

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.03.2017

CORAM

THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER

And

THE HONOURABLE MR.JUSTICE M.SUNDAR

W.A.No.1600 of 2016

And

C.M.P.No.19792 of 2016

M/s.Pravin Tex Pvt. Ltd.,
Represented by Mr.Viswanathan,
Partner

... Appellant

Vs.

1.The Customs & Central Excise Settlement Commission,
Additional Bench,
Narmada Block, 2nd Floor,
Custom House, No.60, Rajaji Salai,
Chennai - 600 001.

2.The Commissioner of Customs,
Custom House,
Tuticorin.

.... Respondents

Prayer:

Appeal filed under Clause 15 of Letters Patent praying to set aside the judgment dated 12.09.2016 in Writ Petition No.14999 of 2005.

Prayer in W.P.No.14999/2005: Writ Petition is filed under Article 226 of the Constitution of India praying to issue a Writ of Certriofied Mandamus, calling for the records of the first respondent culminating in the Order No.VIII/10/84 to 88 93 to 95/2003-SC Final Order No.50/Cus/2004 dated 19.11.2004 and quash the same in so far as it relates to demand of additional duty of 24% instead of 16% as per the Notification No.21/2002.

For Appellant : Mr.S.Murugappan

For Respondents : Mr.V.Sundareswaran

J U D G M E N T

(Judgment of the Court was delivered by RAJIV SHAKDHER,J.)

1.This is an appeal preferred against the judgment of the learned Single Judge, dated 12.09.2016.

2. By virtue of the said judgment, the learned Single Judge disposed of a batch of writ petitions, which included, the writ petition filed by the appellant, before us.

2.1. The writ petition filed by the appellant was numbered as: W.P.No.14999 of 2005.

2.2. We may also indicate that, a review was preferred against the order of the learned Single Judge, which was also dismissed by him, vide his order dated 03.11.2016.

3. The record shows that the prayer in the appeal is directed only against the main judgment of the learned Single Judge and not against the order passed in the review petition.

3.1.Both counsels agree, that by itself, will not impact the tenability of the appeal, in view of the fact that, if, we were to deal with the main judgment, it would necessarily impact the order passed in the review petition.

4. In order to adjudicate upon the appeal, the following facts need to be noticed :

4.1.The appellant claims to be a manufacturer and exporter of textile garments. During 2001-2002, the appellant claims that it had exported goods worth Rs.10,17,08,547/-. Consequently, the appellant was issued an export performance certificate by the Apparel Export Promotion Council (in short, AEPC).

4.2. Based on the exports made and the export performance certificate issued by AEPC, the appellant sought to take benefit of Notification No.21/2002, Customs, dated 01.03.2002, which, inter alia entitled import of lining and interlining material equivalent to 2% of the total FOB value of the exports made, during the previous financial year, by claiming full exemption under Entry 168 of the Table appended to the said notification.

4.3. As is indicated above, the value of the imports, which could be made, was correlatable to the Export Certificate, issued by the AEPC.

5. It is the appellant's case that besides the aforesaid, the AEPC had also issued an import certificate in Form IC in favour of the appellant, which entitled it, to import, specifically, polyester lining fabric equivalent to 37697 yards of a value equivalent to Rs.8,34,391.06. The said certificate, according to the appellant, was issued, subject to the

condition, that the goods imported would be used in the manufacture of textile garments and / or leather garments. In other words, the imported goods could not be sold and disposed of in the domestic market.

5.1. Admittedly, the goods which were imported by the appellant were diverted to the domestic market and thereby, ended up violating the conditions of import.

6. This information was made available to the customs authority, which resulted, ultimately, in the issuance of a show cause notice dated 28.05.2003 (in short, SCN).

6.1. The record shows that no reply to the SCN was filed by the appellant; a fact which has been admitted before us by Mr.Murugappan.

7. The appellant, however, filed an application before respondent no.1, i.e., the Customs and Central Excise Settlement Commission, (hereinafter, referred to as 'the Settlement Commission'), on 15.09.2003.

8. We must indicate, at this juncture, that apart from the appellant, there were eight other entities, which were issued, a show cause notice, for the very same infraction, that is, for diversion of goods to the domestic market.

8.1. Furthermore, along with the appellant, the other eight had also moved the Settlement Commission to arrive at settlement, with the Customs Authorities.

9. Continuing with the narrative, the Settlement Commission on 31.12.2003, under Section 127 B of the Customs Act, 1962 (in short, the Act), passed an order, allowing the petitioner's application filed under Section 127 B of the Act.

9.1. The operative directions, which the Settlement Commission issued vide order dated 31.12.2003, are contained in paragraph 5 of the order, which, for the sake of convenience are extracted hereafter:

".... 5. Accordingly, the application is allowed to be proceeded with in terms of sub section (1) of Section 127C of the Customs Act, 1962. M/s.Pravin Tex Pvt. Ltd., Tirupur are directed to pay the balance admitted duty amount of Rs.4,88,768/- within 30 days from the date of receipt of this order, and report compliance."

10. As would be evident from the extract of the order dated 31.12.2003, the appellant was required to pay the balance duty amount of Rs.4,88,768/-, within a period of 30 days from the date of receipt of the said order. Since, compliance of the

said direction was required to be reported, the appellant vide communication dated 13.02.2004, filed a letter with the office of the Settlement Commission, recording therein, that the said sum had been deposited with the concerned Treasury.

11. It is, in this background, that the Settlement Commission proceeded to the next step, which is to pass a final order with regard to the application preferred by the appellant under Section 127B of the Act.

11.1. During the course of the proceeding, the appellant was required to file a work sheet with regard to, what according to it, would be the duty payable in the matter.

11.2. This aspect of the matter is important, as while the appellant did not dispute the fact that there had been infraction of the import conditions, what it did dispute, is the quantification and the levy of the duty under different heads.

11.3. In particular, the appellant disputed the levy of Special Additional Duty (in short "SAD"), as indicated in the show cause notice. We will, touch upon this aspect of the matter, during the course of our discussions, in the latter part of our judgment.

12. Suffice it to say, the Settlement Commission, while passing the final order dated 19.11.2004, directed the appellant to pay the Basic Customs Duty (in short "BCD"), Counter Vailing Duty (in short "CVD"). CVD was levied at the rate of 16%. Apart from this, Additional Duty of Excise (in short, ADE) was also levied, albeit, at the rate of 8%.

12.1. In addition thereto, the appellant was also called upon to pay cess at the rate of 0.5% of the aggregate of assessable value and BCD, as per the table appended to the final order.

12.2. In lieu thereof, the appellant was given immunity from interest in the excess of 10%; penalty, fine and prosecution under the Act.

13. The appellant, however, was not satisfied with the final order passed by the Settlement Commission, as it sought to levy ADE at the rate of 8%. Resultantly, the appellant filed a writ petition, under Article 226 of the Constitution. The learned Single Judge, as stated at the very outset, dismissed the writ petition, as also, the review petition preferred by the appellant.

14. It is, in these circumstances, that the appellant has preferred the instant appeal before us.

15. In support of the appeal, arguments have been advanced

by Mr.Murugappan, while the respondents are represented by Mr.Sundareswaran.

16. Mr.Murugappan, has briefly submitted that under the provisions of the Customs Tarrif Act, 1975 (in short, CTA), only one of the two duties could have been levied, i.e., ADE or SAD, and not both.

16.1. Insofar as the ADE is concerned, it is the learned counsel's submission, that it could not have been levied beyond the consolidated rate of 16%, in view of the provisions of Notification No.21/2002, dated 01.03.2002.

16.2. The aforesaid submission was also sought to be buttressed by the learned counsel, by relying upon Section 3 A (5) of the CTA.

16.3. Based on the said provision, the learned counsel submitted that if SAD was levied, ADE could not have been levied on the appellant.

17. This argument was made in the context of the SCN, which was served on the petitioner, which adverted to, only SAD besides BCD and CVD.

18. In other words, the learned counsel submits that, at best, the appellant could have been mulct with, if at all, SAD, pegged at 4%, as was indicated in SCN.

18.1. It is pertinent to note, though, that before the Settlement Commission the stand taken was SAD could not be levied. It is because the Settlement Commission, via, its final order levied ADE, at the rate of 8%, even while deleting SAD, that the appellant approached the Court by way of a writ petition. Clearly, there is a change in position by the appellant in so far as SAD is concerned, to which, the appellant says that it cannot be held to its earlier position, as the concession given was contrary to law. As to why the stand vis-a-vis SAD was taken in the first, is explained, hereafter.

19. It is also the submission of the learned counsel, both before us and, as it appears, before the Settlement Commission, that though, the Notification No.21/2002, dated 01.03.2002, was an exemption notification, in so far as importers were concerned, conditions contained therein would apply only to the extent they could not be satisfied.

19.1. This submission is sought to be supported by the learned counsel based on a recent judgment of the Supreme Court in the matter of : SRF Ltd. Vs. Commissioner of Customs, Chennai, 2015 (318) E.L.T. 607 (S.C.).

19.2. Furthermore, it was submitted that, since, the exemption Notification No.21/2002, dated 01.03.2002, stipulated a consolidated rate of additional duty at the rate of 16%, qua, textile fabrics whether or not processed, the appellant could be

charged with, only BCD and CVD.

19.3. It is, in this background that, at the relevant time, before the Settlement Commission the appellant took the stand that it could only be called upon to pay BCD and CVD at the rate of 16%.

19.4. In other words, according to the appellant, the Customs Authorities could neither impose SAD, nor, could the Settlement Commission, by way of the final order have imposed ADE, in view of the terms of the Notification No.21/2002, dated 01.03.2002.

20. This submission, however, today, is not pressed before us, by the learned counsel, given the nature of the proceedings from which, the instant appeal emanates. The learned counsel says that he is conscious of the fact that the appellant on its own volition, had approached the Settlement Commission for a settlement, based on the duty delineated under various heads of duty as set out in the SCN.

20.1. The SCN referred to three components of duty, i.e., BCD, CVD and SAD.

20.2. Therefore, the learned counsel submits that neither he nor the Settlement Commission, given the nature of proceedings, can go beyond the SCN.

20.3. Thus, in other words, the submission is that the appellant, in a case, de hors a settlement proceeding, could have, perhaps, argued that duty beyond BCD and CVD cannot be imposed; an argument that may not be available to the appellant, at this juncture.

21. Mr. Sundareswaran, on the other hand contends, that the Settlement Commission proceeded based on the calculation submitted by the appellant which included an element of ADE, besides BCD and CVD.

21.1. It is the learned counsel's submission that, as a matter of fact, based on the say so of the appellant's representative, the Settlement Commission excised SAD, which was intended to be imposed upon it, by virtue of the SCN.

21.2. The learned counsel laid emphasis on the fact that the powers of the Settlement Commission, as reflected in Section 127 C of the Act, are equivalent to that of an Assessing Officer and therefore, it was well within its jurisdiction, to impose ADE on the appellant, while passing a final order.

22. We must indicate herein, that it is not even the case of the respondents that both ADE and SAD could be imposed on the appellant.

22.1. Mr. Sundareswaran, based on the provisions of Section 3(5) of the CTA, fairly stated that it is quite obvious upon a bare perusal of the said provision that only one of the two duties, i.e., SAD or ADE, could be imposed on the appellant.

23. We have heard the learned counsels for the parties and perused the record.

24. According to us, the controversy lies in a narrow compass. The only aspect which is agitated before us, by the appellant is that the Settlement Commission could not have imposed ADE upon it. The submission in this behalf, as noticed above, is based on the reading of the Notification No.21/2002, dated 01.03.2002.

25. It is not in dispute before us, that imposition of ADE is based on the provisions of Section 3 of the Additional Duties Of Excise (Goods of Special Importance) Act, 1957 (in short, 1957 Act).

25.1.A perusal of the 1957 Act, would show that the duty imposed under the 1957 Act is in the nature of excise duty. This is evident even upon a bare perusal of the statement of object and reasons of the 1957 Act.

25.2. For the sake of convenience, the same is extracted hereunder:

"..... An Act to provide for the levy and collection of additional duties of excise on certain goods and for the distribution of a part of the net proceeds thereof among the States in pursuance of the principles of distribution formulated and the recommendations made by the Finance Commission in its second report dated the 18th December, 1990."

(emphasis is ours)

26. If that be so, then, Mr.Murugappan is right in his contention, which is that, the Notification No.21/2002, dated 01.03.2002, would come to the aid of the appellant.

26.1.The reason being that the said notification which is issued under Section 25 of the Act, exempts, so much of additional duty which is leviable under sub-section (1) of Section 3 of the CTA, which is in excess of the rate specified in the corresponding entry in column 5 of the table appended to the said notification. Section 3 (1) of the CTA speaks about excise duty. The entry 410 in Column 5 of the table appended to Notification No.21/2002, dated 01.03.2002, restricts the duty to 16%.

27. Therefore, in our view, as correctly submitted by Mr.Murugappan, ADE, which is in the nature of excise duty is the additional duty, which, if imposed will take it beyond the consolidated rate of 16% in terms of Notification No.21/2002, dated 01.03.2002, as CVD, at the rate of 16% is already imposed.

27.1. Therefore, this brings us to the next point, that is, as to which of the two duties is to be levied, i.e., ADE or SAD. Since, ADE is exempted, quite clearly, the respondents were entitled to levy SAD, as was indicated, initially, in the SCN.

28. As alluded to herein above, this position, obtains by virtue of Section 3 A (5) of the CTA, the relevant extract of which is set out herein below:

"SECTION 3A. Special additional duty. -

(1) Any article which is imported into India shall in addition be liable to a duty (hereinafter referred to in this section as the special additional duty), which shall be levied at a rate to be specified by the Central Government, by notification in the Official Gazette, having regard to the maximum sales tax, local tax or any other charges for the time being leviable on a like article on its sale or purchase in India:

Provided that until such rate is specified by the Central Government, the special additional duty shall be levied and collected at the rate of eight per cent of the value of the article imported into India.

(2)

(3)

(4)

(5) Nothing contained in this section shall apply to any article, which is chargeable to additional duties levied under sub-section (1) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957)."

29. Therefore, as indicated by the learned counsel for the appellant, levy of SAD would be in order. This apart, there is another dimension to the matter, which is, that, under sub-section (1) of Section 3 A of the CTA, SAD can be levied at the rate specified by the Central Government, by way of a Notification published in the Official Gazette, having regard to the maximum sales tax, local tax or other charges for the time being leviable on a like article on its sale or purchase in India. Sub-Section (1) of Section 3A of the CTA is followed by a proviso, which, provides that until such rate is specified by the Central Government, SAD would be levied and collected at the rate of 8% of the value of the article imported in India.

30. An attempt was made in the course of the argument by Mr.Sundareshwaran to trace ADE to this provision, at which stage,

we asked the learned counsel, as to whether any Notification had been issued by the Central Government.

30.1. Though Mr.Sundareswaran could not, Mr.Murugappan, has placed the relevant Notifications before us, that is, Notification No.23/2002, dated 01.03.2002, and the subsequent Notification bearing No.63/2002, dated 18.06.2002.

30.2. These are notifications which provide for effective rates of SAD.

30.3. The relevant entry in Notification No.23/2002, dated 01.03.2002, is set out at serial no.62, which is a residuary entry and, it reads as follows:

S. No.	Chapter or heading or sub-heading	Description of goods	Standard rate
62	Any Chapter	All goods, other than those specified against S.Nos.1 to 61 above	4% ad valorem

31. It is not in dispute that even if ADE was traced to 3 A (1) of CTA, by virtue of the Notification, the rate of duty could only be 4%. The indication in the proviso to Section 3A (5) of the CTA that the rate of duty could be 8% is subject to any Notification being issued by the Central Government. Since, a Notification is in place, the rate of duty could not have exceeded 4%.

32. This brings us to the last aspect of the matter, as to whether the Settlement Commission could have gone beyond the SCN.

33. As indicated, right at the beginning, the SCN only speaks of three components of duty, i.e., BCD, CVD and SAD. The Settlement Commission, while, giving relief to the appellant, vis-a-vis, SAD has by way of settlement imposed ADE upon it, for the reasons given in the impugned order.

34. We are of the view that ADE could not have been imposed on the appellant, which, admittedly, did not form part of SCN. The approach adopted by the Settlement Commission resulted in making matters worse for the appellant.

35. In our opinion, the Settlement Commission could not have crossed the periphery of the SCN, and imposed a duty and that too, at rate higher than, what could have been mandated in law.

35.1.Mr.Sundareswaran's submission that the Settlement Commission has the same powers which are available to the Assessing Officer under Section 127 C of the Act, and hence, could have imposed ADE on the Assessee, is, in our view,

untenable, in the facts of the instant case.

35.2. The reason for the same, is that, in our opinion, even the Assessing Officer could not have gone beyond the SCN. Therefore, by logical corollary, if, the Assessing Officer could not have gone beyond the SCN, we have grave doubts as to whether the Settlement Commission, in exercise of powers under Section 127C of the Act, could have included ADE in the final order passed by it, and that too, at a rate, which adversely, impacted the appellant's financial burden, in the given facts and circumstances.

35.3. A perusal of the final order of the Settlement Commission would show that it was not the case of the Revenue that the appellant had not disclosed the entire duty liability, or, that the reports were generated under Section 127C(3) of the Act, or sub section 127C(4) of the Act, which were suggestive of the fact that the appellant, had not made a full and complete disclosure of its duty liability, in its application for settlement filed under Section 127B. While one can, perhaps, envisage a situation where an applicant approaches the Settlement Commission and discloses an income, and thus, resultant duty liability, which is, more than what is adverted to in the SCN, it cannot be that without any case being made out of non-disclosure, the Settlement Commission, on its own, albeit, on an erroneous application of the law, enhances the duty liability of the applicant, i.e., the appellant in this case. In the absence of such ingredients or circumstances obtaining, certainly, the Settlement Commission could not, in our view, go beyond the SCN. (See *Reckitt and Colman of India Ltd V. Collector of Central Excise*, (1997) 10 SCC 379 ; and *Saci Allied Products Ltd., U.P. V. Commissioner of Central Excise*, (2005) 7 SCC 159).

36. The learned Single Judge's reasoning for dismissing the writ petition is, broadly, pivoted on the following rationale : Firstly, that the appellant had conceded to the imposition of ADE @ 8%. It appears that the learned Single Judge has concluded that, since, the appellant allowed the case to be settled, on the said basis, it is thereafter estopped from contending to the contrary. The other reason given by the learned Single Judge, in coming to the conclusion, that the writ petition was not viable, and therefore, had to be rejected, was that, such ADE could be levied under Section 3(5) of the CTA.

36.1. We are unable to agree with the learned Single Judge, with regard to the either of the two reasons given by him, in support of his conclusion that the writ petition could not be entertained.

36.2. As indicated above, the appellant had principally objected to levy of SAD @ 4%. The Settlement Commission, while agreeing with this submission of the appellant, ended up, imposing ADE @ 8%. According to us, as discussed above, only

one of the two duties could have been levied, i.e., SAD or ADE.

36.3. The provisions of Section 3A(5) of the CTA make that very clear. In fact, the Revenue has not disputed this aspect of the matter. ADE, as discussed above, could not have been levied, in view of the provisions of Notification No.21/2002, dated 01.03.2002.

36.4. Therefore, the fact that the appellant agreed to the imposition of ADE @ 8%, was a concession given on aspects of law, to which, it could not be bound down. A concession of issues pertaining to law, given by a Lawyer, cannot bind his client. (See Uptron India Limited V. Shammi Bhan, (1998) 6 SCC 538).

36.5. In so far as the other reason given by the learned Single Judge is concerned, which is that, ADE could be sourced to Section 3(5) of CTA, in our view, is also erroneous for the following reasons : First, ADE is in the nature of excise duty leviable under the 1957 of the Act. Its an imposition in the form of additional duty on articles imported into India and is traceable to Section 3(1) of CTA, and not, to Section 3(5) of CTA.

36.6. Furthermore, a plain reading of Section 3(5) of CTA would show that additional duty on the imported articles, is levied to counter-balance Sales Tax, Value Added Tax, Local Tax, or other charges for the time being levied on a like article upon on its sale, purchase, or transportation in India which cannot be imposed at the rate exceeding 4%. Clearly, therefore, the justification provided for levy of ADE at the rate of 8% under Section 3(5) of CTA, cannot be sustained.

36.7. Thus, in our opinion, the view of the learned Single Judge, for the reasons given above, cannot be accepted.

37. For the foregoing reasons, the appeal is allowed. The order of the learned Single Judge, dated 12.09.2016, is set aside. Consequently, the order passed in the review application will be rendered inefficacious.

37.1. Mr.Murugappan, at this stage says, that the balance amount, along with interest, calculated in terms of the order passed by us, today, will be paid, within a period of four weeks from the date of receipt of a copy of the order.

38. Consequently, connected miscellaneous petition is closed. However, there shall be no order as to costs.

sd/
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

To

1.The Customs & Central Excise Settlement Commission,
Additional Bench,
Narmada Block, 2nd Floor,
Custom House, No.60, Rajaji Salai,
Chennai - 600 001.

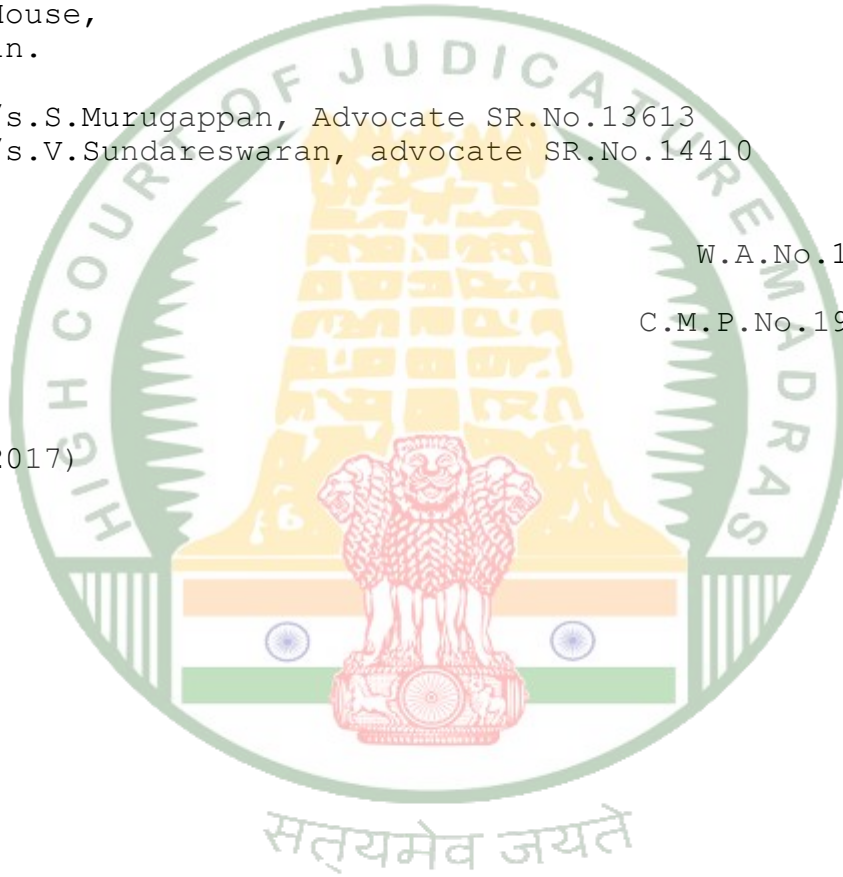
2.The Commissioner of Customs,
Custom House,
Tuticorin.

+1cc to M/s.S.Murugappan, Advocate SR.No.13613

+1cc to M/s.V.Sundareswaran, advocate SR.No.14410

W.A.No.1600 of 2016
And
C.M.P.No.19792 of 2016

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