

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.06.2015

CORAM

THE HONOURABLE MR.JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MS.JUSTICE K.B.K.VASUKI

Civil Miscellaneous Appeal No.350 of 2009
& M.P.No.1 of 2009

The Commissioner of Central Excise,
Central Excise Commissionerate,
No.1, Williams Road,
Cantonment, Tiruchirappalli - 620 001.

... Appellant

Vs.

1. M/s.Super Spinning Mills Ltd.,
'C' Unit, D.Gudalur,
Vedasandur Taluk,
Dindigul District.
2. Customs, Excise and Service Tax Appellate
Tribunal, Chennai Bench,
No.26, Haddows Road, 1st Floor,
Shastri Bhavan Annexe,
Chennai - 600 006.

... Respondents

APPEAL filed under Section 35G of the Central Excise Act against the order dated 12.08.2008 made in Final Order No.866 of 2008 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant : Mrs.RK.Sekina Reshma

For Respondents : Mr.Lakshmi Kumaran - R1

J U D G M E N T
(Judgment of the Court was delivered by R.SUDHAKAR,J.)

This Civil Miscellaneous Appeal filed by the Revenue as against the order dated 12.08.2008 made in Final Order No.866 of 2008 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South

Zonal Bench, Chennai was admitted by this Court on the following substantial questions of law:

" 1. Whether mentioning of Section 72 of the Customs Act, 1962 along with Section 28 of the Customs Act, 1962 would render the Show-Cause Notice outside the purview of Section 72, when the said Show-Cause Notice was purporting improper accounting of the imported materials under Section 72(1)(d) through violation of the condition specified in the exemption Notification No.53/97 - Cus dated 03.06.1997 by M/s.Super Spinning Mills Ltd., who were holders of private bonded warehouse licence issued under Section 58 of the Customs Act, 1962 and were carrying out manufacturing and other operations in the private bonded warehouse, as per Section 65 of Customs Act 1962?

2. Whether wrong mention of provision of law in the show cause notice is sufficient to invalidate the exercise of that power, when the power exercised is available under a different provision?"

2. The brief facts of the case are as follows:

The first respondent/assessee is a 100% Export Oriented Undertaking and holders of Central Excise Registration No.AADCS 0672 XM 01 and Customs Licence No.1/92 dated 21.2.1992 for undertaking manufacturing activity under bond. The assessee is engaged in the manufacture of cotton yarn falling under Chapter Heading 52.05 of the Schedule to both Central Excise Tariff Act, 1985 and Customs Tariff Act, 1975 and procure raw materials viz., cotton indigenously and also through imports. They were exporting cotton yarn as well as clearing under DTA sales in the domestic market. The assessee had imported cotton from various countries without payment of Customs Duty claiming exemption under Notification No.53/97 (Cus) dated 3.6.97 as amended for use in the manufacture of cotton yarn. One of the conditions stipulated in the said Notification was that the imports, clearance, export, transfer and usage of goods and goods manufactured there from and the net foreign exchange earning as a percentage of export shall be subject to the conditions of Export and import policy for 1st April 1997 to 31st March 2002 notified by the Government of India under the Ministry of Commerce Notification No.1/97 dated 31.3.1997. The norms were fixed for waste and scraps, fixed for an export product by an Export Oriented Unit as per Sl.No.100 of Appendix 41 of Hand Book of Procedures, EXIM Policy 1997-02 vide Public Notice No.34(RE-01)/97-02 effective from 1.12.1999 in the following manner:

S.No.	Goods Manufactured	Imported goods used	Percentage of scrap or waste on imported goods
1	Combed cotton yarn below 40's	Cotton	25%

3. In terms of Notification No.53/97 dated 3.6.97 as amended that in case of imported cotton, permissible wastage is 25% when used in the manufacture of combed cotton yarn below 40's count. If the waste exceeds 25%, no benefit of duty free import under the said notification would be available in the cotton imported and used in such excess waste. The assessee has been regularly corresponding with the jurisdictional authorities on the quantum of waste collected and some of the correspondences referable to the instant case were dated 02.02.2000, 16.10.2000, 06.10.2000, 10.11.2000 and 11.10.2001. These correspondences relate to excess generation of waste in respect of the imported cotton. However, on scrutiny, the Department was of the view that the cotton waste generated in the Course of manufacture of combed cotton yarn out of the imported cotton, exceeded the prescribed norms on several occasions, which the importer did not declare to the Department; consequently, statements were recorded from the person concerned and a show cause notice was issued on 16.12.2003 in the following manner:

"Therefore, M/s. Super Spinning Mills Ltd., D.Gudalur are hereby called upon to show cause to the Joint Commissioner of Central Excise (Tech), Trichy as to why

i. an amount of Rs.6,21,062/- (Rupees Six Lakhs twenty one thousand and sixty two only) being the Customs duty amounting to Rs.5,91,560/- and the surcharge amounting to Rs.29,502/- as detailed in the Annexure should not be demanded under proviso to Section 28(1) of the Customs Act, 1962 read with Section 72 of the Customs Act, 1962.

ii. a penalty should not be imposed under Section 117 of the Customs Act, 1962 for contravening the provisions as detailed above and

iii. interest at appropriate rate should not be recovered from them under Section 28 of the Customs Act, 1962.

(emphasis supplied)

4. In response to the said notice, the assessee filed a reply denying the allegations made in the Show Cause Notice. After due process of law, the Adjudicating Authority adjudicated the matter and passed an order holding that there was no suppression by the

assessee. After considering the entire issue, the Adjudicating Authority came to the conclusion that the waste generated was well within the knowledge of the jurisdictional Central Excise Officers and there is no question of suppression of facts regarding the cotton waste generated. To buttress the plea of no suppression, the Original Authority referred to the various correspondences between the assessee and the Department, which we extract herein for better clarity:

"The other contention raised by SSML is that the demand is barred by limitation of time. I have perused the copies of communication between the Range Officer and SSML during the material period, which are referred below:

i) SSML vide letter dated 02.02.2000 addressed to the Range Officer, submitted "Yearly return of Bond Account" for the Year 1999 furnishing the details of receipt and issue, wastage, and invisible loss for the imported materials for the period from 01.01.99 to 31.12.99. The Range Officer had signed on each statement.

ii) The Range Officer vide letter O.C.No.877A/2000 dated 04.10.2000, called for the particulars of cotton waste and yarn waste of imported cotton. In their reply dated 16.10.2000 SSML had furnished the details of such waste.

iii) The Range Officer vide letter O.C.No.886/2000 dated 06.10.2000, has asked SSML to pay 50% of applicable Customs Duty and other duties immediately on the waste cleared to DTA. SSML in their reply dated 10.11.2000, claimed that waste falling under Chapter heading 52.02 is exempt from whole of the duty. "

Accordingly, the Adjudicating Authority passed the following order:

"21. From the above correspondence that took place over a period of time, it is clear that the issue of waste generated was well within the knowledge of jurisdictional Central Excise Officers. Hence, it cannot be said that there was suppression of facts regarding cotton waste generated. Therefore, there is no case for invoking extended period of limitation. Hence, the demand is not sustainable on the ground of limitation of time.

22. In view of the above findings, I pass the following

ORDER

I here by drop the proceedings initiated against M/s. Super Spinning Mills Ltd., 'C' Unit, D.Gudalur vide show cause notice dated 16.12.03."

5. As against the order of the Adjudicating Authority, the Department filed an appeal before the Commissioner (Appeals) contending that that the time limit specified under Section 28(1) of the Customs Act was not applicable to the case and that the applicable provisions were those of Section 72(1) of the Customs Act, which did not specify any time limit. The Commissioner (Appeals) rejected the contention of the Department and held that Section 72 of the Customs Act was not applicable to the facts of the case and it was not open to the Department to change their stand after having invoked Section 28 of the Customs Act for demanding duty. The Commissioner (Appeals) further held that the Department had no basis to sustain the duty in terms of Section 72 as they proceeded entirely on the basis of proviso to Section 28 of the Customs Act. Accordingly, the Commissioner (Appeals) upheld the order of the Adjudicating Authority holding as follows:

" From the above, it may be seen that under four situations demand under Section 72 could be raised. It is seen in the show cause notice and in the order, situations mentioned in Section 72(1) (a), (b), (c) are not referred to. Though Section 72 had been invoked in the SCN, it has not been spelt out how the said Section would be applicable. Similarly in the Order in Original also the adjudication authority had only denied the benefit of notification 53/97-CUS for the reason that while manufacturing cotton yarn, excess waste has been generated in the use of imported raw materials in contravention of the notification in question and accordingly the adjudicating authority has confirmed the demand, though it has dropped it on the question of time limit under Section 28 of the Customs Act. But in the impugned appeal the department had raised a point which was not there in the original proceedings i.e. in the show cause notice viz., Section 72(1)(d) would be applicable as there had been non-accountal of goods. The raising of a ground, for the first time which is not in the show cause notice itself is not legally acceptable. Section 72 relates to such quantum of goods which are supposed to be bonded through bond under Section 59 and which have not been cleared for home consumption or exportation and the same are not duly accounted by the importer whereas this is a case where the department contends that imported raw materials which have been bonded correctly and which have been used in the manufacturing process correctly have resulted in excess generation of waste which have been cleared in DTA. Hence the situation contemplated under the provision 72(1)(d) is not relevant to the facts of the case.

4.5 In this case the goods/waste/scrap were neither bonded goods nor covered in Bond under Section 59 of Customs Act, 1962. Therefore they were not warehoused goods and provisions of Section 72 will not apply. Reliance placed in the case of Union Carbide India Ltd., reported in 1995(22) ELT 102. Since provisions of sec. 72 are not applicable, the lower authority having not invoked provisions relating to Central Excise Act have resorted to provisions of sec 28 and further found that proviso to sec 28 could not be invoked for the reasons stated in the order and accordingly dropped the proceedings. In this connection it may be noted that the Department's contention that sec 28 of Cus. Act has been wrongly invoked and that cannot be relied upon is totally misconceived for the reason that there is an application of mind on part of the Officer who has invoked proviso to sec 28(1) of the Cus Act which envisages demand of duty for a period of 5 years in cases of various situations mentioned therein. After having invoked Section 28(1) without invoking the correct provisions of Section 72, the Department cannot change stand in the grounds of appeal that Section 28 itself is not applicable and only sec 72 is applicable. This alleged wrong invoking of Section 28 cannot come to the rescue of the department. The departmental contention may be correct if the reasoning adopted in the proceedings does not lead to a particular section, which has been wrongly quoted or wrongly invoked, then a stand can be taken that such mistake was purely clerical in nature and in that situation quoting of wrong section or rule will be applicable and would not vitiate the proceedings. But in the instant case the situation is not the same. In Para 8 of the show cause notice there is a clear cut allegation regarding knowledge on the part of the respondents about the provisions of Exim policy about prescription of waste norms and a specific allegation to the extent that the respondents did not inform the department about the generation of such excess cotton waste. So, there is no mis-quoting or wrong quoting of the provisions in the show cause notice as contended by the Department in review application."

(emphasis supplied)

6. Aggrieved by the order of the Commissioner (Appeals), the Department once again pursued the matter before the Tribunal.

7. The Tribunal, concurred with the view of the Commissioner (Appeals), dismissed the appeal holding as follows:

"After giving careful consideration to the submissions, I have found valid point in the submissions made by the counsel. The SCN invoked Section 28 read with Section 72 of demanding duty of Customs from the respondents on a certain quantity of the imported raw material. It invoked the extended period of limitation under the proviso to Section 28(1) of the Act on the ground that the notice had deliberately suppressed the generation of excess cotton waste before the department. The entire drift of the SCN was in the direction of a demand of duty under the proviso to Section 28. The notice also contains peripheral mention of section 72. In the present appeal, the department says that Section 72(1)(d) was invoked in the SCN. This is not factually correct. No fact was pleaded, nor any allegation raised, against the notice by the department purporting to demand duty under Section 72. According to Section 72(1)(d), the proper officer of Customs may demand duty on any goods in respect of which a bond has been executed under Section 59 and which have not been cleared for home consumption or exportation (or) are not duly accounted for to the satisfaction of the proper officer. For such a demand of duty, the ingredients of clause (d) of sub-section (1) of section 72 should be alleged and proved. This has not been done in the present case. As already observed, the tenor of the SCN is for demand of duty under the proviso to Section 28(1) of the Customs Act. Therefore, the claim of the appellant that Section 28 was erroneously mentioned in the SCN and that it was Section 72 which was intended to be pressed into service cannot be accepted. The findings of the ld. Commissioner (Appeals) are eminently sustainable. The appeal gets dismissed." (emphasis supplied)

8. Aggrieved by the order of the Tribunal, the Department is before this Court in this appeal.

9. Learned Standing Counsel appearing for the Department buttress the question of law raised by stating that the mere wrong mentioning of provision of law would not render the entire exercise futile. In this regard, he relied on the decision in the case of Collector of Central Excise, Calcutta V. Pradyumna Steel Ltd. reported in 1996 (82) ELT 441 (SC) and submits that in the said decision, the Supreme Court held as follows:

"It is settled that mere mention of a wrong provision of law when the power exercised is available even though

under a different provision, is by itself not sufficient to invalidate the exercise of that power. Thus, there is a clear error apparent on the face of the Tribunal's order dated 23-6-1987. Rejection of the application for rectification by the Tribunal was, therefore, contrary to law."

10. Heard learned Standing Counsel appearing for the appellant and the learned counsel appearing for the first respondent and perused the materials placed before this Court.

11. It is not the case of the Department that the provision has been wrongly quoted. Factually, there is no allegation or material to support the invocation of Section 72 of the Customs Act. The claim of the Department to demand duty was not in terms of Section 72 of Customs Act. The entire exercise of the Department was on the question of invoking the extended period of limitation. A passing reference to Section 72 will not cure the defect because the assessee or the importer was not put on notice in respect of the charge or demand for duty in terms of Section 72 of the Customs Act.

12. The decision relied on by the appellant does not apply to the facts of the case, as the case before the Supreme Court arose out of the rectification petition. The stand of the Department before the Supreme Court was that the mere mention of an incorrect provision of law in the show cause notice was not sufficient to invalidate the same. In the instant case, it is not the case of the Department that the provision has been wrongly quoted. In the present case, the relevant provision, namely, Section 72 of the Customs Act was not invoked and there was no charge or show cause notice in support of such a demand. Hence, the assessee or the importer cannot be asked to answer the charge, which is not specifically raised.

13. Assuming that Section 72(1)(d) of the Customs Act would apply, there is no material to support such a plea in the show cause notice. As the exact nature of the contravention for invoking Section 72 is absent, on facts, the Original Authority, the Appellate Authority as well as the Tribunal have correctly come to the conclusion that the allegation of the Department against the first respondent/importer is only in respect of willful suppression, which has been found against the Department and in favour of the assessee. There is also a finding that there is no case for demand of duty in terms of Section 72 of the Customs Act. As the Original Authority held that when the jurisdictional Officers have knowledge with regard to the issue of waste generated, which was confirmed by the Appellate Authority, there is no question of suppression of fact by the assessee.

14. In the light of above, we find no reason to interfere with such finding of the fact. The first question of law has been framed on the premise that the show cause notice has proceeded on the basis that there is a demand in terms of Section 72 of the Customs Act only, which is factually not correct. Consequently, the first question of law does not arise, since the show cause notice does not support such a plea.

15. In view of our finding that the show cause notice is bereft of demand to support the claim under Section 72 of the Customs Act, the second question of law is not relevant to the facts of the present case. Accordingly, this appeal stands dismissed. No costs. Consequently, M.P.No.1 of 2009 is also dismissed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To

Customs, Excise and Service Tax Appellate
Tribunal, Chennai Bench,
No.26, Haddows Road, 1st Floor,
Shastri Bhavan Annexe, Chennai - 600 006.

+lcc to Mr.Lakshmi Kumaran, Advocate, S.R.No.31590
+lcc to Mr.R.K.Sekina Reshma, Advocate, S.R.No.31883

सत्यमेव जयते

C.M.A.No.350 of 2009
& M.P.No.1 of 2009

TEJ(CO)
CA(12/08/2015)

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