IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.02.2021

CORAM :

The Honourable Mr.Justice T.S.SIVAGNANAM
and
The Honourable Ms.Justice R.N.MANJULA

C.M.A.No.746 of 2016
and
C.M.P.No.6097 of 2016

M/s.IOCEE Exports Ltd.,
4E, Century Plaza,
560-562, Mount Road,
Chennai - 600 018. ...Appellant/Applicant

Vs

1. The Commissioner of Central Excise,
Chennai-II Commissionerate,
Nungambakkam, Chennai - 600 034.

2. Customs, Excise and Service
Tax Appellate Tribunal,
South Zonal Bench,
Shasthri Bhavan, 26, Haddows Road,
Chennai - 600 006. ...Respondents/Respondents

PRAYER: Civil Miscellaneous Appeal filed under Section 35(G) of the Central Excise Act, 1944 to set aside Final Order No.41495/2015 dated 04.11.2015 in Appeal No.E/42341/2013-SM passed by the 2nd respondent Tribunal, which was received by the Appellant on 23.11.2015.

For Appellant : Mr.B.Satish Sundar

For Respondents: Mr.A.P.Srinivas
Senior Standing Counsel

JUDGMENT
(Delivered by T.S.Sivagnanam,J)

This appeal, filed by the appellant-assessee under Section 35G of the Central Excise Act, 1944, ('the Act' for brevity) is directed against the order dated 04.11.2015 made in Final Order No.41495/2015 passed by the Customs, Excise & Service Tax Appellate Tribunal, Chennai ('the Tribunal' for brevity).

2. The appeal was admitted on 07.04.2016 on the following reframed substantial questions of law:

> "1. Whether in the facts and circumstances of the case, the failure of the Tribunal, to arrive at definitive findings of fact, despite being a final fact finding authority, vitiated its order?
>
> 2. Whether in the light of the finding that there was no diversion of imported material and that consequently, the levy of penalty was unjustified, the confirmation of the demand for duty alone could be upheld? and
>
> 3. Whether in the facts and circumstances of the case, the Tribunal was right in confirming the demand of duty under the proviso to Section 28(1) of the Customs Act, 1962, inasmuch as the duty if at all recoverable could only be in terms of Rule 8 of the Customs (Import of Goods at Concessional Rate of Duty for Manufacturer of Excisable Goods) Rules, 1996?"

3. We have elaborately heard Mr.B.Satish Sundar, learned counsel for the appellant and Mr.A.P.Srinivas, learned Senior Standing Counsel appearing for the respondents.

4. Though the assessee has raised the above mentioned substantial questions of law, question No.2 is not required to be answered, since we find that the finding of the Tribunal vacating the penalty is just and proper. The other two substantial questions of law raised by the assessee were to strengthen their submission that if it has been found that there has been no diversion, the extended period of limitation as provided to the proviso to Section 28(4) of the Act cannot be invoked.

5. In our considered opinion, we do not propose to travel thus far in this matter, as we have to first examine as to whether the exercise done by the Adjudicating Authority to conclude that the assessee has disposed of the wastage at the value of Rs.2/- per kg without obtaining the permission of the proper officer is correct or not.

6. The reason for issuance of the Show Cause Notice is by reference to the standard input-output norms fixed in respect of the concerned industrial activity.

7. In our view, the standard input-output norms can be treated as an indicator and that may not be a sole reason for initiation of proceedings. This aspect was considered by the High Court of Gujarat in the case of Goodluck Garments Pvt. Ltd. Vs. Commissioner of Central Excise & Customs, Surat-II reported in 2019 (365) E.L.T 893. The argument of the assessee therein was that the input-output norms were in the nature of guidelines and not a fixed formula. This aspect was considered and the Court held that the mere fact that the wastage was in excess of the input-output norms, without anything more, would not be sufficient for the Assistant Collector to arrive at the satisfaction that the imported fabric had not been used for the manufacture of the articles for export. Further, the Court pointed out that Condition No.6 of the Notification No.13/Customs, dated 09.02.1981 could not be read in a manner, whereby despite the fact that the assessee was in a position to show that the entire material had been used for the purpose of manufacture of goods and there was no allegation with regard to diversion of goods, merely because the wastage norms were not satisfied, the Assistant Collector of Customs could record satisfaction to the effect that the goods had not been used for the manufacture of articles for export.

8. The learned Senior Standing Counsel appearing for the respondents would submit that the assessee himself has given a letter accepting that they have sold the wastage in the local market.

9. On a perusal of the reply given by the assessee dated 15.10.2009 to the Show Cause Notice dated 16.09.2009, the assessee has not made any unconditional acceptance of any diversion. All that they have stated is that the practice is common in the industry and they were not aware that a letter has to be obtained from the proper officer and they made it clear that they have not hidden any facts and have not caused any reason for the Adjudicating Authority to believe that the facts were suppressed. Therefore, the so called letter issued by the assessee cannot be taken to be a case where the assessee accepted the fact that they have not utilized the raw materials for the purpose for which it was imported.

10. Therefore, we are of the view that the materials which were available cannot be a reason for issuance of the Show Cause Notice dated 16.09.2009. Consequently, the Order-in-Original No.23 of 2009 cannot be sustained.

11. In the result, the appeal filed by the assessee is allowed on a different ground than what was raised by the assessee, namely that standard input-input norms cannot be a sole basis for giving a cause of action for issuing the Show

Cause Notice for determination of the wastage, when there is no allegation of diversion made against the appellant. Therefore, the re-framed two substantial questions of law namely question Nos.1 and 3 are answered in favour of the appellant. The order passed by the Tribunal vacating the penalty is sustained. No costs. Consequently, connected miscellaneous petition is also closed.

Sd/-
Assistant Registrar

//True Copy//
Sub Assistant Registrar

hvk

To

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   Chennai-II Commissionerate,
   Nungambakkam, Chennai - 600 034.

2. Customs, Excise and Service
   Tax Appellate Tribunal,
   South Zonal Bench,
   Shasthri Bhavan, 26, Haddows Road,
   Chennai - 600 006.

+1cc to Mr.B.Sathish Sundar, Advocate SR.11530
+1cc to Mr.A.P.Srinvas, Advocate SR.11094

C.M.A.No.746 of 2016
and
C.M.P.No.6097 of 2016

VBA(CO)
CB(08/03/2021)