IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR. JUSTICE SYAM KUMAR V.M.

MONDAY, THE 8TH DAY OF JULY 2024 / 17TH ASHADHA, 1946

WA NO. 1630 OF 2023

AGAINST THE JUDGMENT DATED 25.07.2023 IN WP(C) NO.7262 OF 2016 OF HIGH COURT OF KERALA

APPELLANT/PETITIONER:

M/S. ELITE GREEN PVT LTD
BUILDING NO.IX/433, 434, 435 KUTTANELLUR P.O.,
TRISSUR-680 014
REPRSENTED BY ITS DEPUTY MANAGER C. SANTHOSH KUMAR,S/O.KUNJUKRISHNAPILLAI,
AGED 48 YEARS BUILDING NO.IX/433, 434, 435
KUTTANELLUR P.O., TRISSUR-680 014

BY ADVS.
SRI.M.A.BABY
SMT.MEENAKSHY PARVATHY

RESPONDENTS/SRESPONDENTS:

1 UNDER SECRETARY (CUSTOMS-III/VI)
GOVERNMENT OF INDIA, MINISTRY OF FINANCE,
DEAPRTMENT OF REVENUE,
CENTRAL BOARD OF EXCISE & CUSTOMS,
NORTH BLOCK, ROOM NO. 253-A, NEW DELHI, PIN – 110001

2 THE DIRECTOR GENERAL OF FOREIGN TRADE
UDYOG BHAVAN, NEW DELHI, PIN – 110011

3 THE COMMISSIONER OF CUSTOMS
CUSTOMS HOUSE, WILLINGDON ISLAND,
COCHIN, PIN – 682009

4 ASSISTANT COMMISSIONER OF CUSTOMS (REFUND)
OFFICE OF THE COMMISSIONER OF CUSTOMS,
CUSTOMS HOUSE,
COCHIN, PIN – 682009

**BY ADVS.**
**SMT.S.KRISHNA, CGC**
**SMT.PREETHA S. NAIR, SC, CENTRAL BOARD OF EXCISE AND CUSTOMS (SC-2094)**

**THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 08.07.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

## JUDGMENT

**Dr. A.K.Jayasankaran Nambiar, J.**

The petitioner in WP(C). No.7262 of 2016 is the appellant herein aggrieved by the judgment dated 25.07.2023 of the learned Single Judge in the Writ Petition.

2. Briefly stated the facts necessary for the disposal of this Writ Appeal are as follows:-

The appellant is stated to be a leading food processing unit in India and is engaged in the export of processed food. In connection with its business activities, it procures raw materials locally to process the food items for export. On certain occasions, raw materials are also imported for the purposes of meeting its export obligations.

3. It is the case of the appellant that while importing goods it used to pay the basic customs duty and special additional duty of customs, by debiting the duty amounts in the Duty Entitlement Pass Book (DEPB) scrips that were obtained by it as export incentives under the DEPB export promotion scheme. Thereafter, whenever a duty exemption was claimed, the same would be made available to the

exporters either by way of re-crediting the scrips with the refund amount or by paying the refund amount in cash to them. In the instant case, the appellant had paid the 4% Special Additional Duty (for short, 'SAD') by debiting the DEPB Scrips. However, while claiming a refund of the SAD paid, by adducing proof of payment of value added tax, in accordance with Notification No.102/2007-Cus dated 14.09.2007, which envisaged an exemption from, and consequent refund of, the SAD paid, to importers, it came across a Circular No.18/2013-Cus dated 29.04.2013 that changed the procedure for claiming refund of SAD. As per the said Circular, the refund of 4% SAD would be available to importers only if they had made the initial payment of 4% SAD in cash instead of through debiting the DEPB scrips. It was on account of the reluctance shown by the customs authorities in processing the refund claims preferred by the appellant, that he approached the writ court through the Writ Petition aforementioned seeking a direction to the Customs Authorities to process its refund claim for 4% SAD notwithstanding the fact that the initial payment of SAD was through a debit of the DEPB scrips.

4. The learned Single Judge, who considered the matter found that the contention of the appellant that he was not aware of the new Circular issued by the Director General of Foreign Trade (for short,

'DGFT') could not be countenanced, and further that his contention that so long as the Customs Authorities did not deny the initial payment of 4% SAD by the appellant, they could not deny him the refund, once the conditions for refund had been satisfied in terms of Notification/Circular No.18/2013-Cus dated 29.04.2013, could not be accepted. He therefore dismissed the Writ Petition after finding that the claim for refund preferred by the appellant could not be processed.

5. Before us, it is the submission of Sri. Baby M.A, the learned counsel for the appellant that the learned Single Judge erred in not considering the fact that the appellant had actually paid the 4% SAD at the time of import, albeit by debiting the DEPB scrips, and that this payment was in fact accepted by the Customs Authority as being in due discharge of its liabilities under the Customs Act and Rules. It is contended, therefore, that on the appellant satisfying the condition for refund of SAD as envisaged under Notification No.102/2007-Cus dated 14.09.2007 the respondents could not have denied the appellant the benefit of refund by relying on the Circular No.18/2013-Cus dated 29.04.2013. He relies on the decision of the Delhi High Court in **Allen Diesels India Pvt. Ltd v. Union of India [2016 (334) E.L.T. 624 (Del.)]**, which struck down the aforesaid Circular dated 29.04.2013 by holding that the Central Board of Excise and Customs could not have

imposed additional restrictions for availing the exemption in terms of Notification No.102/2007-Cus dated 14.09.2007 issued under Section 25(1) of the Customs Act, 1962. He also places reliance on the judgment dated 07.07.2023 of a learned Single Judge of this Court in WP(C).No1845 of 2016 that follows the judgment of the Delhi High Court cited above and directs the Customs Authorities to reconsider the refund application preferred by an exporter who is similarly placed as the appellant herein.

6. Per contra, it is the submission of Smt. Krishna, the learned Standing counsel for respondents 1 and 2 that the case of the appellant before the learned Single Judge was only that he was not aware of the Circular issued by the Central Board of Excise and Customs, and therefore, the judgment of the learned Single Judge, which repelled his contentions based on the said argument did not merit any interference.

7. We have considered the rival submissions and we find force in the submission of the learned counsel for the appellant with regard to the entitlement of the appellant for the refund aforementioned. While it may be a fact that, based on the subsequent Circular issued by the Central Board of Excise and Customs (which has since been annulled by the Delhi High Court in the decision in **Allen Diesels India Pvt. Ltd**

**(Supra))**, the appellant did not satisfy a pre-condition for claiming refund, the fact remains that the payment of 4% SAD effected by the appellant at the time of import of the goods, albeit by debiting the DEPB scrips, was accepted by the Customs Authorities, who recognised the said payment as in the discharge of the appellant's liability in respect of the import duties at the time of import of the goods. If that be the case, then notwithstanding the Circular dated 29.04.2013 aforementioned, the respondents cannot take a stand that there was no "payment" of the 4% SAD by the appellant at the time of import of the goods. It follows as a consequence that if the appellant satisfies the conditions in Notification No.102/2007-Cus dated 14.09.2007 for the purposes of refund of the said 4% SAD, then merely because the facility of re-crediting the DEPB scrips has been taken away, the refund that the appellant is entitled to by virtue of the notification aforementioned cannot be denied. At any rate, since the Delhi High Court has already annulled the Circular dated 29.04.2013, the respondents are now legally obliged to consider the refund application preferred by the appellant independently, on its merits, to see whether the conditions specified in Notification 102/2007-Cus dated 14.09.2007 have been satisfied by the appellant. We, therefore, allow the Writ Appeal by setting aside the impugned judgment of the learned Single Judge and by directing the respondents to process the application for refund preferred by the appellant within a period of one month from the date of receipt of a copy of this judgment, after hearing the appellant.

The Writ Appeal is allowed as above.

Sd/-
**DR. A.K.JAYASANKARAN NAMBIAR**
**JUDGE**

Sd/-
**SYAM KUMAR V.M.**
**JUDGE**

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