

IN THE HIGH COURT OF DELHI

WP (C) 3624/2018

AMBIKA VIKAS UDYOG

Vs

**DIRECTORATE OF REVENUE INTELLIGENCE DELHI
ZONAL UNIT AND ANR**

S Muralidhar & Asha Menon, JJ

Dated: May 30, 2019

Appellant Rep by: Mr Shubhankar Jha, Adv.

**Respondent Rep by: Mr Satish Aggarwala, Sr. Standing
Counsel for DRI/R-1 with Mr Vineet Sharma, Adv. Mr K S
Negi, Adv.**

Cus – Notification No.57/2000-Customs - Petitioner seeks a direction to the DRI to issue a NOC to MMTC Ltd. for release of the bank guarantee furnished by them – Petitioner has been making gold jewellery exports out of the gold procured through MMTC against security deposited with the MMTC, and over a period of time, a total security deposit of Rs.81,70,000/- has been lying with the MMTC – case of DRI is that the petitioner is one of the members of a syndicate of exporters involved in the alleged fraudulent diversion of gold jewellery meant for export - during the course of such investigation, the Petitioner was compelled to deposit custom duty to the extent of Rs. 42,50,000/- by way of three TR-6 challans dated December 2015 - In the process of investigation, a letter dated 29th October, 2015 was issued by the DRI to MMTC requesting that "security money or bond or bank guarantee deposited with your office" by a string of firms including the present Petitioner, against purchases of gold under the Exim scheme, "may be kept on hold till further communication and should not be released to these

parties without the permission of DRI, Delhi Zonal Unit" - grievance of the Petitioner is that for more than three years since the above instruction, the MMTC has been constrained not to release the BG/ security furnished by the Petitioner to the extent of Rs.81,70,000/- - A SCN dated 27th November 2017 was issued to the Petitioner inter alia demanding Customs duty amounting to Rs.46,48,286/- and appropriation of the amounts deposited.

Held: Mere pendency of the proceedings in the SCN will itself not provide justification for continuing the instructions issued by the DRI to the MMTC - DRI has nowhere in its counter affidavit sought to justify the impugned instructions given to MMTC as a "seizure" under Section 110(3) of the Act - Court fails to understand as to how the instructions to MMTC by the DRI that it should not release to the Petitioner the BG/security deposited by the Petitioner with MMTC, could amount to a "seizure" - Section 110(3) of the Act cannot be invoked for such purpose and there is no other provision of the Act referred to by the DRI in its counter affidavit, as providing a legal basis for such instructions - Court finds no justification in law for continuation of the impugned instructions of the DRI to MMTC by its letters dated 29th October, 2015 and 17th December, 2015 - Instructions are hereby quashed - MMTC will proceed in the matter as if the two instructions dated 29th October, 2015 and 17th December, 2015 of the DRI are no longer operational - MMTC shall release the security/BG amount to the Petitioner, to the extent it is entitled in accordance with law, forthwith and in any event not later than 10 days - Adjudicating Officer should proceed to pass the adjudication order within three months – Petition allowed: High Court

[para 17, 18, 19, 24, 25]

Petition allowed

Case laws cited:

Lawson Tours and Travels (India) P. Ltd. v. Dy. Director, DGCEI, Zonal Unit, Mumbai 2015 (317) ELT 248 (Bom.)... Para 13, 23...relied upon

Commissioner of Customs v. Euroasia Global - 2009-TIOL-56-SC-CUS ... Para 14, 20...distinguished

LPA No.146/2010 (Directorate of Revenue Intelligence v. Laxman Overseas)... Para 14, 22...distinguished

JUDGEMENT

Per: Dr S Muralidhar:

1. This petition by M/s Ambika Vikas Udyog through its Partner, seeks a direction to the Respondent No. 1, Directorate of Revenue Intelligence ("DRI.) to issue a no objection certificate ("NOC.) to the MMTC Limited ("MMTC.) (Respondent No.2) for release of the bank guarantee ("BG.) /security furnished by the Petitioner to the MMTC.
2. The background facts are that the Petitioner is in the business of export of gold jewellery. The gold for making such jewellery is procured by the Petitioner from MMTC, which is a Government of India undertaking and is a duly authorized licensee for importing gold into the country.
3. As part of the procedure for procurement of gold from MMTC, the Petitioner has to first make a request for supply of gold quantity-wise for export purpose. MMTC then obtains the necessary documents from the Petitioner, viz., the export order and a BG as security for the duty foregone on the basis of the value of the gold. Within 90 days of the procurement of such gold and its handing over to the Petitioner, the Petitioner is expected to export the

jewellery. After such export, the Petitioner is required to furnish a Bank Realization Certificate to show that the goods have been exported and foreign remittance against the said export has been received. After all of the above steps are completed, the security deposited in the form of BG with MMTC is discharged.

4. According to the Petitioner, it has been making gold jewellery exports out of the gold procured through MMTC against security deposited with the MMTC, and over a period of time, a total security deposit of Rs.81,70,000/- has been lying with the MMTC.

5. The DRI commenced investigation into alleged fraudulent diversion of gold jewellery meant for export. According to the DRI, the Petitioner was one of the members of a syndicate of exporters involved in such illegal activities. According to the Petitioner, during the course of such investigation, the Petitioner was compelled to deposit custom duty to the extent of Rs. 42,50,000/- by way of three TR-6 challans dated 10th December 2015, 10th December 2015 and 21st December, 2015. Further, since on an earlier occasion, in respect of 1.7 kg duty free gold procured by it, the Petitioner could not export the corresponding gold jewellery, custom duty and interest totalling Rs.4,62,635/- was deposited by it by way of TR-6 challan dated 21st November, 2014.

6. In the process of the investigation, a letter dated 29th October, 2015 was issued by the DRI to the MMTC requesting that "security money or bond or bank guarantee deposited with your office" by a string of firms including the present Petitioner, against purchases of gold under the Exim scheme, "may be kept on hold till further communication and should not be released to these parties without the permission of DRI, Delhi Zonal Unit". The said instruction dated 29th October, 2015 was reiterated by another communication dated 17th

December, 2015 stating that the bond/fixed deposit/cash furnished as security by the present Petitioner "may be kept on hold till further clearance from this office".

However, the Petitioner was allowed to commence normal operations and procure duty free as well as duty paid goods so that its normal day-to-day business activities were not affected.

7. The grievance of the Petitioner is that for more than three years since the above instruction, the MMTC has been constrained not to release the BG/ security furnished by the Petitioner to the extent of Rs.81,70,000/-.

8. A show cause notice ("SCN") dated 27th November 2017 was issued to the Petitioner and other co-noticees by the DRI, where inter alia, specific to the Petitioner, in paragraph 31.1 (a) the Petitioner was asked to show cause why:

"(a) Customs duty amounting to Rs.46,48,286/- (Rupees Forty Six Lakh Forty Eight Thousand Two Hundred Eighty Six Only) forgone on duty free gold, totally weighing 18.7 kg, imported by M/s MMTC, as detailed in Table-C.1. and C.2. above, and procured by M/s Ambika Vikas Udyog should not be demanded and recovered from them for failing to fulfil export obligation as per condition of Notification No.57/2000-Customs dated 08th May, 2000(as amended), and the amount totalling Rs.47,12,635/- deposited by M/s. Ambika Vikas Udyog and M/s. MMTC on behalf of M/s Ambika Vikas Udyog towards non export should not be appropriated against the confirmed demand of Customs duty, interest and penalty."

9. The above paragraph acknowledged that the Petitioner had already deposited a total of Rs.47,12,635/- and that the customs duty which was recoverable was Rs.46,48,286/-. This was apart from interest under Section 28AA of the Customs Act, 1962 ("Act"). The Petitioner replied to the

said SCN on 10th March, 2018 requesting that the proceedings against it be dropped.

10. In the meanwhile, by letter dated 29th May, 2017 the Petitioner requested that the above instructions to MMTC be withdrawn. When the said request was not acceded to, the present writ petition was filed.

11. When the writ petition was heard first on 13th April, 2018, this Court passed the following order:

"Notice, returnable on 18.7.2018. Mr. Satish Aggarwala, Advocate accepts notice on behalf of respondent No. 1.

Counter-affidavit will be filed within four weeks. Rejoinder, if any, may be filed within four weeks, after counter-affidavit is served.

We clarify that we have not stayed any proceedings, pursuant to the Show Cause Notice. The petitioner will cooperate in the proceedings."

12. In response to the petition, a counter affidavit has been filed by the DRI on 17th November, 2018 where it is stated in paragraph 8 that the Petitioner is liable to pay customs duty foregone amounting to Rs.46,48,286/- on the export consignment of gold jewellery in which duty free gold weighing 18.7 kg having an assessable value of Rs. 4,51,28,991/- procured from MMTC was not utilized for export. In response to the plea of the Petitioner that there was no power under the Act for the DRI to have simply issued "instructions" to the MMTC to withhold the amounts/BG deposited by the Petitioner as security, the DRI referred to Section 110 (3) of the Act which authorizes the "Proper Officer" to seize "any documents or things which would be useful to and relevant in any proceedings under this Act". However, there is no categorical statement by the DRI whether the instructions issued by it to the MMTC should be treated as a "seizure" of "any document or thing".

13. Mr. Shubhankar Jha, learned counsel for the Petitioner, states that till date no adjudication order in the SCN dated 29th November, 2017 has been passed. He points out that there is no justification in law for the DRI's instructions to the MMTC not to release the security amount to the Petitioner. He referred to the decision of the Bombay High Court in Lawson Tours and Travels (India) P. Ltd. v. Dy. Director, DGCEI, Zonal Unit, Mumbai 2015 (317) ELT 248 (Bom.) where in similar circumstances, the Bombay High Court quashed the communications issued to the banks freezing the accounts of those Petitioners pending the adjudication of the SCN.

14. Mr. Satish Aggarwala, learned Senior Standing Counsel for the DRI, on the other hand, refers to the decision of the Supreme Court in Commissioner of Customs v. Euroasia Global 2009 (236) ELT 627 (SC) = *2009-TIOL-56-SC-CUS* and a decision dated 19th August, 2010 of the Division Bench of this Court in LPA No.146/2010 (Directorate of Revenue Intelligence v. Laxman Overseas). Mr Aggarwala adds that despite hearing being fixed in the adjudication proceedings on 20th December and 27th December 2018, the Petitioner's representative failed to appear. He accordingly complains of non-cooperation by the Petitioner in completion of the adjudication proceedings. While not being able to point out any provision in the Act which permits the issuance of such "instructions" to the MMTC to withhold the BG/security amount, Mr Aggarwala submitted, on the strength of the above decisions, that the Petitioner should nevertheless be asked to furnish some form of security to the DRI if it were to withdraw the instructions given to the MMTC.

15. The above submissions have been considered by the Court. At the outset, it requires to be noticed that this Court in its order dated 13th April, 2018 itself made it very

clear to the DRI that it had not stayed the proceedings pursuant to the SCN. This Court also required the Petitioner to cooperate in those proceedings. Although according to Mr. Aggarwala, the Petitioner's representative did not appear in the adjudication hearings, the partner of the Petitioner, who is present in the Court states that he did appear on 26th April, 2019 in the adjudication proceedings and that no further date of hearing has been communicated to him.

16. However, even assuming that the Petitioner failed to appear on the dates fixed in those proceedings, the Adjudicating Officer was supposed to proceed and pass the adjudication order in accordance with law. There was no restraint on him from doing so. On the contrary, it was made clear to him by this Court on 13th April 2018 itself that there was no stay of the proceedings. Consequently, the failure by the Petitioner to appear in those proceedings cannot be an excuse to delay the adjudication order.

17. In any event, the mere pendency of the proceedings in the SCN will itself not provide justification for continuing the instructions issued by the DRI to the MMTC to withhold the release of the security/BG amount which the Petitioner had deposited with the MMTC, as part of its obligation for procurement of gold through MMTC for export of gold jewellery in the manner indicated hereinbefore. Mr Aggarwala has been unable to point out a single provision in the Act, which permits issuance of such instructions.

18. Section 110 (3) of the Act permits the "Proper Officer" "to seize any document or thing which in his opinion will be useful or relevant to any proceedings under this Act". This requires the Proper Officer to actually apply his mind and pass a reasoned order under the said provision in regard to such "seizure". Once there is a seizure made

under Section 110 (3) of the Act, the time limit for issuance of an SCN would begin to run in terms of Section 110 (2) of the Act. In the present case, the instructions to the MMTC were first issued on 29th October 2015, and reiterated on 17th December, 2015. If this was to be treated as some kind of a "seizure", for the purpose of Section 110 (3) of the Act, then clearly the SCN issued to the Petitioner, would be well beyond the time permitted in terms of Section 110 (2) of the Act. Perhaps conscious of this difficulty, the DRI has nowhere in its counter affidavit sought to justify the impugned instructions given to the MMTC as a "seizure" under Section 110 (3) of the Act. Consequently, the Court understands the DRI as not seeking to justify the impugned instructions to the MMTC as a "seizure" in terms of Section 110 (3) of the Act.

19. In any event, the Court fails to understand as to how the instructions to the MMTC by the DRI that it should not release to the Petitioner the BG/security deposited by the Petitioner with the MMTC, could amount to a "seizure". The Court is unable to find any legal justification for issuance of such instructions. Section 110 (3) of the Act cannot be invoked for such purpose and there is no other provision of the Act referred to by the DRI in its counter affidavit, as providing a legal basis for such instructions.

20. Turning now to the two decisions cited by Mr Aggarwala, it is seen that in Commissioner of Customs v. Euroasia Global (supra), an amount of Rs.23.90 lacs in cash had been seized from the premises of the Respondent in that case and it was sought to be explained that the said amount represented sale proceeds of the imported goods. It was in those circumstances that the Supreme Court interfered with the order of the High Court directing release of such seized cash to the Respondent on the ground that such release ought not to have been

"unconditional". The Supreme Court called upon Euroasia Global to furnish a BG, but it was unable to do so.

21. The facts here are different. The Petitioner has admittedly deposited Rs.47,12,635/- upfront even during the course of the investigation. Further, the investigations are complete and that is how a SCN had been issued to the Petitioner. The amount, even according to the DRI, which is owed by the Petitioner is Rs.46,48,286/- as customs duty. There can be no justification for the DRI to insist that the BG/security in the sum of Rs.81,70,000/- deposited by the Petitioner with the MMTC should not be released to the Petitioner only because the SCN is yet to be adjudicated.

22. As far as the decision in Directorate of Revenue Intelligence v. Laxman Overseas (supra) is concerned, there is nothing therein which indicates that Laxman Overseas had made any deposit of duty during the course of the investigation. Consequently, the Court is not persuaded that the said order is of any help to the DRI in providing a legal justification for the impugned instructions to the MMTC.

23. On the other hand, the decision of the Bombay High Court in Lawson Tours and Travels (India) P. Ltd. v. Dy. Director (supra) supports the case of the Petitioner. There the bank accounts of the Petitioner were frozen pending the completion of adjudication of the SCNs. The Bombay High Court disapproved of the said action and observed:

"We are not concerned as much with the adjudicating proceedings; the outcome thereof, leave alone the merits. But, we do find that there was no reason for the authority to hastily freeze and attach the bank account. If the Petitioner has a huge liability and which is towards taxes due to the Government, then, the least that was expected is that the competent authority decides the adjudication

proceedings and by an appropriate order. It is only thereafter that the dues could be said to be crystallized and adjudicated. Presently, merely on issuance of show cause-cum-demand notice, copy of which is at Annexure 'B', the bank account could not have frozen and attached. More so, when the petitioner claims to have made some payments. As a result of the above discussion, the writ petition succeeds. Both communications at Annexures 'A1' and 'A2' are quashed and set aside. The bank account of the Petitioner with South Indian Bank shall stand released from the attachment. However, we clarify that it would be open for the Revenue to initiate such proceedings and for recovery of the sums which are due and payable to it in the event of an order in adjudication proceedings being passed and, the dues being finalised in terms thereof. All such measures are open for being initiated and undertaken irrespective of disposal of this writ petition. We clarify that we have not expressed any opinion on the rival contentions as far as merits of the show cause notice."

24. For the aforementioned reasons, the Court finds no justification in law for continuation of the impugned instructions of the DRI to the MMTC by its letters dated 29th October, 2015 and 17th December, 2015. The said instructions are hereby quashed. MMTC will now proceed in the matter as if the two instructions dated 29th October, 2015 and 17th December, 2015 of the DRI are no longer operational. MMTC shall release the security/BG amount to the Petitioner, to the extent it is entitled in accordance with law, forthwith and in any event not later than 10 days from today.

25. As far as the SCN is concerned, if no further hearings are contemplated, the Adjudication Officer should proceed to pass the adjudication order not later than three months from today in accordance with law. The petition is allowed in the above terms.

