exempted goods, unlike the goods under the DEEC Scheme. That is why outlining the difference between the two Schemes, the assessee's appeal was dismissed.

69. We do not see how any assistance can be derived by the Revenue from this Judgment. Before us, this issue has never been raised. On the other hand, the argument was that there is no obligation to pay interest, though there is an entitlement which is computed in terms of money as far as the petitioners are concerned. If that is indicated in the Pass Book but eventually to be released in the form of money, then, not releasing the same within the statutory limit, attracts interest, is the argument of the assessee/petitioners before us. That is based on the statutory scheme and outlined in Sections 27, 27A, 74, 75 and 75A of the Act. Therefore, this Judgment is also clearly distinguishable.

70. As a result of the above discussion, the writ petition succeeds. Rule is made absolute. The respondents shall pay the amount of interest quantified at Rs.1,58,91,182/within a period of six weeks from the date of receipt of a copy of this order and if not paid within this period, it shall carry interest at the rate of 6% per annum, to be payable after this period till actual disbursement.