

2020-TIOL-65-HC-MAD-CUS

IN THE HIGH COURT OF MADRAS

WP.No.9656 of 2019

M/s DALMIA CEMENT BHARAT LTD  
REPRESENTED BY ITS DEPUTY EXECUTIVE DIRECTOR R GURURAJAN  
'FAGUN MANSION' FOURTH FLOOR, 26, ETHIRAJ SALAI  
EGMORE, CHENNAI-600008

Vs

1) ASSISTANT COMMISSIONER OF CUSTOMS (REFUNDS)  
OFFICE OF THE COMMISSIONER OF CUSTOMS  
CUSTOMS HOUSE, CHENNAI-600001

2) DEPUTY COMMISSIONER OF CUSTOMS (GR.2)  
OFFICE OF THE COMMISSIONER OF CUSTOMS  
CUSTOMS HOUSE, CHENNAI-600001

Dr Anita Sumanth, J

Dated: January 03, 2020

Appellant Rep by: M/s P Jayalakshmi

Respondent Rep by: Mr Kumudh Jabhakh Junior Standing Counsel

Cus - Petitioner seeks a mandamus directing the respondents to refund the amount deposited for the purposes of import through several bills of entry - despite the elapse of nearly 15 years from the dates of the Provisional assessments of the Bills of Entry, no final assessments have been completed till date in the matters - petitioner, for its part regularly sought the refund of EDD and Cess, however, due to the inordinate delay and inaction of the department, the present petition has been filed - no counter has been filed by the respondent in the matter, however, instructions as received from the department mentions that Directorate of Revenue Intelligence appears to have undertaken certain investigations into the import of Coal from Indonesia against 'some importers' and it is solely for this reason that the provisional assessments of the petitioner have been kept pending inordinately till date, despite furnishing of all necessary particulars by the petitioner; that there is no time limit for finalisation of the provisional assessments and hence there is no limitation that would apply.

Held: Argument of Revenue is unacceptable in the light of Circular No.11/2001 dated 23.02.2001 wherein it is instructed that where provisional assessment is being resorted to, the investigation and finalisation of the assessment must be completed within four months from the date of reply; that if no decision is taken within four months, the extra duty deposit should be discontinued and the Deputy Commissioner/Assistant Commissioner concerned will be held responsible for inexplicable delay in finalisation - Moreover the Board, on 16.07.2007 has also specifically referred to the pendency of

provisional assessments on demands on leviability of Cess /EDD on import of Coking Coal stating that in the case of M/s. Tata Iron & Steel Co. Ltd. Vs. Commissioner of C. Ex. & Cus., Bhubaneswar = 2003-TIOL-94-SC-CUS, Supreme Court has held that, since coal is neither produced nor manufactured, the additional duty of customs is also not leviable on imported coal under Section 3 of the Customs Tariff Act read with section 6 of the Coal Mines (Conservation & Development) Act 1974 (CCDA); that since the issue regarding leviability of cess/additional duty of customs on imported coal stands settled, all concerned are required to finalise the provisional assessments accordingly - It is thus clear that this very issue has been settled by the Board even as early as in 2007, in favour of the assessee and, therefore, there is thus no justification for the respondents in the present case to have tarried so long and to delay finalisation of assessments as well as consequential refunds to the petitioner - Refund is required to be paid to the petitioner within a period of four weeks along with interest in terms of Section 27(a) of the Customs Act - Writ petition is allowed: High Court [para 9 to 12]

Petition allowed

#### JUDGEMENT

Per: Dr Anita Sumanth:

The petitioner seeks a mandamus directing the respondents to refund the amount deposited for the purposes of import through several bills of entry (B/E) bearing Nos.614713, 614714, 614715, 614716, 614717, 614718, 614719, 614720, 614721 all dated 15.04.2004, B/E No.621470 dated 28.04.2004 and B/E No.633745 dated 25.05.2004 along with interest till date of payment.

2. The petitioner had imported coal in 2004 on two vessels, the M.V.Tamil Anna and M.V.Selendang Nilam and had remitted Additional Duty Deficit (ADD) in respect of the imports. An indemnity bond had also been executed by the petitioner. Thereafter, the petitioner, vide communication dated 25.04.2005 enclosed various original documents in regard to the imports requesting the Deputy Commissioner of Customs to finalise the proceedings for assessments and refund the EDD and Cess remitted, expeditiously.
3. Admittedly, despite the elapse of nearly 15 years from the dates of the Provisional assessments of the Bills of Entry, no final assessments have been completed till date in the matters. The petitioner, for its part regularly sought the refund of EDD and Cess, on 18.05.2005, 10.12.2007 and 17.01.2008. On 10.03.2008 a notice was issued by the respondents calling upon the petitioner to produce documents necessary for finalisation of the provisional assessments, such as bills of entry, bills of lading, bank attested final invoices and survey reports, The notice was accompanied by a deficiency memo-cum-notice for personal hearing, calling upon the assessee to appear in person.
4. The petitioner appeared before the officer on 31.03.2008 and also made detailed submissions in regard to the veracity of its claim regarding refund of EDD and Cess, which was reiterated on 30.04.2008 and followed up thereafter.
5. The present writ petition has been filed in the light of the inordinate delay and the inaction of the Department to issue the refund due to the petitioner.

6. No counter has been filed in the matter, despite a final opportunity having been granted to the respondent.

7. Today instructions as received from the Department are circulated by the learned Standing Counsel. The Instructions are as follows:

'Please refer to Legal Section - Sea Note dated 23.12.2019 and 27.12.2019 calling for brief facts, para wise comments and certain clarification on the above subject.

The brief facts of the case are that M/s.Dalmia Cement (Bharat) Ltd., had filed 12 Bills of Entry during April and May, 2004 for import of Coal from Indonesia and the Bills were assessed provisionally with Extra Duty Deposit of Rs.21,92,486/- in terms of the instructions contained in Board's Circular No.11/2001-Cus dated 23.02.2001. The Directorate of Revenue Intelligence, New Delhi undertook certain investigations into the import of Coal from Indonesia against some importers and hence the assessment of the Bills of Entries filed by M/s.Dalmia Cement (Bharat) Ltd., continued to be provisional. However during February, 2008 the petitioner filed refund claims for the EDD deposited by them. The claims could not be sanctioned for want of finalization of the said provisional assessments. DRI, Mumbai Zonal Unit vide their letter dated 29.07.2019 received on 05.08.2019 informed that finalization of assessments of Bills of Entry relating to imports of Coal from Indonesia prior to the period 01.10.2010 may be considered on merits. Accordingly finalization of the Bills of Entry filed by the importer are now being taken up and would be completed within 15 working days and consequently the fact of finalization would be intimated to Refunds Section for further processing of their refund claim. It is also informed that there is no time limit for finalization of provisional assessments and hence limitation of time would not apply for these cases. It is further submitted that the question of payment of interest on EDD does not arise since refund of EDD or any other amounts would arise only on finalization of provisional assessments.

In view of the above facts, it is requested that the Hon'ble High Court may be informed accordingly.'

8. The following facts emanate from the Instructions, as above:

(i) The petitioner has co-operated till date in furnishing the details called for by the respondents.

(ii) The Directorate of Revenue Intelligence appears to have undertaken certain investigations into the import of Coal from Indonesia against 'some importers' and it is solely for this reason that the provisional assessments of the petitioner have been kept pending inordinately till date, despite furnishing of all necessary particulars by the petitioner.

9. The stand of the Revenue is that there is no time limit for finalisation of the provisional assessments and hence there is no limitation that would apply. This argument is unacceptable in the light of Circular No.11/2001 dated 23.02.2001, wherein at paragraph-9 the Board states as follows:

'9. The amount of extra duty deposit presently kept at 1% will be continued. Board has however decided that if the importer does not furnish complete reply to the questionnaire within 30 days, of receipt of the 'Questionnaire' by the importer, the extra duty deposit will be increased to 5% till the date of receipt of reply by the Department. It should therefore be impressed upon the concerned

importers (in the public notice that is issued) to ensure timely replies being sent to the Questionnaire to avoid any higher deposit being insisted.

Furthermore, where provisional assessment is being resorted to, the investigation and finalisation of the assessment must be completed within four months from the date of reply. If no decision is taken within 4 months, the extra duty deposit should be discontinued and the concerned Deputy Commissioner/Assistant Commissioner will be held responsible for inexplicable delay in finalisation.'

10. Moreover the Board, on 16.07.2007 has also specifically referred to the pendency of provisional assessments on demands on levability of Cess /EDD on import of Coking Coal stating as follows:

'To

All the Chief Commissioner of Customs & Central Excise,  
All the Chief Commissioner of Customs,  
All the Chief Commissioner of Central Excise.

Sub: Levability of Cess/Additional Duty of Customs on import of Coking Coal, Coke - reg.

...

Sir,

I am directed to say that as informed by the field formations, a number of provisional assessments and demands are pending on levability of cess/additional duty of customs on import of coking coal.

2. The matter has since been examined in consultation with the Ministry of Coal, who have informed that no notification has been issued by them under Section 7 of Coal Mines (Conservation & Development) Act 1974 (CCDA) for imposing duty of Customs under the said Act. Further, Hon'ble Supreme Court, in the case of M/s. Tata Iron & Steel Co. Ltd. Vs. Commissioner of C. Ex. & Cus., Bhubaneswar (2003 (154) ELT. 343 (SC)) = 2003-TIOL-94-SC-CUS, held that, since coal is neither produced nor manufactured, the additional duty of customs is also not leviable on imported coal under Section 3 of the Customs Tariff Act read with section 6 of the CCDA. Audit para no. 10,12 (DAP No.74) of C&AG's audit report for 2002-2003 (Customs) has also been settled by the C&AG on the aforesaid grounds.

3. In light of the above, the issue regarding levability of cess/additional duty of customs on imported coal stands settled. You are requested to instruct all concerned to finalise the provisional assessments accordingly & decide the pending demands on the aforesaid issue.

Yours faithfully,

(T.K.Bandyopadhyay)  
Under Secretary (LC)  
Telefax: 2336 0473'

11. It is thus clear that this very issue has been settled by the Board even as early as in 2007, in favour of the assessee. There is thus no justification for the respondents in the present case to have tarried so long and to delay finalisation of assessments as well as consequential refunds to the petitioner.

12. This writ petition is allowed. The refund will be paid over to the petitioner within a period of four weeks from date of receipt of copy of this order along with interest in terms of Section 27(a) of the Customs Act, computed from three (3) months from 17.12.2007 being date of receipt of the application in respect of one claim and three (3) months from 10.09.2007 in regard to the other claim. No costs.