

THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 05.01.2017

Coram

The Honourable **Mr.JUSTICE RAJIV SHAKDHER**

Writ Petition Nos.28908 and 28909 of 2016
and WMP No.24974 of 2016 in W.P.No.28908 of 2016

M/s.Planet Pop Foods Pvt. Ltd.,
Rep. by its Director,
Ms.Kavitha Jayaraman,
A2, 3/1 Angalamman Koil 2nd Street,
Off Cart Track Road, Guindy,
Chennai-600 032.

.. Petitioner

Vs.

1. The Assistant Commissioner of Customs,
(Special Valuation Branch),
Custom House, No.60, Rajaji Salai,
Chennai-600 001.

2. The Commissioner of Customs (Appeals-II),
Custom House, No.60, Rajaji Salai,
Chennai-600 001.

.. Respondents

* * *

Prayer in W.P.No.28908 of 2016 : Writ Petition filed under Article 226 of The Constitution of India praying for the issuance of Writ or order or direction, in the nature of Writ of Certiorari calling for the records pertaining to impugned order-in-original no.44588/2016, dated 04.02.2016 issued by respondent No.1 and quash the same as illegal.

Prayer in W.P.No.28909 of 2016 : Writ Petition filed under Article 226 of The Constitution of India praying for the issuance of Writ or order or direction, in the nature of Writ of Certiorari calling for the records pertaining to impugned order in appeal No.678/2016, dated 06.07.2016 issued by respondent No.1 and quash the same as illegal and direct respondent No.2 to hear the appeal and pass orders on merits.

* * *

For Petitioner : Mr.G.Derrick Sam

For Respondents : Mr.T.R.Senthil Kumar, CGSC

ORDER

1. These two writ petitions, essentially bring forth the grievance of the petitioner that its matter has not been decided on merits.

1.1. The writ petition No.28908 of 2016 has been filed to assail the order-in-original dated 04.02.2016, while W.P.No.28909 of 2016 has been filed to assail the order of the Commissioner of Customs (Appeals), dated 06.07.2016.

2. As is obvious, upon perusal of the impugned orders that the order dated 04.02.2016, is an order on merits, whereas, the order dated 06.07.2016, whereby, the petitioner's appeal was dismissed, is not an order on merits, but is based on the fact that the appeal preferred was filed beyond limitation, as prescribed under Section 128 of the Customs Act, 1962 (in short "the Act").

3. It is a common ground that in view of the order passed by the Commissioner of Customs (Appeals), the order-in-original dated 04.02.2016, would stand merged with the said order passed in appeal.

3.1. Therefore, in these circumstances, all that I am required to do is to deal with the order dated 06.07.2016, whereby, the petitioner's appeal was dismissed on the ground of limitation.

4. In so far as this aspect is concerned, the following brief facts are required to be noticed :

4.1. On 04.02.2016, the Adjudicating Authority, i.e., the Assistant Commissioner of Customs (Special Valuation Branch), held that the technical licence fee paid by the petitioner to the entity, from which, it had bought a machine, which essentially, was a popcorn machine, had to be added to the capital value of the said machinery. This conclusion was reached by the Adjudicating Authority based on its reading of the Rule 10(1)(c) and 10(1)(e) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (in short "the 2007 Rules").

4.2. In sum, the Adjudicating Authority had come to a conclusion that the technical fee, paid by the petitioner to the entity, from which, the capital goods, i.e., machinery, had been purchased, was in the nature of royalty and license fee, and that, the said entity was a related party.

4.3. The petitioner, however, disputes both the conclusions and in fact, before me, has raised an issue, with regard to the jurisdiction and power of the Assistant Commissioner, Special Valuation Branch, to pass the order dated 04.02.2016; which was signed and dispatched on 09.02.2016.

4.4. It is the assertion of the petitioner that on the date, when, the order-in-original was passed, i.e., on 09.02.2016, the

concerned Adjudicating Officer, was divested of his power to adjudicate the matter, in view of the Circular No.5/2016-Customs, dated 09.02.2016, issued by the Central Board of Excise and Customs (in short the Board).

4.5. As indicated right at the outset, these are matters pertaining to the merits of the case.

4.6. I must note, at this stage, that it is the stand of the respondents that the Adjudicating Officer had time to complete the pending proceedings till 31.12.2016.

4.7. This stand is taken by the respondents, based on Circular No.4/2016-Customs, dated 09.02.2016.

5. Continuing with the narrative, the record shows that the petitioner, instead of filing an appeal, lodged a letter dated 28.03.2016, with the Commissioner of Customs, Chennai. In the letter, the petitioner's Director sought to bring to fore various difficulties she had faced as a woman entrepreneur in establishing the business, and that, therefore, in the given circumstances, the order-in-original passed by the Adjudicating Authority ought to be withdrawn.

5.1. Admittedly, this letter was not entertained as an appeal by respondent No.2. A communication to this effect, was, concededly, sent by respondent No.1 on 21.04.2016, informing the petitioner that against the order-in-original, an appeal could be

preferred before the Commissioner of Customs (Appeals) within the time frame prescribed under Section 128(1) of the Act.

5.2. I must indicate here that this letter has been placed on record only today by the learned counsel for the petitioner. Neither the contents nor the factum of issuance of this letter have been disputed by the learned counsel for the respondents.

6. It appears that given this position, on 27.04.2016, the petitioner sent a communication to respondent No.2 qua the order-in-original, *albeit*, via e-mail, which was followed by the petitioner, by lodging an appeal in the appropriate format, i.e., with respondent No.2. The lodgement was carried out on 15.12.2016.

6.1. Admittedly, the petitioner was granted personal hearing in the matter and was also given opportunity to raise additional grounds by respondent No.2. However, all these came to a naught, as respondent No.2, dismissed the appeal vide order dated 06.07.2016, on the ground that the appeal filed, was beyond limitation.

7. Aggrieved by the impugned order dated 06.07.2016, the petitioner, as indicated at the outset, preferred the captioned writ petition.

8. The issue, which arises for consideration, is, as to whether in the given facts and circumstances, this Court should treat the representation dated 28.03.2016, or, the representation dated 27.04.2016, as an appeal in the eyes of law.

9. Mr.G.Derrick Sam, who appears for the petitioner, says that if, not the representation dated 28.03.2016, then, surely, second representation dated 27.04.2016, should be treated as an appeal, as it was lodged before the correct forum, i.e., before respondent No.2, notwithstanding the fact that it was not in the prescribed form.

9.1. Learned counsel for the petitioner submits that failure to lodge the appeal in the prescribed form, should not come in the way of the petitioner losing its right to contest the matter on merits.

10. As against the same, Mr.T.R.Senthil Kumar, who appears for the respondents, resists the relief sought in the writ petitions, on the following grounds :

(i) That the order-in-original itself communicated the time-frame within which, the appeal had to be filed and the manner of filing the said appeal.

(ii) Both, the representation dated 28.03.2016, and the representation dated 27.04.2016, did not raise any grounds of

challenge, on merits, qua the order-in-original. It was submitted that a perusal of the contents of these two communications would show that these were representations which articulated the difficulties faced by the petitioner's Director, in continuing with the business, being a woman entrepreneur.

(iii) There was no error in the impugned order, and that, respondent No.2 could not have condoned the delay, beyond the time prescribed under Section 128(1) of the Act.

11. I have heard the learned counsels for the parties and perused the record.

12. In my view, while there can be no cavil with the proposition that respondent No.2 has no power to condone the delay under the provisions of Section 128 of the Act, what is required to be considered in the given facts obtaining between the parties for the present, is that, should this Court treat the representations made by the petitioner as appeals filed to assail the order-in-original.

12.1. A perusal of the representations dated 28.03.2016 and 27.04.2016, would show that the Director of the petitioner did convey to the respondents that the impugned order-in-original should be withdrawn.

12.2. Furthermore, a reading of the two communications

would show that while the communication, dated 28.03.2016 was addressed to the Commissioner of Customs, the second communication dated 27.04.2016, was sent via e-mail to respondent No.2, i.e., Commissioner of Customs (Appeals).

13. The fact that respondent No.1, i.e., the Assistant Commissioner of Customs, Special Valuation Branch, vide a letter dated 21.04.2016, had directed the petitioner to prefer an appeal in terms of Section 128 of the Act, is not disputed.

13.1. Therefore, what emerges is that after the petitioner's Director received the communication dated 21.04.2016, she understood the said communication to raise an objection with regard to the forum, before which, she ought to have filed the appeal, and not with regard to the form of the appeal.

13.2. This perhaps, the petitioner's Director did out of ignorance, as quite clearly, she did not peruse the cover sheet of the order-in-original, which, did indicate that the appeal had to be filed in sixty (60) days in the prescribed form.

14. Learned counsel for the respondents, with usual fervour, argues that ignorance of law cannot come to the aid of a litigant.

14.1. While this oft quoted phrase is generrally true, it cannot be said that every litigant is aware of the law. In this regard, I

may only quote the observations of the Supreme Court in **Motilal Padampat Sugar Mills V. State of U.P., AIR 1979 SC 621 (page 629)**, which, in the given circumstances, appear to be quite apposite :

"..... 6. The claim of the appellant to exemption could be sustained only on the doctrine of promissory estoppel and this doctrine could not be said to be so well defined in its scope and ambit and so free from uncertainty in its application that we should be compelled to hold that the appellant must have had knowledge of its right to exemption on the basis of promissory estoppel at the time when it addressed the letter dated 25th June, 1970. **In fact, in the petition as originally filed, the right to claim total exemption from sales tax was not based on the plea of promissory estoppel which was introduced only by way of amendment. Moreover, it must be remembered that there is no presumption that every person knows the law. It is often said that every one is presumed to know the law, but that is not a correct statement: there is no such maxim known to the law.** Over a hundred and thirty years ago, Maule, J., pointed out in *Martindale v. Faulkner*, (1846) 2 CB 706 **"There is no presumption in this country that every person knows the law: it would be contrary to common sense and reason if it were so".** Scrutton, also once said: **"It is impossible to know all the statutory law, and not very possible to know all the common law."** But it was Lord Atkin who, as in so many other

spheres, put the point in its proper context when he said in *Evans v. Bartlem*, 1937 AC 473 " **the fact is that there is not and never has been a presumption that every one knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application.**" It is, therefore, not possible to presume, in the absence of any material placed before the Court, that the appellant had full knowledge of its right to exemption so as to warrant an inference that the appellant waived such right by addressing the letter dated 25th June, 1970. We accordingly reject the plea of waiver raised on behalf of the State Government."

(emphasis is mine)

14.2. Therefore, what, in my view, the Court has to look at is, as to whether a party aggrieved by an order passed by the original authority, lodged its grievance before the appropriate appellate forum within the prescribed time. The fact that the petitioner was aggrieved, was articulated by its Director, via its representations dated 28.03.2016 and 27.04.2016. The fact that the petitioner sought withdrawal of the order, i.e., the order-in-original, which, also emerges upon a perusal of the said representations, is not in dispute. It is not unknown, and an aspect of which judicial notice can be taken, that even when appeals are lodged in proper form, litigants often add, thereafter, additional grounds of challenge.

14.3. In this case also grounds were added by the petitioner with the permission of respondent No.2. Furthermore, ultimately, via the impugned order, respondent No.2 dismissed the appeal, not on merits, but on the ground that it was lodged after the period of limitation.

14.4. To my mind, in the facts and circumstances of this case, the approach adopted appears to be pedantic, and consequently, resulted in emasculating the petitioner of its right to have the matter decided on merits.

15. Having said so, it is not suggested that limitation ought not to be adhered to, when required. Statute of limitation is a statute of repose. Limitation is put in place by the Legislature to put a quietus to disputes, which are not raked up by aggrieved parties in time.

15.1. In other words, litigants, who claim to be aggrieved, should approach the Courts in time. Should they fail to do so, their right may survive, but the remedy available to agitate the right may not be accessible.

15.2. However, in this case, the petitioner did approach the correct forum, at least, via the representation, dated 27.04.2016, in time, though, not in the manner prescribed under the rules.

15.3. In my opinion, this was more an error which pertained to the form than the substance of the matter.

16. Therefore, looking at the overall circumstances obtaining in the instant case, I am inclined to set aside the impugned order dated 06.07.2016, with a direction to respondent No.2 to decide the appeal on merits, subject to the petitioner depositing a cost of Rs.10,000/- with the Juvenile Justice Fund, maintained by the Director of Social Defence, Government of Tamil Nadu.

16.1. The cost will be paid within one week from the date of receipt of a copy of the order.

16.2. The proof of cost will be placed before the Court by the learned counsel for the petitioner.

17. The writ petitions are, accordingly, closed, in terms of the aforesaid directions. Consequently, pending applications shall also stand closed. There shall, however, be no order as to costs.

05.01.2017

Index : Yes/No

Internet: Yes

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To

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(Special Valuation Branch),
Custom House, No.60, Rajaji Salai,
Chennai-600 001.
2. The Commissioner of Customs (Appeals-II),

Custom House, No.60, Rajaji Salai,
Chennai-600 001.

RAJIV SHAKDHER, J.

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W.P.Nos.28908 and 28909 of 2016
and WMP No.30613 of 2016

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