IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.11.2021

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.NO.17844 OF 2021
AND WMP.NO.19054 OF 2021
(THROUGH VIDEO CONFERENCING)

M/s.Laxmi Enterprises,
Represented by its Proprietor
Mrs.Nagalakshmi Sampath,
No.14, P.V.R.Road,
Ranasinghpet,
Bengaluru 560 053. ... Petitioner

.vs.

1. The Joint Commissioner of Customs (Group 4),
Office of Commissioner of Customs, Imports,
Department of Revenue,
Ministry of Finance, Government of India,
Customs House,
60, Rajaji Salai,
Chennai 600 001.

2. MMTC Limited,
6, Chennai House,
Esplanade Road, Chennai 600 108.

... Respondents

Prayer:

Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari to call for the records relating to Order in Original No.83811/2021 dated .04.2021 passed by the 1st respondent and quash the same .

For Petitioner : Mr.Joseph Prabakar

For R1 : Mr.Umesh Rao.K.
Standing Counsel.

For R2 : Mr.Karthik Sundaram

ORDER

The petitioner has challenged the impugned order in Original No.83811/2021 dated 04.2021 of the first respondent .

2. By the impugned order, the first respondent has confirmed the demand proposed in the show cause notice dated 16.04.2019 issued to the petitioner .

3. It is the case of the petitioner that the petitioner imported Tin Ingots during the year 2014 and 2016 which was purchased as high sea sale from MMTC Ltd. It is stated that MMTC endorsed the Bills of lading in favour of the petitioner and supplied the Certificate of Origin issued by the Ministry of International Trade and Industry, Malaysia.

4. It is submitted that Notification No.46/2011 dated 01.06.2011 exempted the petitioner from payment of Customs Duty for importing the aforesaid goods. The exemption was conditional upon complying with the provisions of the Customs Tariff (Determination of Origin of Goods under preferential Trade Agreement between the Government of member States of the Association of the South East Nations and the Republic of India) Rules, 2009.

5. The Department stated that the actual Regional Value Content (RVC) of Tin Ingots was less than 35% and therefore the Department contended that the Certificate of Origin furnished by the petitioner was invalid and stated that the petitioner had wrongly claimed exemption from payment of Basic Customs Duty on the imported goods. It is further submitted that the first respondent issued a Show Cause Notice (SCN) dated 16.04.2019 stating that the Certificate of Origin obtained from M/s.Malaysia Smelting Corporation (MSC), Malaysia was incorrect and accordingly proposed to recover the differential duty along with interest and penalty from the petitioner.

6. It is submitted that the said SCN was without jurisdiction. Thereafter, the 1st respondent passed order in Original No.83811/2021 dated .4.2021 in which the first respondent confirmed differential customs duty of Rs.16,67,121/- under Section 28(4) of the Customs Act, 1962 along with the interest and penalty. Hence the petitioner has been filed the present writ petition before this Court.

7. The learned counsel for the petitioner submits that the order has been passed contrary to well settled principle of law

in the case of Cosmic Dye Chemical vs. Collector of Central Excise, Bombay, 1995(75)E.L.T.721 (S.C.). In this connection, a reference was made to para 6 from the said decision which reads as follows:-

> " 6. Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word 'wilful' preceding the words "misstatement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or rules" are again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or misstatement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11-A. Misstatement or suppression of fact must be wilful".

8. The learned counsel also drawn attention to a decision of the Telangana High Court in M/s.Radiant Corporation Private Limited, B1 and B2, Industrial Estate Sanath Nagar, Hyderabad 500018 rep.by K.V.V.Janardhana Rao vs. The Union of India, through its Revenue Secretary, Department of Revenue, Ministry of Finance, 128-A/North Block, New Delhi 110 001 and two others, I.A.No.1 of 2019 in W.P.No.14026 of 2019 wherein an interim direction was issued to restrain the department from proceeding further with show cause notice dated 28.05.2019 and the said writ petition is said to be pending further orders.

9. The learned counsel for the petitioner further submits that there was no mis-statement or misdeclaration by the petitioner at the time of import. The learned counsel further submits even though the first respondent has admitted that there is no wilful suppression of facts, yet has justified the invocation of the extended period of limitation under Section 28 (4) of the Customs Act, 1962. The learned counsel therefore, submits that the writ petition has to be allowed.

10. Appearing on behalf of the respondents, the learned counsel for the respondents submits that the petitioner hs not an alternate remedy by way of appeal under Section 128 of the Customs Act, 1962 and therefore the petioner should work out a

remedy under the aforesaid Act and therefore the writ petition is liable to be dismissed. He further submits that the second respondent has unnecessarily been arrayed as a party in the proceedings.

11. The learned counsel for the respondents has also placed reliance on the decision of the Division Bench of this Court rendered in Nivaram Pharma Pvt.ltd., vs. The Customs, Excise and Gold (Control) Appellate Tribunal, South Regional Bench and Ors., (2005) 2 MlJ 246 : 2008(12) S.T.R.98(Mad.) wherein the Hon'ble Division Bench of this Court following decision of the Hon'ble Supreme Court in H.B.Gandhi vs. Gopinath & Sons, 1992 (Suppl) 2 SCC 312 and in the case of Karnatak Chemical Industries vs. Union of India, Menu/SC/0439/1999 of the Hon'ble Supreme Court held that where there is a hierarchy of appeals provided under a statute, the party must exhaust the statutory remedies before resorting to involve the writ jurisdiction.

12. Heard the learned counsel for the petitioner and the learned Standing Counsel for the first respondent and the learned counsel for the second respondent.

13. The learned counsel for the petitioner has relied on the decision of the Hon'ble Supreme Court in Cosmic Dye Chemical vs. Collector of Central Excise , Bombay, 1995(75) E.L.T.721(S.C.). There is no quarrel with the proposition laid therein. In Tamil Nadu Housing Board vs. Collector of Central Excise, Madras, 1994 (74) E.L.T.9 (SC), the Court held extended period of Limitation under Section 11A of the Central Excise Act, 1994 will not apply. The proviso to Section 11 A read as under:-

> " Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder, with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if for the words " Central Excise Officer", the words " Collector of Central Excise" and for the words " six months" the words " five years" were substituted".

14. Section 28(4) of the Customs Act, 1962, which has been invoked in the present case reads as under:-

(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,

15. The facts as to whether a case was made out for suppression of facts or wilful mistatement with an intent to evade of payment of duty or not is a question of fact which has to be decided by the hierarchy of the authorities under Customs Act, 1962. The petitioner has to establish the case for interference only before the Appellate Commissioner under Section 128 of the aforesaid Act. Even if the Appellate Commissioner does not accept the contention of the petitioner, the petitioner is not remedyless. The petitioner can recover the same from the 2nd respondent in accordance with the provisions of the Sale of Goods Act, 1930.

16. Considering the same, the writ petition is liable to be dismissed and it is dismissed. The petitioner is however given liberty to approach the Appellate Commissioner under Section 128 of the Customs Act, within a period of 30 days from the date of receipt of a copy of this order. If such anappeal is filed, the Appellate (Commissioner) shall entertain the appeal on merits and dispose the same in accordance with law subject to the petitioner pre-depositing 7.5% of the disputed tax or penalty as is required under the Act. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

kkd

To

The Joint Commissioner of Customs (Group 4),
Office of Commissioner of Customs, Imports,
Department of Revenue,
Ministry of Finance, Government of India,
Customs House, 60, Rajaji Salai,
Chennai 600 001.

W.P.No.17844 of 2021

KSM(CO)
PM/07/01/2022