IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.10.2020

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.P. No.4163 of 2019
WMP.No.4667 of 2019

M/s. MaruvurArasi Logistics Pvt. Ltd.,
Catholic Centre, No.108, II Level
Armenian Street, Chennai-600 001
Rep. by its Managing Director
D.Bhaskaran ...Petitioner

Vs

The Commissioner of Customs (Chennai I)
O/o. The Principal Commissioner of Customs
(Chennai-I), New Customs House
Meenambakkam, Chennai-600 027 ...Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying Writ of Certiorari calling for the records pertaining to order in original No.202/2018-19-Chennai-I dated 24.12.2018 passed by the respondent herein and to quash the same, in so far as the said order have been passed without jurisdiction and in excess of the authority conferred on the respondent and against the provisions of law.

For Petitioner :Mr.S.Baskaran

For Respondents :Mr.K.S.Ramaswamy
Standing Counsel

O R D E R

The petitioner seeks a certiorari calling for and quashing order in original dated 24.12.2018, passed by the Commissioner of Customs, primarily on the grounds that the same has been passed in violation of the provisions of Sections 28(2) and 28 (4) of the Customs Act, 1962 (in short 'Act').

2. The petitioner is a customs house agent. On the basis of intelligence gathered by the Customs Department, an enquiry was launched in regard to certain imports by one PNN Steel Private Limited, leading to the conclusion that the importer had

erroneously claimed benefit under various customs notifications. As a consequence, enquiry was also launched as against the petitioner, who was engaged in clearing the consignments imported by the said PNN Steel Private Limited. A statement was recorded from one D.Bhaskaran, a director of the petitioner herein, and earlier a partner in one, Horizon Forwarders. Horizon Forwarders had initially been clearing the import consignments of PNN Steel Private Limited till the petitioner had obtained an CHA licence, after which such activity was carried on by the petitioner.

3. I consciously refrain from referring to the voluminous details and particulars of imports and the alleged discrepancies found therein, since they are not material in the light of my conclusion on the legal grounds adduced by the petitioner challenging the impugned order.

4. Suffice it to say that after a detailed examination of the transactions of import, the assessing authority refers, at para 26 of the show cause notice dated 09.05.2017 to the fact that the importer had made payments towards differential duty and interest on various dates between 03.02.2014 and 02.04.2014. Thereafter he identifies the issues arising in the proceedings and calls upon the petitioner to show cause why penalty under Section 112 of the Act not be imposed for abetting imports that are alleged to be in violation of the provisions of the Act and various notifications and for failing to comply with paragraphs 13(d) and (e) of the Customs House Agents Licensing Regulations, 2004.

5. On 27.09.2018, the petitioner replies to the show cause notice. The reply is detailed and refers to various factual particulars of the transactions engaged in by the parties. Interalia, the petitioner raises the bar of limitation, as according to it, there was no fraud, collusion or willful mis-statement/suppression of fact justifying the invocation of the provisions of Section 28(4) of the Act providing for an extended period of limitation of five years. Moreover, since the differential duty along with interest had been remitted even in 2014, the petitioner submitted that the show cause notice ought not to have been issued at all, presumably making reference to the provisions of Section 28(2) of the Act.

6. The impugned order came to be passed on 24.12.2018 confirming the levy of penalty upon the petitioner in terms of Section 112(a) of the Act for abetment of offence committed by the importer as against which the petitioner has filed the present writ petition.

7. Section 28 sets out the scheme of assessment under the Customs Act and reads as follows:

SECTION 28. Recovery of duties not levied or not paid or short-levied or short- paid or erroneously refunded. - (1) Where any duty has not been levied or not paid or short-levied or short-paid] or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any wilful mis-statement or suppression of facts,-

(a) the proper officer shall, within two years from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;

(b) the person chargeable with the duty or interest, may pay before service of notice under clause (a) on the basis of,-

(i) his own ascertainment of such duty; or

(ii) the duty ascertained by the proper officer,

the amount of duty along with the interest payable thereon under section 28AA or the amount of interest which has not been so paid or part-paid.

Provided that the proper officer shall not serve such show cause notice, where the amount involved is less than rupees one hundred.

(2) The person who has paid the duty along with interest or amount of interest under clause (b) of sub-section (1) shall inform the proper officer of such payment in writing, who, on receipt of such information, shall not serve any notice under clause (a) of that sub-section in respect of the duty or interest so paid or any penalty leviable under the provisions of this Act or the rules made thereunder in respect of such duty or interest:

Provided that where notice under clause (a) of sub-section (1) has been served and the proper officer is of the opinion that the amount of duty along with interest payable thereon under section 28AA or the amount of interest, as the case may be, as specified in the notice, has been paid in full within thirty days from the date of receipt of the notice, no penalty shall be levied and the proceedings against such person or other persons to whom the said notice is served under clause (a) of sub-section (1) shall be deemed to be concluded.

(3) Where the proper officer is of the opinion that the amount paid under clause (b) of sub-section (1) falls short of the amount actually payable, then, he shall proceed to issue the notice as provided for in clause (a) of that sub-section in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of [57][two years] shall be computed from the date of receipt of information under sub-section (2).

(4) Where any duty has not been levied or not paid or has been short-levied or short-paid] or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of,-

(a) collusion; or

(b) any wilful mis-statement; or

(c) suppression of facts,

by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or not paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.

(5) Where any duty has not been levied or not paid or has been short-levied or short paid or the interest has not been charged or has been part-paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or the employee of the importer or the exporter, to whom a notice has been served under sub- section (4) by the proper officer, such person may pay the duty in full or in part, as may be accepted by him, and the interest payable thereon under section 28AA and the penalty equal to fifteen per cent. of the duty specified in the notice or the duty so accepted by that person, within thirty days of the receipt of the notice and inform the proper officer of such payment in writing.

(6) Where the importer or the exporter or the agent or the employee of the importer or the exporter, as

the case may be, has paid duty with interest and penalty under sub-section (5), the proper officer shall determine the amount of duty or interest and on determination, if the proper officer is of the opinion-

(i) that the duty with interest and penalty has been paid in full, then, the proceedings in respect of such person or other persons to whom the notice is served under sub-section (1) or sub- section (4), shall, without prejudice to the provisions of sections 135, 135A and 140 be deemed to be conclusive as to the matters stated therein; or

(ii) that the duty with interest and penalty that has been paid falls short of the amount actually payable, then, the proper officer shall proceed to issue the notice as provided for in clause (a) of sub-section (1) in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of two years shall be computed from the date of receipt of information under sub-section (5).

(7) In computing the period of two years referred to in clause (a) of sub-section (1) or five years referred to in sub-section (4), the period during which there was any stay by an order of a court or tribunal in respect of payment of such duty or interest shall be excluded.

(8) The proper officer shall, after allowing the concerned person an opportunity of being heard and after considering the representation, if any, made by such person, determine the amount of duty or interest due from such person not being in excess of the amount specified in the notice.

(9) The proper officer shall determine the amount of duty or interest under sub-section (8),-

(a) within six months from the date of notice, where it is possible to do so, in respect of cases falling under clause (a) of sub- section (1);

(b) within one year from the date of notice, where it is possible to do so, in respect of cases falling under sub-section (4).

(10) Where an order determining the duty is passed by the proper officer under this section, the person liable to pay the said duty shall pay the amount so determined along with the interest due on such amount whether or not the amount of interest is specified separately.

. . . .

8. Section 28 provides for assessments to be framed in two specific situations and I refer to the same as 'regular' and 'special' assessments respectively. Sub-section (1) sets out a limitation of two years for the initiation of a 'regular' assessment specifying explicitly that this limitation, of two years, will not cover cases of assessments involving fraud, mis-statement or collusion. In the case of a regular assessment, a show cause notice (SCN) may to be issued calling upon the assessee to respond to why the demand set out therein not be raised upon it upon receipt of which the assessee may acquiesce and pay over the duty proposed to be demanded along with interest thereupon. The assessee may also, if the proposed demand has been communicated to it even prior to the issuance of the SCN, remit the amount of duty with interest, voluntarily and in anticipation of the SCN. In the latter case, sub-section (2) forecloses all further action for assessment, providing that where the differential duty along with interest is remitted voluntarily, no proceedings shall be initiated thereafter and the matter allowed to rest. Section 28(3) provides for the regular assessment of transactions if the officer is of the view that the duty and interest voluntarily remitted fall short of the demand arising in that case.

9. Assessments involving fraud, mis-statement or collusion, 'special' assessments, may be initiated, in terms of sub-section (4) within the extended limitation of five years and are assessments where the short levy/short payment/erroneous refund, of duty or interest, is attributable to collusion, wilful misstatement or suppression of facts on the part of the assessee. A show cause notice in such cases can be issued and proceedings for assessment initiated at any time within five years from the relevant date.

10. Sub-section (5) states that where a show cause notice, as referred to in sub-section (4), is received by an assessee, the assessee may choose to pay the duty in full or in part as accepted by him along with interest under Section 28AA and penalty equal to 15% of the duty specified or so accepted by the assessee within 30 days of the receipt of the notice, and duly intimate the Officer of such payment.

11. Sub-section (6) states that in cases of remittance as contemplated under sub-section (5), a determination of the proper amount of duty and interest shall be made by the officer and if he is of the view that the amount of duty, interest and penalty has been paid in full, then the matter shall be treated as conclusive as regards all matters raised in the SCN except without prejudice to the provisions of Sections 135, 135A and 140 of the Act providing for 'Evasion of duty or prohibitions', 'Preparation' and 'Offences by companies' that, if the assessee

were a company, deems every person who, at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of its business, to also be guilty of the offence and to be proceeded against and punished accordingly. This, in my considered view, offers a benefit in cases of 'special' assessments along the lines of the benefit offered to a regular assessment under section 28(2).

12. There are thus two separate and distinct streams of assessments with corresponding beneficial offers extended in either cases. the Act naturally, contemplates a more rigorous procedure for assessment in cases of apprehension/allegations of collusion, wilful mis-statement or suppression of facts by an assessee.

13. Sub clause (ii) of sub-section (6) provides for a situation where, upon determination, the Officer finds that the amount remitted by the assessee falls short of the amount actually payable and in such a case, determination of the proper amount of duty shall be made as though it were a regular assessment under Section 28(1)(a) within two years from the date of receipt of information under sub-section (5) of Section 28. Sub-section (7) states that in computing the demand in terms of sub-section (4), the period of stay granted by a Court or Tribunal shall be excluded.

14. Section 28(8) provides for an opportunity of hearing to the assessee prior to the determination to be made further stipulating that the determination would not be of an amount in excess of the amount specified in the show cause notice. The limitation for completion of proceedings under Section 28(8) is stipulated under sub-section (9) and sub-section (10) provides for a mandatory payment of interest on such determination.

15. Thus, a 'special' assessment is itself bifurcated into two parts. Firstly, where an assessee accepts the allegation of collusion/wilful misstatement/suppression and remits duty and penalty leaving the door open for the initiation of certain specified proceedings and secondly a situation where the acceptance is only part, in which case, the Statute provides for a determination of the remaining duty as though it were a regular assessment under sub-section (1).

16. On a holistic reading of Section 28, the reasoning appears to be that where, in cases of a regular assessment, the voluntary payment of duty of interest would close the door on all further proceedings in a case of willful mis-statement/collusion/suppression, there are other consequences that might visit the assessee, for which the options are kept open. The benefit under Section 28(2) is thus restricted only to those cases of regular assessment simplicitor and not an

assessment involving alleged collusion, mis-statement or suppression of facts.

17. In fine, I am of the considered view that the benefit extended to an assessee under section 28(2) is available only in those situations falling under clauses (i) and (ii) of section 28(1)(b), that is, either where the assessee self-computes or seeks a computation from the proper officer of the duty and interest payable, and remits the same voluntarily, even prior to the receipt of a SCN from the officer and not in any other situation contemplated under Section 28. In the present case, the SCN has been issued invoking the provisions of section 28(5) which contemplates an alternate scheme of assessment as I have elaborated in the preceding paragraphs.

18. Learned counsel for the petitioner would argue that this was not a case of suppression at all and the invocation of section 28(4) was itself erroneous. However, both the SCN as well as the impugned order of assessment contain voluminous factual assertions and allegations in regard to collusion, wilful mis-statement and suppression of facts on the part of the petitioner, and it is certainly not appropriate for me to go into such disputed questions of facts in writ proceedings. This is best left for the appellate authority. The determination of the proper period of limitation involves mixed questions of facts and law and necessary enquiry upon the facts to determine whether the petitioner satisfies the conditions precedent under Section 28(5) is best left to the appellate authority to take a decision after due examination of all relevant facts and details. I am thus not inclined to interfere in the impugned order on this aspect.

19. The second legal proposition put forth by the petitioner is that the issuance of the show cause notice was itself contrary to law in the light of the admitted position that the importer has remitted the differential duty and interest voluntarily in 2014, long before the issuance of the show cause notice. This argument is made relying upon the provisions of Section 28(2) of the Act.

20. This submission is not acceptable for the reason that it does not take note of the scheme of assessment under Section 28 as noted and explained by me in the preceding paragraphs. To reiterate the conclusion in paragraphs 12 to 17 above, the benefit under Section 28(2) is available only in the case of a 'regular' assessment contemplated made under Section 28(1). This is made clear by the explicit exclusion in Section 28(1) of cases of collusion, wilful mis-statement or suppression of facts for the initiation of which revenue has the benefit of an extended limitation of five years. Furthermore, section 28(2)

makes reference to the duty and interest remitted by the assessee computed in terms of Section 28(1), that is, in cases where there is no allegation of collusion, mis-statement or suppression of facts. The placement of Section 28(2), immediately after 28(1) is also, to my mind, supportive of the aforesaid conclusion. It is evident that it is only the remittance of duty and interest as referred to in sub-section (1) that is addressed in sub-section (2) of Section 28.

21. This writ petition is dismissed permitting the petitioner to file an appeal challenging the impugned order before the appellate authority within a period of two weeks from the date of uploading of this order. Such appeal, if filed within the period as stated hereinbefore, shall be received by the registry of the appellate authority without reference to limitation but subject to all other statutory pre-conditions and will be heard and disposed on merits. No costs. Connected Miscellaneous Petition is closed.

s/d-
Assistant Registrar(CS VIII)

True Copy

Sub-Assistant Registrar

To

The Commissioner of Customs (Chennai I)
O/o. The Principal Commissioner of Customs
(Chennai-I), New Customs House
Meenambakkam, Chennai-600 027

W.P. No.4163 of 2019
WMP.No.4667 of 2019

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