

(2006) 02 DEL CK 0059

In the Delhi High Court

Case No : Writ Petition (C) 2636 of 2005

Rai Agro Industries Ltd.

APPELLANT

Vs

Director General of Foreign Trade

RESPONDENT

Date of Decision : 24-02-2006

Acts Referred:

Customs Act, 1962 — Section 28, 28(2), 28(2B), 28AA, 28AB

Citation : (2006) 02 DEL CK 0059

Hon'ble Judges : T.S. Thakur, J;Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : A.J. Bhambhani and Divya Kesar, for the Appellant; Anil Nag and Amit Gupta, for the Respondent

Final Decision : Dismissed

Judgement

T.S. Thakur, J.—The short question that falls for our consideration in this writ petition is whether the demand made by the respondents for payment of interest on the differential customs duty payable on the import of machinery under Export Promotion Capital Goods (EPCG) Scheme is legally valid. That the petitioner had imported capital goods under the said Scheme and paid customs duty on concessional rates stipulated for the purpose is not in dispute, nor is it in dispute that the petitioner has failed to comply with its export obligation under the Scheme. It is also common ground that the petitioner has already paid the principal amount of Rs. 81,60,200 towards differential customs duty saved by it under the Scheme. What the petitioner now assails is a demand raised against it by the respondents for payment of interest at the rate of 24% p.a. on the said differential amount for the period 2nd June, 1994, i.e., the date of import of the first consignment to 17th August, 1999, the date of deposit by the petitioner of the differential duty. The total amount so claimed by the respondents towards interest has been calculated to be Rs. 1,20,00,250/- in the letter of the Assistant Commissioner of Customs dated 8th September, 1999. The claim was subsequently reduced to 15% differential duty amount instead of 24% as is

evident from the demand notice dated 12th November, 2003, issued by the Deputy Commissioner of Customs, Mumbai. According to the petitioner, the demand for payment of the amount aforementioned is legally untenable in as much as there was no constitutional or statutory sanction for such a demand. It is contended that service of a show cause notice upon the petitioner in terms of the mandatory requirement u/s 28 of the Customs Act, 1962 (for short 'the Act') was a condition precedent for any demand on account of interest or otherwise against the petitioner. No such notice having been served on the petitioner, the demand raised by the respondents is untenable in law. Before we deal with the twin grounds of challenge urged on behalf of the petitioners, we may briefly summarise the facts in the backdrop.

2. The petitioner-company is engaged in the business of manufacturing wheat and rice gluten, glucose syrup, starches, etc. besides Chemical used for industrial and manufacturing purposes. Before its take over by the NRI Management some time in the year 1986 it was a Government of Punjab owned and operated sick industrial undertaking in the name and style of M/s. Punjab Maize Products Ltd.. The NRI Management of the company obtained a license under the EPCG Scheme in February, 1994, with a view to importing sophisticated machinery and equipment from abroad ostensibly for increasing its production capacity. As a part of the grant of said license, the petitioner also executed in favor of respondent No. 1, the Director General of Foreign Trade, three bank guarantees apart from an agreement, to which we shall presently refer. Suffice it to say that the petitioner, on the authority of the said license and related documentation, imported capital goods, valuing Rs. 3,75,27,680/- from Germany in the year 1994 and paid on the said import concessional customs duty at the rate of 15% on the CIF value of the equipment so imported. It is not in dispute that against the imports so made by the petitioner it was under an obligation to export wheat gluten worth US \$ 47,42,503/- being four times the CIF value of the capital goods to be imported within a period of five years from the date of the issue of the license. This export obligation, the fulfillment whereof alone could entitle the petitioner to the concessional rate of customs duty, has not been satisfied by the petitioner. The petitioner's version is that its failure is due entirely to the non-availability of additional electricity load for which it had approached the Punjab State Electricity Board and even agitated the matter in the Punjab and Haryana High Court at Chandigarh. Another reason, which the petitioner sets up to justify its failure to comply with the export obligation, is the alleged unfair treatment meted out to it by the Punjab Pollution Control Board as regards adherence to pollution control norms. The petitioner alleges that in spite of its best efforts and good intentions, it was, for reasons beyond its control, disabled from attaining higher production levels and exploiting the potential of customers outside the country. It has, all the same, deposited with respondent No. 3 the differential amount of duty saved on the imports, amounting to Rs. 81,60,200/- under a challan dated 17th August, 1999. Shortly thereafter a demand for payment of interest on the said amount at the rate of 24% p.a. was raised against the

petitioner which, as noticed earlier, was reduced to 15% in the demand notice dated 12th November, 2003.

3. The petitioner claims to have made representations to various authorities, seeking waiver of the interest primarily, on the ground that its failure to meet the export obligation was for reasons beyond its control. These representations did not evoke any response. On the contrary, the petitioner was placed on what is known as the 'Denied Entity List', suspending its IEC number and thereby disabled it from conducting any import or export whatsoever under the EXIM Policy with effect from 9th May, 2002. It was only later on that the said suspension letter was withdrawn though only for a period of six months. Around the same time, the petitioner also received a response to its representation, stating that the Policy Relaxation Committee of respondent No. 1 has declined the petitioner's request for payment of interest on differential customs duty demanded by the respondents. The petitioner has, in that background, filed the present writ petition challenging the demand made by the respondents.

4. The respondents, have filed a counter affidavit, inter alia, stating that the EPCG Scheme allows import of capital goods with duty concession to enable production of export product at internationally competitive prices. These imports are accompanied by an obligation on the part of the importers to fulfill their export obligation in value terms. The licensee under the Scheme is required to furnish bank guarantees towards duty amount saved and an undertaking for completion of export obligation in value terms within a specified period. Failure on the part of the importer to fulfill its obligation under the license renders him liable for penal action under Foreign Trade (D and R) Act, 1992, Customs Act, 1962 and Rules and Regulations framed there under. The respondents have referred to the execution of a bond by the petitioner under paragraph 45 of the Policy which contained an undertaking for payment of interest at the rate of 24% p.a. on the amount of duty saved in the event of non-fulfillment of the export obligation under the license. It is submitted that since the petitioner had admittedly failed to perform its export obligation, it was duty bound to pay the differential amount of duty with interest at the stipulated rate of 24% p.a.

5. We have heard, learned counsel for the parties and perused the record.

6. The EPCG Scheme notified in terms of Notification No. 160/92- Cus., dated 20th April, 1992, owes its legal sanction to Section 25 of the Act and requires the importer to produce at the time of clearance of the goods a bond executed by the importer under para 45 of the Policy and a declaration binding himself to pay on demand an amount equal to the duty livable on the goods imported by it if the conditions specified in column-(2) of the Table in the notification are not satisfied. Conditions-I, II and III and the table below the same as appearing in the notification which stipulate the terms on which the import is permitted at a concessional rate of duty may be extracted at this stage:

(i) the capital goods imported are covered by a valid license issued on or before

30th April, 1995 under the Export Promotion Capital Goods (EPCG) Scheme, in terms of the Export and import Policy (hereinafter referred to as the Policy) and the said license is produced for debt at the time of clearance.

(ii) the importer, at the time of clearance, shall produce to the Assistant Commissioner of Customs or Deputy Commissioner of Customs a certificate from the licensing authority for having executed a bond under paragraph 45 of the Policy; and

(iii) the importer at the time of clearance of the said capital goods shall make a declaration before the Assistant Commissioner of Customs or Deputy Commissioner of Customs. In such form as he may specify, binding himself to pay on demand an amount equal to the duty livable on such capital goods but for the exemption contained herein in respect of which the conditions specified in column (2) of the Table have not been complied with.

TABLE

S. No.	Description of importer	Rate of duty	1)	2)	3)
1	Importer undertaking an export	25% ad valorem obligation equivalent to three times the CIF value of the said capital goods over a period of four years under paragraph 38 of the Policy			
2	Importer undertaking an export	15% ad valorem obligation equivalent to four times the CIF value of the aforesaid capital goods over a period of five years under paragraph 38 of the Policy			

7. Para 45 of the Export and Import Policy referred to in Condition No. 2 supra reads as under:

45. The importer shall be required to execute with the licensing authority a Legal Undertaking supported by a bank guarantee wherever necessary for the fulfillment of the export obligation. The details in this regard are specified in the Handbook of Procedures.

8. The Handbook of Procedures issued by the Ministry of Commerce, Government of India to which reference is made in the above paragraph inter alia stipulates the consequences arising from a failure on the part of an importer to fulfill its export obligations. Para 105 of the said Handbook may also at this stage be extracted:

105. In case of failure to fulfill the export obligation, either in full or in part, within the stipulated period, the Indemnity-cum-Surety Bond shall be invoked and the bank guarantee shall be enforced. In addition, the license holder shall also be liable to pay interest at the rate of 24% per annum on the amount of duty saved, from the date of import of the first consignment till the date of payment. This shall be without prejudice to any other action that may be taken under the Imports (Control) Order, 1955 and the Customs Act, 1962.

9. The petitioner had, pursuant to the above requirement of furnishing the bank guarantee and a legal undertaking, executed an agreement with the Government

of India through Director General of Foreign Trade. In paras "a" and "h" of the said agreement, the petitioner had agreed to perform the export obligations and realise convertible/free foreign exchange or pay the duty amounts saved with interest @ 24% per annum from the date of the import of the first consignment till the date of payment. The relevant parts of the agreement read as under:

And whereas the party has agreed:

(a). to perform the export obligations and realise free foreign exchange to the extent of US \$ 47,42,503 (FOB) within the period specified in the aforesaid Scheme/ license/Sanction;

(b), (c), (d), (e), (f) and (g) XXX XXX

(h) that in the event of his default in meeting the aforesaid obligations/ conditions/, he shall be pay an amount equal to 24% interest per annum on the amount of duty saved from the date of import of the first consignment till the date of payment.

10. The petitioner had irrevocably undertaken that in the event of its default in meeting the export obligation, it shall pay the amount equal to 24% interest per annum on the amount of custom duty saved from the date of import of the first consignment till the date of payment. Para (x) of the agreement which contains the said undertaking reads thus:

(x). That the party irrevocably undertakes that in the event of his default in meeting the aforesaid export obligations/ conditions, they shall pay an amount equal to 24% interest per annum on the amount of customs duties saved from the date of import of the first consignment till the date of payment.

11. The petitioner had, apart from the undertaking given in terms of the provisions of the policy, the license and the Handbook of procedure, also to furnish bank guarantees in terms whereof the amount guaranteed by the bank concerned was payable to the Government in case the conditions contained in the license including the export obligations mentioned therein was violated.

12. Two questions in the above background arise for our consideration. These are:

(1) Whether the demand for payment of interest has been raised in violation of the provisions of Section 28 of the Customs Act, 1962 or the principles of natural justice encapsulated in the same? and

(2) Whether the demand for payment of interest is legally sound and enforceable against the petitioner

We shall deal with the questions ad Serialtim:

Regarding Question 1:

13. Section 28 of the Customs Act, 1962 inter alias provides that when any duty

has not been levied or has been short-levied or erroneously refunded, or interest has not been paid, part-paid or erroneously refunded, the proper officer may, within the time stipulated for the purpose, serve a notice on the person chargeable with the duty or interest requiring him to show cause why he should not pay the amount specified in the notice. There is no gainsaying that the requirement of service of notice as contained in the above provision is intended to afford to the person concerned an opportunity of being heard in the matter before any amount towards duty or interest is recovered from him. The statutory provision in essence engrafts the requirement of natural justice which would even independent of the said provision demand a fair opportunity to the party from whom any duty or interest not levied, short levied or erroneously refunded is sought to be recovered. The petitioner has not however made any grievance in the writ petition against the demand raised by the respondents on the ground that a notice u/s 28 of the Act was not issued to it or on the ground that the principles of natural justice were violated by the respondents in raising a demand without affording to the petitioner an opportunity of being heard in the matter. This implies that the petitioner has neither alleged nor actually suffered any prejudice on account of the alleged non-service of notice for otherwise there is no reason why it should not have made a specific grievance against the demand on that ground.

14. That apart, a perusal of the official record which was produced before us by Mr. Nag, learned counsel for the respondents, shows that notices were in fact issued to the petitioner in connection with the payment of interest due from the petitioner to which the petitioner had not responded. Notices dated 28.4.1999, 20.7.1999, 7.3.2000 and 30.3.2000 sent to the petitioner did not evoke any response from it forcing the Assistant Commissioner of Customs EPCG Section, Mumbai to direct the Assistant Commissioner of Central Excise, Sangrur to verify the existence of the unit and to send a report. There is in the light of these facts no gainsaying that the petitioner had been given an opportunity of being heard in the matter and that a demand was raised only after it failed to respond to or avail of that opportunity. There has thus been no violation of either the provisions of Section 28 or the requirement of principles of natural justice on which the said provision is based.

Regarding Question No. 2:

15. There are two facets of this question that call for an examination. The first aspect that needs to be examined is whether this court ought to interfere at the instance of a party who has unequivocally and unconditionally undertaken to pay the duty amount saved on the import of equipment together with interest at the agreed rate in the event of its failure to discharge the export obligations. The second aspect relates to the chargeability of interest on duty which was payable but was not paid in view of an exemption granted subject to fulfillment of the conditions prescribed for such exemption.

16. In so far as the first aspect is concerned, there is no dispute that the

petitioner had unequivocally undertaken to pay the differential amount of duty saved on the import, if it failed to comply with its export obligations. The provisions of para 105 of the Handbook and the legal undertaking/agreement executed by the petitioner created in no uncertain terms a legal and enforceable obligation against the petitioner to pay interest on the amount of duty saved by it on the import of the equipments. That position was not disputed before us as indeed the same could not be disputed in the light of the terms of the policy and the provisions of the Handbook of Procedures to which it made a reference and the undertaking contained in the agreement executed between the parties. It is also not in dispute that the condition subject to which the petitioner could have availed of a reduced rate of duty, namely, performance of the export obligation has not been complied with. The question then is whether a party who has availed of a benefit on a solemn assurance and a legal undertaking that it shall perform certain acts necessary for the enjoyment of the benefit being extended in its favor could continue enjoying those benefits while the conditions subject to which the benefit was extended are violated. Our answer is in the negative. No party can avail of a benefit which was available subject to its performing conditions prescribed for the same, without performing such conditions. If the conditions fail, the party cannot retain the benefit. There is no equity in favor of a person who has availed of a benefit but failed to perform the obligation subject to which alone it could take such benefit. If that be so, as it indeed is, we see no reason why this court should come to the rescue of a party who fails to do equity in exercise of our equitable jurisdiction. It is trite that one who seeks equity must do equity. The petitioner having failed to discharge its part of the obligation despite the assurance and undertaking furnished cannot be granted any relief in the equitable jurisdiction of this court.

17. That brings us to the second aspect of the matter, namely, whether there is any illegality in the demand made by the respondent for payment of interest on the amount of duty recoverable from the petitioner. The answer to that question is provided by Section 28AA, which deals with interest on delayed payment of duty and inter alias provides that where a person chargeable with duty determined under sub-section (2) of Section 28, fails to pay such duty within three months from the date of such determination, he shall pay, in addition to the duty, interest at such rate not below 10% and not exceeding 36% per annum from the date immediately after the expiry of period of three months till the date of payment of such duty. Section 28AB deals with interest on delayed payment of duty in special cases and inter alias provides that where any duty has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person who is liable to pay duty as determined under sub-section (2) or has paid the duty under sub-section (2B) of Section 28, shall, in addition to the duty, be liable to pay interest at such rate not below 10% and not exceeding 36% per annum, as is fixed by the Central Government by notification. It is, thus, evident that duty determined as payable would earn interest in the event of a delay in the payment of the same. But for the exemption from payment of duty under the

EPCG scheme, the petitioner would have been liable to pay the duty at the rate stipulated for the imports made by it. A concessional rate was, however, applied to the said imports subject to the petitioner's satisfying the requirements stipulated for the said benefit. No sooner it is found that the petitioner has failed to perform its export obligation which was one of the conditions for applying a concessional rate of duty, the exemption would cease to be effective and the liability to pay the duty at the rate ordinarily applicable re-emerge. Consequently non-payment of the differential would attract payment of interest in terms of the statutory provisions referred to above. The provisions of the Handbook of Procedures would in such situations step in to provide for what may appear to be a grey area as to the period for which interest on such duty would be recoverable. A reading of para 105 of the Handbook which happens to be the stipulation incorporated even in the legal undertaking furnished by the petitioner would show that the liability to pay interest at the stipulated rate arises from the date of import of the first consignment till the date of payment. Regardless of which, the failure of the export obligation is noticed or established against the importer, once a failure is established or admitted the obligation to pay the differential duty along with interest at the stipulated rate arises and the period for which such payment has to be made will be reckoned from the date when the first consignment was cleared till the date of actual payment. There is in that view sufficient legal sanction for the demand of interest raised against the petitioner on the amount of differential duty. Reliance upon the decisions of the Supreme Court in *India Carbon Ltd. etc. Vs. State of Assam*, *J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another*, *M/s. VVS Sugars Vs. Govt. of Andhra Pradesh and Others*, and *York Knitwear Ltd. Vs. Asstt. Collector of Customs and Others*, are of no avail to the petitioner. Claim for interest, it is fairly settled, can arise either on the basis of a statute or a contract or trade usage. In the instant case, the claim for payment of duty is supported not only by the statutory provisions of Section 28AA and 28AB, but also the terms of the statutory policy and the legal undertaking provided by the petitioner in accordance with the same.

18. In the result, this writ petition fails and is hereby dismissed but in the circumstances without any order as to costs.