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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: 21.11.2022

+ **W.P.(C) 8900/2021 & CM Appls.27657/2021, 34449/2021**

R K OVERSEAS THROUGH ITS PROPRIETOR

MR. RAKESH

.....Petitioner

Through: Ms Vibha Datta Makhija, Sr. Advocate with Mr Shariq Ahmed, Mr Tariq Ahmed and Mr Vinay Vats, Advs.

versus

SENIOR INTELLIGENCE OFFICER, DIRECTORATE OF REVENUE INTELLIGENCE & ORS.Respondents

Through: Mr Satish Kumar, Sr. Standing Counsel with Ms Vaishali Goyal and Mr Dhruv, Advs. for R-1, 2 & 3. Mr Sandeep Gunjal, Deputy Director and Mr Anuj Pundhir, Intelligence Officer, DRI. Mr Vikrant N. Goyal with Mr Vishal Mishra, Advs. for R-4. Mr Vipin Bhasker, Adv. for R-5.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MS. JUSTICE TARA VITASTA GANJU

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J. (Oral):

1. This writ petition is directed against the communication dated 29.07.2021 [hereafter referred to as "impugned communication"], passed by respondent no.1 i.e., Senior Intelligence Officer, Directorate of Revenue Intelligence (DRI), Mumbai Zonal Unit.

2. Notice in the writ petition was issued on 24.08.2021.
- 2.1 Since then, pleadings in the writ petition stand completed.
3. The respondent nos.1 to 3/revenue [hereafter referred to as “official respondents”] pursuant to the various orders of this Court, have filed several additional affidavits.
4. Rejoinder has also been filed by the petitioner in the matter.
5. We have heard the counsel for the parties at length.
6. The submissions on behalf of the petitioner have been advanced by Ms Vibha Datta Makhija, learned senior counsel, while Mr Satish Kumar, learned senior standing counsel made submissions on behalf of official respondents/revenue.
7. The broad facts which have emerged in the matter are as follows:
8. The respondent no.1 issued the impugned communication to the banker of the petitioner i.e., IndusInd Bank Limited [hereafter referred to as the “bank”], which in substance, prevented the bank from making any debit entries in the account maintained with it by the petitioner.
- 8.1 Furthermore, it was clearly indicated in the impugned communication, that no “outward transactions” would be permitted in the said account, until further communication was received in that behalf from respondent no.1.
- 8.2 A request was made *via* the same communication to the petitioner’s banker, to provide KYC documents and bank statement, *albeit* from the date when the account was opened till the date when the impugned communication was issued.
9. It is this, which brought the petitioner to the Court.

10. The petitioner has assailed the impugned communication on the ground, that it has been issued without the authority of law.

10.1 *Inter alia*, the provisions of Section 110 of the Customs Act, 1962 [in short “Act”] were adverted to, on behalf of the petitioner.

11. Upon the official respondents/revenue filing a counter-affidavit [and other additional affidavits] in the matter, what emerged was, that according to the official respondents/revenue, the petitioner had illegally availed duty drawback, against overvalued exports.

11.1 The stand of the official respondents/revenue is, that based on the intelligence developed by DRI, Mumbai, it surfaced that the petitioner was part of a syndicate, which was involved in fraudulent/unlawful availment of duty drawback, by taking recourse to bogus dummy Importer Exporter Codes [“IECs”].

11.2 The IECs, according to the official respondents/revenue, were fraudulently obtained by misleading certain “innocent persons.”

12. The official respondents/revenue have alleged, that the syndicate has obtained 124 IECs, which represent exports worth Rs.1960 crores, and in the process, availed, *albeit* illegally, Rs.52 crores as duty drawback.

12.1 As indicated above, the official respondents/revenue allege, that the petitioner is a member of the syndicate.

13. Insofar as the petitioner is concerned, the more specific allegation is, that it had exported, in June, 2021 “Ready Made Garments made of Man Made Fiber Boys Woven Shirts”, against 26 shipping bills.

13.1 The FOB value represented by these 26 shipping bills, even according to the petitioner, is Rs.20,92,85,278.50/-.

13.2 Against this, the petitioner, concededly, has lodged a duty drawback claim amounting to Rs.63,71,452/-.

14. The petitioner has admittedly obtained duty drawback against 20 shipping bills, out of a total of 26 shipping bills, upon the same being sanctioned by the official respondents/revenue.

14.1 The duty drawback sanctioned against 20 shipping bills amounts to Rs.49,23,635/-.

15. Thus, what remained to be processed, were 6 shipping bills, which represent duty drawback amounting to Rs.14,47,817/-.

15.1 Because investigations were on, the amount claimed against 6 shipping bills has not been sanctioned, and hence remittance of money against 6 shipping bills remains on hold.

16. Thus, at the heart of the matter, is the amount which represents duty drawback against the 20 shipping bills, which stands credited to the subject bank account maintained by the petitioner with respondent no.4 i.e., the bank.

17. We may note, that the record, as presently made available to us, discloses that a provisional attachment order was issued on 23.08.2021, which was received by the petitioner's bank on 06.09.2021.

17.1 The record also reveals, that before the expiry of six (6) months, the official respondents/revenue extended the tenure of provisional attachment *qua* the petitioner's bank account, by issuing a second provisional attachment order on 18.02.2022.

17.2 The provisional attachment order dated 18.02.2022 purported to extend the timeframe of the provisional attachment order dated 23.08.2021 by further six (6) months, in terms of the proviso appended to Section

110(5) of the Act.

18. Willy-nilly, the statutory timeframe of one year provided in Section 110(5) [read with the proviso appended thereto] of the Act, commencing from the date when the provisional attachment was issued in the first instance i.e., on 23.08.2021 expired [after the issuance of the second provisional attachment order dated 18.02.2022] on 23.08.2022.

19. Therefore, the situation which obtains today, is that while the writ petition assails the impugned communication, the official respondents/revenue have brought on record provisional attachment orders [referred to hereinabove], to which no challenge has been laid.

20. The stand of the petitioner, however, is that if in the first instance the action was contrary to law, the same could not have been cured by issuance of subsequent provisional attachment order.

21. Whether there is force in this submission or not, is an aspect which need not detain us, at this juncture, because, as noticed above, even the extended statutory timeframe provided under Section 110(5) of the Act has expired.

22. Therefore, according to us, the only issue which needs to be considered is: whether we should allow the petitioner to take benefit of the duty drawback amounting to Rs.49,23,635/- lying credited in its bank account, while the adjudication is on?

23. During the course of arguments, Ms Makhija placed before us, a sample hard copy of the Let Export Order [“LEO”].

23.1 A perusal of the LEO shows, that remittance against the exports was required to be received latest by 31.03.2022.

23.2 Ms Makhija does not dispute this aspect.

23.3 The very same LEO, *inter alia* also discloses, that it refers to the FOB value of consignment, as also the duty drawback amount.

24. Admittedly, up until now, against none of the 26 shipping bills, sale proceeds have been received.

24.1 Ms Makhija says, that because the impugned communication was issued, the buyers did not remit the money.

25. In our view, this submission is untenable.

25.1 A perusal of the impugned communication would show, that all that it prevented was the outward flow of money, by prohibiting the bank from making a debit entry in the petitioner's account maintained with it.

25.2 There was no bar on the petitioner's banker receiving remittances from foreign buyers.

26. We may also note, that nothing has been placed on record before us, [perhaps given the nature of action when the petitioner, in the first instance, approached the Court] as to whether extension of time was sought from the concerned authority for receipt of sale proceeds against the subject exports, and if it was, what was the outcome of such request.

27. Section 75 of the Act, in which the provision for grant of duty drawback is embedded, is founded on the fact that sale proceeds are received by or on behalf of the exporter within the timeframe allowed under the Foreign Exchange Management Act, 1999 ["FEMA"], else it is deemed to never have been allowed¹, save and except in such circumstances or conditions as is provided in the rules framed by the Central Government.

¹ **Surinder Singh (Dead) through legal representatives vs. Union of India & Ors. (2018) 17 SCC 270**
"15...Suffice is to point out that the effect of Section 75 of the Customs Act, 1962, is that in case value/price of the goods exported is not received, it is to be presumed as if no drawback was ever allowed and in that view of the matter, the duty drawback which was taken by the appellant had to be refunded."

27.1 The power to frame rules is provided in sub-section (2) of Section 75 of the Act.

28. For the sake of convenience, the aforementioned section, along with the relevant proviso is extracted hereunder:

“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 [clause (a) of section 84] 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 sub-section (2): PROVIDED that no drawback shall be allowed under this sub-section in respect of any of the aforesaid goods which the Central Government may, by rules made under sub-section (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 sub-section 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 rule, specify,] be deemed never to have been allowed and the Central Government may, by rules made under sub-section (2), specify the procedure for the recovery or adjustment of the amount of such drawback.]”

[Emphasis is ours]

28.1 These are aspects, which the concerned authority, if approached, will have to consider.

29. In this context, we may also, usefully, advert to Rule 18 of the Customs and Central Excise Duties Drawback Rules, 2017 [in short “2017 Rules”]. For the sake of convenience, the said Rule is extracted hereafter:

“18. Recovery of amount of Drawback where export proceeds not realised. –

(1) Where an amount of drawback has been paid to an exporter or a person authorised by him (hereinafter referred to as the claimant) but the sale proceeds in respect of such export goods have not been realised by or on behalf of the exporter in India within the period allowed under the Foreign Exchange Management Act, 1999 (42 of 1999), including any extension of such period, such drawback shall, except under circumstances or conditions specified in sub-rule (5), be recovered in the

manner specified below:

Provided that the time-limit referred to in this sub-rule shall not be applicable to the goods exported from the Domestic Tariff Area to a special economic zone.

(2) If the exporter fails to produce evidence in respect of realisation of export proceeds within the period allowed under the Foreign Exchange Management Act, 1999, or any extension of the said period by the Reserve Bank of India, the Assistant Commissioner of Customs or the Deputy Commissioner of Customs, as the case may be, shall cause notice to be issued to the exporter for production of evidence of realisation of export proceeds within a period of thirty days from the date of receipt of such notice and where the exporter does not produce such evidence within the said period of thirty days, the Assistant Commissioner of Customs or Deputy Commissioner of Customs, as the case may be, shall pass an order to recover the amount of drawback paid to the claimant and the exporter shall repay the amount so demanded within thirty days of the receipt of the said order:

Provided that where a part of the sale proceeds has been realised, the amount of drawback to be recovered shall be the amount equal to that portion of the amount of drawback paid which bears the same proportion as the portion of the sale proceeds not realised bears to the total amount of sale proceeds.

(3) Where the exporter fails to repay the amount under sub-rule (2) within said period of thirty days referred to in sub-rule (2), it shall be recovered in the manner laid down in rule 17.

(4) Where the sale proceeds are realised by the exporter after the amount of drawback has been recovered from him under sub-rule (2) or sub-rule (3) and the exporter produces evidence about such realisation within a period of three months from the date of realisation of sale proceeds, the amount of drawback so recovered shall be repaid by the Assistant Commissioner of Customs or Deputy Commissioner of Customs, as the case may be, to the claimant provided the sale proceeds have been realised within the period permitted by the Reserve Bank of

India:

Provided that-

(i) the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, may extend the aforesaid period of three months by a period of nine months provided the sale proceeds have been realised within the period permitted by the Reserve Bank of India;

(ii) an application fee equivalent to 1% of the FOB value of exports or one thousand rupees whichever is less, shall be payable for applying for grant of extension by the Principal Commissioner of Customs or Commissioner of Customs, as the case may be.

(5) Where sale proceeds are not realised by an exporter within the period allowed under the Foreign Exchange Management Act, 1999 (42 of 1999), but such non-realisation of sale proceeds is compensated by the Export Credit Guarantee Corporation of India Ltd. under an insurance cover and the Reserve Bank of India writes off the requirement of realisation of sale proceeds on merits and the exporter produces a certificate from the concerned Foreign Mission of India about the fact of nonrecovery of sale proceeds from the buyer, the amount of drawback paid to the exporter or the claimant shall not be recovered.”

30. A careful perusal of sub-rule (1) of Rule 18 of the 2017 Rules shows, that where duty drawback has been paid to an exporter, or a person authorized by him, but the sale proceeds in respect of such exports have not been realized by or on behalf of the exporter located in India, within the period allowed under the Foreign Exchange Management Act, 1999 [in short “FEMA”] or within such time as extended by the concerned authority, such drawback is required to be recovered [except in circumstances or conditions specified in sub-rule (5)] in the manner specified in the said Rule.

30.1 As is obvious, this provision, broadly, replicates what is provided in the second (2nd) proviso appended to Section 75(1) of the Act.

31. As noticed above, insofar as this case is concerned, there is no dispute, that sale proceeds have not been received.

32. Ms Makhija says, that this is really a case, if at all, of the petitioner having received duty drawback amount in excess, and therefore, the demand by a proper officer under Rule 17 of the 2017 Rules needs to be raised.

33. We are unable to agree with this submission of Ms Makhija; with the *caveat* that recovery, as emanating under Rule 18, has to be made in the manner prescribed under Rule 17, as indicated in Rule 18(3) of the 2017 Rules.

33.1 This is clearly, as demonstrated by the facts recorded above, a case where duty drawback has been paid to the exporter [in the instant case, the petitioner], but admittedly, up until now, sale proceeds have not been received against such exports, and therefore the deeming provision incorporated in the second (2nd) proviso to Section 75 of the Act will kick in.

33.2 The provision, in no uncertain terms stipulates that in such situation, the duty drawback is deemed never to have been allowed.

34. Therefore, since the amount, which is lying credited to the petitioner's account, concededly, represents a part of the duty drawback sanctioned in favour of the petitioner against 20 shipping bills, no such direction can be issued which would result, ultimately, in the petitioner, at this stage, getting access to those funds.

35. As noted right in the beginning, no consequential relief has been sought in the writ petition.

36. Therefore, while we agree with Ms Makhija, that the impugned communication was flawed, inasmuch as it was a case of acting, perhaps, before complying with the requirements of Section 110 of the Act, the

record shows, that the official respondents/revenue corrected course, by issuing a provisional attachment order dated 23.08.2021, and having its tenure extended *via* the second attachment order dated 18.02.2022.

36.1 Insofar as the legal tenability of these provisional attachment orders are concerned, they are not under challenge before us.

37. We may also note, that it is the stand of the official respondents/revenue, that several summons have been issued, which have been returned by the postal authorities.

37.1 Reference in this regard is made to the summons dated 05.10.2021, 10.11.2021 and 01.02.2022.

37.2 The petitioner's assertion *vis-a-vis* these summons is, that it remained available at the given premises, and for this purpose, it has placed reliance on a rent agreement dated 16.09.2020.

38. As mentioned above, these are not the aspects up for adjudication, in this writ petition.

39. Therefore, as indicated above, the writ petition is disposed with the following directions:

- (i) The petitioner will be free to operate the impugned bank account, as at the moment, there is no legal impediment, given the fact that the provisional attachment orders which were issued to make course correction have outlived their legal efficacy. However, insofar as the duty drawback against 20 shipping bills is concerned i.e., Rs.49,23,635/- which stands credited in the petitioner's bank account, it will stand remitted to the official respondents/revenue, leaving the remaining amount, if any, in the petitioner's bank account.

- (ii) The official respondents/revenue will invest the aforesaid amount, in an interest-bearing fixed deposit.
 - (iii) The petitioner will respond to the show-cause notice dated 28.07.2022. For this purpose, the petitioner is granted further four (4) weeks to file a reply. The period of four (4) weeks will commence from today.
 - (iv) The adjudicating authority will attempt to conclude the adjudication proceedings, within the next three months.
 - (v) We may also make it clear, that in case the petitioner is able to obtain sale proceeds against the subject exports, it will have liberty to approach the concerned authority for release of duty drawback, finally or provisionally, in the event the adjudication *qua* the petitioner is not over within the timeframe indicated above. If approached, the concerned authority will take a decision *vis-à-vis* such request, as per law.
40. Consequently, pending applications shall stand closed.

(RAJIV SHAKDHER)
JUDGE

(TARA VITASTA GANJU)
JUDGE

NOVEMBER 21, 2022/pmc