IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.02.2018

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.A.No.219 of 2018
and CMP No.1717 of 2018

M/s.DataField India Private Limited
(formerly known as DATA FIELD India Ltd)
Rep. by its Managing Director M.K.Kannan .. Appellant

versus

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

Writ Appeal filed against the order dated 05.10.2017 in W.P.No.34663 of 2003.

W.P.No.34663 of 2003:
Petition is filed 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 casue notice in C.No. V/85/15/43/2002- CX.ADJ- dated 24.04.2002 issued by the Respondent.

For Appellant : Mr.K.Jayachandran
For Respondent : Mr.A.P. Srinivas

JUDGMENT
(Order of the Court was made by S.MANIKUMAR, J.)

Writ appeal is directed against the order made in W.P.No.34663 of 2003 dated 05.10.2017, by which the writ Court, after considering the submissions of the learned counsel for the petitioner, decisions of the Hon'ble Supreme Court in (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, declined to issue a writ of prohibition, prohibiting the Commissioner of Central Excise, Coimbatore, from proceeding further with the show cause notice dated 24.04.2002.

2. Though, Mr.K.Jayachandran, learned counsel for the appellant reiterated the grounds of challenge and further contended that as per the EXIM policy 1997-2002, permission has been obtained from the Development Commissioner, Government of India, Ministry of Commerce, MEPS & HEOUS in Tamilnadu, Pondicherry, Andaman & Nocobar Island, Government of India, and further added that all the details were furnished before the Development Commissioner, at the time of obtaining necessary orders for sale and that therefore, it is not open to the Commissioner of Central Excise, Coimbatore, to revisit the matter, having regard to the allegations levelled in the show cause notice dated 24.04.2002, we are not inclined to accept the said contentions and it is for the Commissioner of Central Excise, Coimbatore to consider the explanation, if any, to be submitted, furnished by the appellant.

3. At paragraph Nos. 7 & 8 of the show cause notice dated 24.04.2002, Commissioner of Central Excise, Coimbatore, has alleged as follows:

> "7. From the foregoing facts and circumstances, it appears that M/s.DIL had contravened the conditions stipulated under Notification No.2/95 dated 4.1.1995 readwith EXIM Policy 1997-02 in as much as they furnished incorrect details to MEPZ and obtained approval for clearance of goods to DTA sales and the following provisions of the erstwhile Central Excise Rules 1944 (C.E.R.) which are enforceable in terms of Section 38A of the Central Excise Act, 1944 (C.E.A.)
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> a) Rule 9(1) and 173 F readwith proviso to section 3(1)(b) of CEA: In as much as they had cleared the goods in question without discharging appropriate amount equal to the aggregation of the duties of customs which is leviable on the same.
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> b) Rule 173 B: In as much as the assessee claimed ineligible exemption under notification No.2/95 dated 4.1.95 for clearance of the goods to DTA.
>
> 8. As the assessee had furnished incorrect details to MEPZ and got approval for clearance of DTA sales, it appears that they had indulged in wilful mis-statement of the relevant facts, by an act of fraud with an apparent intention to evade payment of duty and in gross contravention of the above cited provisions. Hence, it

appears that provisions under proviso to sub-section (1) of Section 11A of the Central Excise Act, 1944 are applicable in this case."

4. Above said facts, have been taken note of by the writ Court while considering as to whether the show cause notice dated 24.04.2002 has to be injuncted further. At paragraph Nos.21, 22, 23, 24 and 28, writ Court considered and ordered as hereunder.

> 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.

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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 availment 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."

5. Further, writ against show cause notice is not maintainable. Useful reference can be made to the decisions of

this Court.

(i) In State of U.P. v. Brahm Datt Sharma reported in 1987 (2) SCC 179, at Paragraph 9, held as follows:

"When a show cause notice is issued to a government servant under a statutory provision calling upon him to show cause, ordinarily the government servant must place his case before the authority concerned by showing cause and the courts should be reluctant to interfere with the notice at that stage unless the notice is shown to have been issued palpably without any authority of law. 'The purpose of issuing show cause notice is to afford opportunity of hearing to the government servant and once cause is shown it is open to the Government to consider the matter in the light of the facts and submissions placed by the government servant and only thereafter a final decision in the matter could be taken. Interference by the court before that stage would be premature, the High Court in our opinion ought not have interfered with the show cause notice.

(ii) The Supreme Court in Special Director v. Mohd. Ghulam Ghouse reported in 2004 (3) SCC 440, at paragraph 5, held as follows:

"This Court in a large number of cases has deprecated the practice of the High Courts entertaining writ petitions questioning legality of the show-cause notices stalling enquiries as proposed and retarding investigative process to find actual facts with the participation and in the presence of the parties. Unless the High Court is satisfied that the show-cause notice was totally non est in the eye of the 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. Whether the show-cause notice was founded on any legal premises, is a jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authority issuing the very notice initially, before the aggrieved could approach the court. Further, when the court passes an interim order it should be careful to see that the statutory functionaries specially and specifically constituted for the purpose are not denuded of powers and authority to initially decide the matter and ensure that ultimate relief which may or may not be finally granted in the writ petition is not accorded to the writ petitioner even at the threshold by the interim protection granted."

(iii) In Union of India v. Kunisetty Satyanarayana, reported in 2006 (12) SCC 28, the Supreme Court, held that,

"15. Writ jurisdiction is discretionary jurisdiction and hence, such discretion under Article 226 should not ordinarily be exercised by quashing a show-cause notice or charge-sheet.

16. No doubt, in some very rare and exceptional cases the High Court can quash a charge-sheet or 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."

6. In view of the above discussion and decisions, we are of the view that there is no manifest error in the order impugned before us. Hence, the same is sustained. Writ appeal is dismissed as not maintainable. As directed by the writ Court, appellant is directed to 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 the 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 appellant/petitioner, commence and conclude the adjudication process as expeditiously as possible. No costs. Consequently, the connected Civil Miscellaneous Petition is closed.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

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

+1 CC to Mr.K. Jayachandran, Advocate sr 7826.
+1 CC to Mr.A.P. Srinivas, Advocate sr 8153.

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KJI(CO)
SP(20/02/2018)