IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :28.06.2018

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

Writ Petition No.14426 of 2018
and W.M.P.Nos.17041 & 17042 of 2018

| Orders reserved on | Orders pronounced on |
|---|---|
| 14.06.2018 | 28.06.2018 |

1.M/s.Elektronika Sales Pvt., Ltd.,
No.16, Narasingapuram Street,
Mount Road, Chennai – 600 002,
Rep., by its General Manager,
(Operation and Sales),
Shri John Alexander

2.Shri John Alexander
General Manager (Operation and Sales)
M/s.Elektronika Sales Pvt., Ltd.,
No.16, Narasingapuram Street,
Mount Road, Chennai – 600 002. .. Petitioners

vs.

The Commissioner of Customs,
Chennai-II Commissionerate, Custom
House No.60, Rajaji Salai
Chennai – 600 001. .. Respondent

Petitions filed Under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus to quash the order in original No.63572/2018, dated 24.05.2018, issued from F.No.CAU/DRI/CHE/31/2016, and further direct the respondent to permit cross examination of the officers who assessed, audited and examined the goods pertaining to the respective bills of entry impugned in the said order.

For Petitioner : Dr.S.Krishnanandh

For Respondents : Mr.G.M.Syed Nurullah Sheriff
Standing Counsel

O R D E R

This Writ Petition has been filed challenging the order passed by the second respondent, dated 24.05.2018, by which the second respondent rejected the declared/assessed classification in the Bills of Entry filed by the petitioner and reclassified the goods under Chapter Heading 85364100 and issued consequential directions including imposition of penalty.

2.Dr.S.Krishnanandh, learned counsel appearing for the petitioner submitted that the impugned order is in violation of the principles of natural justice as the petitioner has been denied the opportunity of cross examination of the departmental officers, which is very crucial to the petitioner's case. Further, it is submitted that bills of entry impugned in the show cause notice range from 18.01.2011 to 26.11.2014. The self-assessment procedure was introduced into the Customs Act w.e.f., 08.04.2011 vide Finance Act 2011 and therefore, prior to 08.04.2011, all bills of entry were assessed by the proper officer of customs as mandated by Section 17 of the Customs Act, 1962 prior to its amendment. The petitioner has adopted the very same classification in respect of the goods impugned in the show cause notice subsequent to 08.04.2011 and availed the benefit of notification for payment of concessional rate of duty as was assessed by the proper officer of customs prior to 08.04.2011. In the show cause notice, it is alleged that the petitioner has wrongly classified the goods and wrongly availed the benefit of the notification for payment of concessional rate of duty and it is in this context, the petitioner sought for cross examination of the officers, who assessed, audited and examined the goods impugned in the consignment, mentioned in the show cause notice. It is submitted that denial of opportunity of cross examination is not only in violation of principles of natural justice, but also contrary to the stand taken by the respondent as the petitioner has followed the classification adopted by the officers in respect of the consignments cleared prior to 08.04.2011. In this regard, the learned counsel made elaborate reference to the averments set out in the show cause notice, the reply submitted by the petitioner, dated 11.07.2016, wherein a preliminary objection was raised stating that the jurisdiction of the author of the show cause notice, stands ousted, as the show cause notice has been issued primarily in terms of Section 28 of the Customs Act, 1962, pertaining to the demand of duty in respect of clearances effected in the past. The petitioner referred to the decision of the High Court of Delhi in the case of Mangali Impex Ltd., & Ors vs. UOI [2016 (335) ELT 605 (Del)], wherein it was held that the Additional Director General of Revenue Intelligence (DRI), is not the proper officer for demand of duty in terms of the said Section. It is further submitted that the respondent had referred to the decision of the High Court of Kerala in the case of N.S.Mahesh vs. Commissioner of Customs, Cochin [2016 (331) ELT 402 (Ker.)] for denying the opportunity of cross examination of the officers of the Customs. It is submitted that though the said Writ Petition was dismissed, another petitioner and co-noticee in the very same show cause notice one Rejie Cherian filed another Writ Petition before the High Court of Kerala for the very same relief, which was allowed and cross examination was permitted, based on a concession made by the counsel for the department, the department permitted cross examination of the officers as well as the co-noticee, despite the fact that the Writ Petition filed by the N.S.Mahesh, was dismissed. On the above grounds, the learned counsel for the petitioner submitted that the Writ Petition may be entertained and the Court may consider the submissions made by the petitioner and direct an opportunity to be granted to cross examine the officers of the department.

3. Heard Mr.G.M.Syed Nurullah Sheriff, learned Standing counsel for the Revenue on the above submissions.

4. The challenge to the impugned order-in-original is largely pitched upon the denial of the petitioner's request for cross examination of the officers.

5. The noticee/petitioner sought for cross examination of all the officers, who reassessed/verified, audited and examined the goods impugned in the respective bills of entry cleared in the past as the said clearances were permitted by the said officers after exercising due diligence as appropriate officer. This request was made while submitting an interim reply dated 11.07.2016 to the show cause notice dated 30.12.2015 and corrigendum dated 14.03.2016. The petitioner through their counsel while responding to the intimation for personal hearing, submitted a written representation, dated 14.03.2013, reiterating the same request. The respondent by reply dated 11.04.2018, informed the counsel for the petitioner that the request for cross examination was denied by the Commissioner by communication dated 21.02.2017. Apart from other things it is stated that no statements were recorded from the officers who reassessed/verified, audited and examined the goods impugned and that they have discharged the functions in their official capacity based on the documents provided by the importer. The respondent referred to the decision of the High Court of Kerala in the case of N.S.Mahesh (supra). Thus, the respondent informed the counsel for the petitioner that the Adjudicating Authority has denied the opportunity of cross examination with sound reasons and in the same letter, intimation of personal hearing was given. However the petitioner did not respond to the notice and therefore, two more opportunities of personal hearing were granted on 22.03.2017 and 16.03.2018 for which also

there was no response from the petitioner.

6. The respondent further stated that the representation dated 14.03.2018, reiterating the request made vide letter dated 11.07.2016, without any new grounds cannot be entertained and it is open to the petitioner to submit their objections by way of reply to the show cause notice. The decisions, which were relied on by the petitioner, were also distinguished on the ground that it was factually different. Thus, it was informed that more than three opportunities of personal hearing has already been granted in compliance with the provisions of Section 122A of the Act and one more opportunity of personal hearing was given on 24.04.2018. Subsequently, the petitioner sent another letter through their counsel dated 22.05.2018, reiterating whatever has been said earlier and once again seeking for permission to cross examine the officers. It appears that the reason for submitting such a representation is that though the Writ Petition filed by the N.S.Mahesh was dismissed by the High Court of Kerala, since the departmental counsel made a concession in the case of a co-noticee agreeing for cross examination of the officers, the department also permitted cross examination of the officers in N.S.Mahesh case.

7. In my considered view, the request made for cross examination has been rejected by the authority, not once, but twice. The rejections have been by speaking orders. More importantly all the officers have discharged their official function and the department has specifically stated that they have not recorded any statement from the officers so as to make them available for cross examination, as if they have rendered a personal opinion in the matter. I am prima facie in agreement with the stand taken by the respondent stating that the officers having discharged their official duty, that too, based upon the documents which were filed by the importer cannot be subjected to cross examination at the instance of the importer. At best, the importer can place materials before the Adjudicating Authority to establish that the assessment done was improper or incorrect. I make it clear that this is only a prima facie finding. Ultimately, now an order has been passed by the respondent, which is impugned in this Writ Petition. As against the impugned order, the petitioner has a remedy of filing an appeal before the CESTAT.

8. In the given facts and circumstances, the question is whether the petitioner should be permitted to bye-pass such a remedy and whether the Court should exercise discretion in the matter. The issue which is in dispute in the current proceedings pertain to classification of the goods which have been imported to arrive at the rate of duty payable. This undoubtedly is a factual issue which cannot be adjudicated in a

Writ Petition. It is for the petitioner to establish before the Appellate Tribunal that the classification adopted by the Original Authority was incorrect. Such an exercise cannot be done in a Writ Petition. Therefore, in the given facts and circumstances I hold that the Writ Petition is not maintainable.

9. In the result, the Writ Petition is dismissed as not maintainable, leaving it open to the petitioner to avail the appellate remedy before the Tribunal. It is made clear that this Court has not rendered any finding on the merits of the matter and it is open to the petitioner to canvass all points before the Tribunal, if so advised. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

pbn

To

The Commissioner of Customs,
Chennai-II Commissionerate, Custom
House No.60, Rajaji Salai
Chennai - 600 001.

+1cc to Mr.G.M.Syed Nurullah Sheriff, Advocate, S.R.No.42059
+1cc to Mr.B.Sathish Kumar, Advocate, S.R.No.42190

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cs/09/07/18