

In the High Court of Judicature at Madras

<i>Reserved on</i> <i>10.8.2017</i>	<i>Delivered on</i> <i>05/10.2017</i>
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Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM

Writ Petition No.34663 of 2003

M/s.Data Field India Pvt. Ltd.
(formerly known as DATAFIELD
India Ltd.), rep.by its Director
Madhumati Kannan, Coimbatore.

...Petitioner

Vs

The Commissioner of Central
Excise, 6/7, ATD Street,
Race Course, Coimbatore.

...Respondent

PETITION under Article 226 of The Constitution of India praying for the issuance of a Writ of Prohibition prohibiting the respondent from proceeding with the show cause notice in C.No.V/85/15/43/2002-Cx.Adj. dated 24.4.2002 issued by the respondent.

For Petitioner : Mr.K.Jayachandran
For Respondent : Mr.A.P.Srinivas, SPC

ORDER

The petitioner is a 100% Export Oriented Unit (EOU), engaged in the manufacture of telephone cords. By virtue of being a 100% export oriented unit, the petitioner is entitled to procure raw materials by import or from the domestic market for availing customs and excise duty exemption. When raw

material is procured from the domestic market, a certificate in Form CT-3 under the Central Excise Rules (hereinafter called the Rules) is issued.

2. The manufacturing activities done by the petitioner is under bond and the receipt of the raw materials and dispatch of finished products for export are under the control and supervision of the Excise and Customs Authorities. The petitioner is entitled to sell a percentage of the finished products in the local domestic market called as Domestic Tariff Area (DTA) subject to two conditions namely

- (i) upon fulfilling the export obligation
- (ii) with the permission of the Development Commissioner, Madras Export Processing Zone (MEPZ).

3. The petitioner applied to the Development Commissioner, MEPZ on 10.1.1998 and 01.2.1999 seeking permission for effecting DTA sales. The Development Commissioner, after verifying the documents submitted by the petitioner, granted permission for the DTA sales for a total value of Rs.204.34 lakhs on the total ex-factory value of production of Rs.552.59 lakhs for the year 1997-98. सत्यमेव जयते

4. Referring to Notification No.2/95-CE dated 04.1.1995, as amended, it is submitted that the finished products produced in a 100% EOU, when sold in India as the DTA sales, the duty amount payable is 50% of the customs duty including other duties like SCD and ACD respectively. The petitioner is stated to have paid a total sum of Rs.74,35,252/- in terms of Notification No.2/95. The petitioner would state that they are not liable to

pay SCD and ACD, which amount to Rs.41,58,997/-. It is the claim of the petitioner that the said amount is liable to be refunded to them. While so, the respondent issued a show cause notice dated 24.4.2002 alleging irregularity in the availment of concession under the DTA sales furnishing inflated export sales. The petitioner did not submit their objections/reply to the said show cause notice, but has approached this Court seeking for the issuance of a Writ of Prohibition to prohibit the respondent from proceeding with the show cause notice dated 24.4.2002.

5. Mr.K.Jayachandran, learned counsel for the petitioner submits that the impugned notice is merely on speculation, premises and assumptions and wholly without jurisdiction. It is further submitted that in terms of Rule 173A(2) of the Rules, nothing contained in Chapter VII-A of the Rules shall apply to a manufacturer or producer, who has been allowed to discharge his duty liability in accordance with the provisions contained in Sections C-1, E-III, E-VI or E-IX of Chapter V or to whom the provisions of Chapter V-A apply.

6. Therefore, it is submitted by the learned counsel for the petitioner that Rules 173A to 173H of the Rules are not applicable to a manufacturer as a 100% EOU or to the goods removed from a 100% EOU. Therefore, Rule 9 of the Rules is not applicable to the petitioner's case. It is also submitted that the petitioner's factory is under the control of the Customs and Central Excise Department and that the goods are cleared on the permission of the Development Commissioner, MEPZ after assessment by the Central Excise

Authorities and hence, Rule 9 of the Rules is not attracted and the show cause notice is liable to be quashed. Further, the extended period of limitation could not have been invoked in the instant case, as the show cause notice proceeds merely on an interpretation of Notification with allegation of mis-declaration, etc., and that therefore, the show cause notice is barred by limitation.

7. It is further submitted by the learned counsel for the petitioner that the difference on levy of goods manufactured in the case of 100% EOU and that of the levy on goods manufactured and cleared by any other unit is significant. According to the learned counsel, in the case of 100% EOU, it is on the goods allowed to be cleared and sold in India whereas in other cases, it is on the goods manufactured and removed. It is submitted by the learned counsel for the petitioner that the words 'allowed to be sold' in Clause (ii) of Proviso to Section 3(1) of the Central Excise and Salt Act, 1944 (hereinafter referred to as the Act) are very important and relevant. After taking that aspect into account, the petitioner paid appropriate duty on the DTA sales on the goods allowed to be sold and consequently, there cannot be a further levy. Therefore, the notice goes contrary to the charging provision viz. Section 3 of the Act as applicable to 100% EOU.

8. It is further submitted by the learned counsel for the petitioner that the respondent, without taking any steps to set aside the Letter of Permission (LoP) issued by the Development Commissioner, MEPZ, cannot demand any amount as duty, as he cannot sit as an Appellate Authority over the decision of the Development Commissioner. The Central Board of Excise and Customs (CBEC), New Delhi, in their circular No.618/9/2002 - ex - dated 13.2.2002, clarified that prior to 11.5.2001, the clearance from the EOU, if not allowed to be sold in India, shall continue to be chargeable to duty under Section 3(1) of the Act. According to him, in the present case, if the permission granted by the Development Commissioner, MEPZ, is not valid and even if the benefit of Notification No.2/95 is not applicable, then, as per the Board's Circular, the respondent can levy only central excise duty. Therefore, the levy and demand of 50% of the customs duty with ACD and SCD is contrary to the Board Circular. Similarly, the petitioner is entitled to get refund of 50% of the customs duty and ACD and SCD paid as per the said Notification.

9. It is further submitted that the goods were sold in the DTA market after payment of appropriate customs duty and that the Authorities have to treat the goods so sold in the DTA Unit as 'deemed export'. It is submitted that the Central Excise Authorities have knowledge of the value addition formula adopted by the petitioner, more particularly when the permission was granted for the four preceding years in the same manner. The Development Commissioner, MEPZ was also aware of the method of

calculation in the same year and the years that preceded and no explanation was called for from the petitioner till the date of issuance of the show cause notice dated 24.4.2002. Hence, it is further submitted that the impugned show cause notice should not be permitted to be proceeded further.

10. In support of his contention, Mr.K.Jayachandran, learned counsel for the petitioner relied upon the decisions of the Hon'ble Supreme Court in the cases of

(i) ***SIV Industries Ltd. Vs. Commissioner of Central Excise & Customs [reported in 2000 (117) ELT 281];***

(ii) ***Virlon Textile Mills Ltd. Vs. Commissioner of Central Excise [reported in 2007 (211) ELT 353];***

(iii) ***Sarla Performance Fibers Ltd. Vs. Commissioner of Central Excise [reported in 2016 (336) ELT 577]; and***

(iv) ***Commissioner Vs. Ginni International Ltd. [reported in 2007 (215) ELT. A102]; and***

a decision of this Court in the case of

Norton Intec Rubbers (P) Ltd. Vs. CCE, Madras & another [reported in 2003 (58) RLT 773].

11. Mr.A.P.Srinivas, learned Senior Panel Counsel appearing for the respondent has raised a preliminary objection with regard to the maintainability of the writ petition contending that the petitioner seeks to

prohibit the respondent from proceeding further with the show cause notice dated 24.4.2002 on grounds, which are fully factual and that such relief cannot be granted. According to him, a show cause notice should not be interfered at the very threshold.

12. In support of his contention, the learned Senior Panel Counsel placed reliance on the decisions of the Hon'ble Supreme Court in the cases of

- (i) ***Special Director Vs. Mohd. Ghulam Ghouse [reported in 2004 (3) SCC 440];*** and
- (ii) ***Union of India Vs. Kunisetty Satyanarayana [reported in 2006 (12) SCC 28].***

Hence, it is submitted by the learned Senior Panel Counsel appearing for the respondent that the petitioner should be directed to submit their reply to the show cause notice and that the matter should be left to be adjudicated by the respondent.

13. Heard the learned counsel for the parties and perused the materials placed on record. In the preceding paragraphs, the grounds, based on which, the petitioner seeks a Writ of Prohibition, have been summarized. Essentially, the petitioner would contend that the impugned show cause notice cannot be allowed to be proceeded further and the difference of levy on goods manufactured in a case of 100% EOU and that of the levy of goods manufactured and cleared by any other unit is significant, as, in the case of 100% EOU, it is on the goods allowed to be cleared and sold in India whereas in other cases, the levy is on the goods manufactured and removed.

14. The words 'allowed to be sold' in Clause (ii) of Proviso to Section 3(1) of the Act are relevant in this regard. The petitioner paid appropriate duty on the DTA sales on the goods allowed to be sold and consequently, there cannot be a further levy. Therefore, if the show cause notice is allowed to be proceeded further, it would go contrary to the charging provision namely Section 3 of the Act as applicable to 100% EOU.

15. The petitioner places heavy reliance on the Exemption Notification namely Notification No.2/95-CE dated 04.1.1995 whereby the Central Government exempted all excisable goods specified in the Schedule to the Central Excise Tariff Act, 1985 and produced or manufactured in a 100% EOU and allowed to be sold in India under and in accordance with the provisions of paragraphs 102 and 114 of the Export and Import Policy from 1.4.1992 to 31.3.1997, in the case of 100% export oriented undertaking.

16. Reliance is also placed on the circular issued by the CBEC in Circular No.618/9/2002-CX dated 13.2.2002 and it is submitted that the clearance from EOU, if not allowed to be sold in India, shall continue to be chargeable to duty under Section 3(1) of the Act and in the case on hand, if the permission granted by the Development Commissioner is not valid and even if the benefit of Notification No.2/95 - CE dated 04.1.1995 is not applicable, in terms of the circular of the CBEC, the respondent can levy only central excise duty. Therefore, it is contended that the levy and demand of 50% of the customs duty with ACD and SCD are contrary to the circular of the CBEC.

17. What is interesting to note is that in the affidavit filed in support of the writ petition, the petitioner has not touched upon the merits of the case i.e. with regard to the allegation made against them. Thus, essentially, the impugned show cause notice is sought to be challenged on technical grounds without meeting the allegation as pointed out in the impugned show cause notice. It has to be seen as to whether this Court, de hors the factual allegation made in the show cause notice, can examine the correctness of the stand taken by the petitioner and prohibit the respondent from proceeding further with the process of adjudication.

18. On a reading of the show cause notice dated 24.4.2002, this Court is of the view that such exercise cannot be done, as the legal position or for that matter the effect of Exemption Notification cannot be applied in the abstract, but are required to be applied to the facts and circumstances of each case. Therefore, however strong the case of the petitioner would be on legal grounds, while examining the applicability of the same, it is essential and necessary to go into the factual matrix.

19. In the show cause notice, the allegation is that the details furnished by the petitioner to the Development Commissioner, MEPZ vide letters dated 10.1.1998 and 01.2.1999 indicate that the petitioner had deducted Rs.53,04,928/- from the consumption of imported raw materials and thereby reduced the value of consumption of imported raw materials and consequently, the value addition achieved has been boosted to 30.6% as detailed in Annexure I to the show cause notice. It is further alleged that the

petitioner thereby got permission from the MEPZ to clear 40% of value of production in the DTA at concessional rate of duty under Notification No.2/95 dated 04.1.1995.

20. Referring to the formula for calculating Net Foreign Exchange Profit (NFEP), it is stated that the formula is $A - B/A \times 100$, in which, 'A' denotes FOB value of exports by the unit and 'B' is the sum total of imported inputs used and as per the guidelines given in Annexure-I of the Handbook of Procedures for Calculating NFEP, as per paragraph 9.29 of the EXIM Policy, it has been prescribed that while arriving at the value of 'B', whatever raw material consumables and spares are imported during the year are to be taken into account and it is apparent that whatever raw material in balance at the end of the previous year is added, while the raw material at the end of current year is deducted, it would give the amount of raw material consumed during the year. The raw material purchased as inter unit transfer was also included.

21. Thus, going by the facts as reiterated by the petitioner to the Development Commissioner, it has been mentioned in the show cause notice that if the value of the raw materials used for the DTA sales is to be included, the value of 'B' would be the opening balance of raw materials + the raw materials purchased closing balance + the amortized value of capital goods as per the Handbook of Procedures and EXIM Policy, 1997-2002. Thus, the respondent proposed that the actual NFEP would be 3.95%. In this regard, a working sheet has been appended to the show cause notice, as Annexure IA.

Thus, the allegation against the petitioner is that they are not eligible for concessional rate (50% of the customs duty) under Notification No.2/95 dated 04.1.1995 for effecting sales in the DTA, since there should be a minimum of 10% of NFEP in order to effect the DTA clearance at concessional rate as per paragraph 9.5 of the EXIM Policy, 1997-2002 read with Notification No.2/95.

22. It is, therefore, alleged that the petitioner made irregular DTA sales during the year 1997-98. The respondent proceeded to state that the petitioner appears to have contravened the conditions stipulated in Notification No.2/95 read with the EXIM Policy, in as much as they furnished incorrect details to the MEPZ and obtained approval for clearance of goods to the DTA and the provisions of Rules 9(1) and 173F of the Central Excise Rules read with Proviso to Section 3(1)(b) of the Act stand attracted, in as much as they cleared the goods in question without discharging the appropriate amount equal to the aggregate of the duties of customs, which are leviable on the same. Rule 173B of the Rules also stands attracted in as much as the petitioner claimed ineligible exemptions under Notification No. 2/95 for clearance of goods to the DTA.

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23. Thus, it is stated that since the petitioner had indulged in wilful mis-statement of relevant facts with an apparent intention to evade payment of duty, the Proviso to Sub-Section (1) of Section 11A of the Act is applicable. Apart from that, there is also a proposal to levy penalty under Rule 173Q of the Rules and Sections 11AC read with 38A of the Act and a liability to pay interest under Section 11AB(1) of the Act.

24. The petitioner's case largely rests upon the decisions, which were cited by the learned counsel. The earliest of such decision being *SIV Industries Ltd.*, and the latest being *Sarla Performance Fibers Ltd.* One common feature in all these decisions is that the matter has travelled upto the Hon'ble Supreme Court after exhausting all the remedies available under the Act. In other words, the show cause notice was adjudicated upon and an Order-in-Original was passed, which was challenged before the Tribunal and against the decision of the Tribunal, as the matter pertains to valuation, an appeal was filed before the Hon'ble Supreme Court. Except in the case of *Norton Intec Rubbers (P) Ltd.*, which is a decision of the learned Single Judge (as he then was) of this Court, all other decisions of the Hon'ble Supreme Court have been rendered after the respective assessees exhausted the hierarchy of remedies available under the Act. In such circumstances, it has to be seen as to whether the petitioner should be permitted to stay away from the proceedings and seek for a Writ of Prohibition.

25. In *Mohd. Ghulam Ghouse*, the Hon'ble Supreme Court, while considering the issue of maintainability of writ petitions under Article 226 of The Constitution of India against show cause notices, held that in large number of cases, the Hon'ble Supreme Court deprecated the practice of the High Courts entertaining writ petitions questioning the legality of the show cause notices stalling enquiries as proposed and retarding investigative process to find actual facts with participation and in the presence of the parties. It was pointed out that unless the High Court is satisfied that the show cause notice was totally non est in the eye of law for absolute want of jurisdiction of the Authority to even investigate into facts, writ petitions should not be entertained for the mere asking and as a matter of routine and the writ petitioner should invariably be directed to respond to the show cause notice and take all stands highlighted in the writ petition.

26. With regard to the jurisdictional issue, it was pointed out in the decision in *Mohd. Ghulam Ghouse* that when the show cause notice questioned on a legal premise, has a jurisdictional issue, the same can even be urged by the recipient of the notice before the Authority and can be adjudicated by the Authority initially before the aggrieved could approach the Court.

27. In the decision in *Kunisetty Satyanarayana*, the Hon'ble Supreme Court took note of the decision in *Mohd. Ghulam Ghouse* and other decisions and pointed out that a writ petition should not be entertained against a mere show cause notice and that the writ petition may be held to be

premature. A show cause notice does not give rise to a cause of action because it does not amount to an adverse order, which affects the right of any party, unless the same has been issued by a person having no jurisdiction to do so. A mere show cause notice does not infringe the right of anyone. Writ jurisdiction is a discretionary jurisdiction and hence, such discretion under Article 226 of The Constitution of India should not, ordinarily, be exercised by quashing a show cause notice. In some very rare and exceptional cases, the High Court can quash a show cause notice if it is found to be wholly without jurisdiction or for some other reason, if it is wholly illegal. However ordinarily, the High Court should not interfere in such a matter.

28. Bearing in mind the above legal principle, if the case on hand is examined, the allegation against the petitioner being one of irregularity in the avilment of concession under the DTA sales furnishing inflated export sales, is purely a factual issue, which has to be agitated by the petitioner before the Adjudicating Authority. Whether or not there has been inflation and whether the respondent was justified in arriving at the actual NFEP at 3.95% is correct or otherwise, has to be thrashed out before the Adjudicating Authority. After the factual scenario becomes clear, then only a situation arises for applying the legal principle. This Court would not have been wholly justified to examine the four decisions cited by the learned counsel for the petitioner as to their applicability or otherwise. However, having been convinced that the impugned show cause notice cannot be treated to be

wholly without jurisdiction, this Court has refrained from undertaking such exercise, as it would prejudice the rights of the assessee.

29. In the case of *Norton Intec Rubbers (P) Ltd.*, the writ petition was filed challenging a show cause notice and on going through the facts of the case, the Writ Court was satisfied that the petitioner therein had filed appropriate application before the appropriate Officer and the appropriate Officer allowed clearance of excisable goods after following due procedure and in view of this categorical assertion/details furnished in the affidavit and in view of the admission of the respondents in their counter affidavit that there is no clandestine removal without assessment, the Court interfered with the show cause notice. In the preceding paragraphs, the factual matrix has been set out and the allegation against the petitioner is one of wilful mis-statement of relevant facts by an act of fraud with an apparent intention to evade payment of duty. Therefore, the decision in *Norton Intec Rubbers (P) Ltd.*, is distinguishable on facts.

30. Thus, for all the above reasons, I have no hesitation to hold that a Writ of Prohibition cannot be issued to prohibit the respondent from proceeding with the adjudication of the show cause notice dated 24.4.2002.

31. In the result, the writ petition is dismissed as not maintainable/premature with a direction to the petitioner to submit their reply to the show cause notice dated 24.4.2002 within a period of 30 days from the date of receipt of a copy of this order raising all factual and legal contentions in support of their stand. On receipt of the reply, the respondent shall afford an

opportunity of personal hearing to the authorized representative of the petitioner, commence and conclude the adjudication process as expeditiously as possible. No costs.

05/10/2017

Speaking Order
Index : Yes or No
Internet : Yes or No

To
The Commissioner of Central Excise, 6/7, ATD Street, Race Course,
Coimbatore.

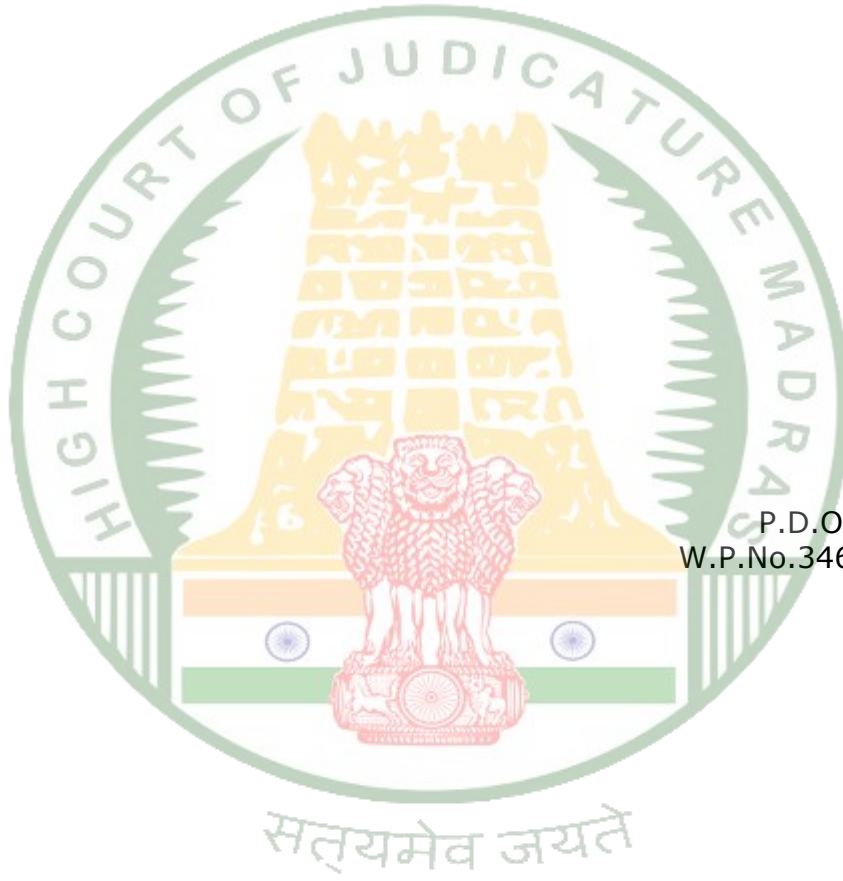
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T.S.SIVAGNANAM,J

RS



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