

\$~19

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

%

Date of Decision : 21st January, 2021

+ W.P.(C) 842/2021 & CM APPL.2146/2021 (*exemption*)

M/S NEW ERA TRADING PVT LTD Petitioner
Through: Mr.Prem Rajan with Mr.Himanshu
Kaushik, Advocates.

versus

THE COMMISSIONER OF CUSTOMS EXPORT
& ANR.

..... Respondents

Through: Mr.Arunesh Sharma, Advocate for
Mr.Harpreet Singh, SSC for R-1.
Ms.Akanksha Mehra, Advocate for Mr.Aditya
Singh, Standing Counsel for R-2/DRI.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGMENT

: **D. N. PATEL, Chief Justice (Oral)**

CM APPL.2146/2021 (*exemption*)

Allowed, subject to just exceptions.

The application is disposed of.

W.P.(C) 842/2021

1. This petition has been preferred with the following prayers:-

“(a) *To issue a writ of Certiorari quashing the show cause notice dated 24.01.2020 issued under DRI/AZU/CI/ENQ-39/(INT-25/2016)/6825/ being time barred as per provisions of Section 28 of the Custom Act,1962; and/ or*

W.P.(C) 842/2021

Page 1 of 10

Signature Not Verified

Digitally Signed By: PANKAJ
KUMAR
Location:
Signing Date: 09.02.2021
22:53:21

(b) *such other appropriate writ, order or direction as this Hon'ble Court may deem fit may also be issued."*

(emphasis supplied)

2. Learned counsel appearing for the petitioner has taken this court to the show cause notice dated 24.01.2020, issued by respondent No.2, which is Annexure A-1 to the memo of this writ petition. It is contended by learned counsel that (a) show cause notice (SCN) issued by respondent No.2 is barred by time and (b) Respondent No.2 does not have the power, jurisdiction and authority to issue the aforementioned SCN. Moreover, learned counsel submits that the grievance ventilated in the present petition is covered by various decisions of the Hon'ble Supreme Court and this Court and other High Courts in favour of the petitioner.

3. Learned counsel appearing for the petitioner has relied upon ***State of Punjab v. Bhatinda District Co-op. Milk P. Union Ltd.***; 2007 (217) E.L.T. 325 (S.C.), ***Madina (UZ) Impex v. Union of India***; 2019 (368) E.L.T. 555 (Del.) and ***Famina Knit Fabs v. Union of India***; 2020 (371) E.L.T. 97 (P & H) and submits that the question of the SCN being time barred be decided by this Court at the threshold.

4. We have heard learned counsel appearing for the petitioner at length and looked into the facts of the present case. Some crucial facts that emerge are enumerated below :-

(a) Case of the respondent as set out in the SCN is that the petitioner had fraudulently availed Special Focus Market Scheme (SFMS) benefits by producing forged house BLs and Landing Certificate, wherein

consignee country was deliberately mis-declared by them for availing undue benefits under the Scheme.

(b) The allegations in para 3.1 of SCN dated 24.01.2020 read as under:-

*“3.1 Intelligence developed by the officers of Directorate of Revenue Intelligence (DRI), Zonal Unit, Ahmedabad indicated that M/s New Era Trading Pvt. Ltd. (hereinafter referred to as "New Era" for the sake of brevity) had **fraudulently availed Special Focus Market Scheme (SFMS) benefits, by producing forged House BLs and landing certificates**, wherein consignee country was deliberately mis-declared by them for the purpose of availing undue benefit under SFMS. It was gathered that Shri Shanti Swaroop Sharma, who looked after all the activities of "New Era" had adopted **this modus operandi** mainly in respect of exports to Armenia, Azerbaijan, Kazakhstan, Sudan and Ethiopia etc. However, the goods had never travelled to the destination shown on the export documents.”*

(emphasis supplied)

(c) It is further alleged that during the course of investigation, it was found that in TR-1 and TR-2 copies of shipping bills, port of discharge and country of destination were found manually changed and forwarded to Additional Commissioner of Customs, Exports and filed. The port of discharge had been manually changed to Jebel Ali from Bandar Abbas, Awassa and Sudan and country of destination had been manually changed to Dubai and the same were endorsed with the customs stamp. It is further alleged that the amendments were wilfully done and the export goods did not correspond with the material particulars with regard to the port of discharge and country of destination. On enquiry with the freight forwarder and the custom broker, it was revealed that amendments were done and the

goods were diverted and despite the fact that the goods never reached the country mentioned in the shipping bills, the Landing Certificate was issued to obtain the SFMS benefits, despite knowing that the petitioner was not eligible for the same.

(d) Para 4.2 of the SCN is also relevant and reads as follows:

“4.2. On scrutiny of documents produced by "New Era", it was revealed that the exporter had shown export of readymade garments from ICD Tughlakabad to Azerbaijan, Kazakhstan, Sudan and Ethiopia during the period from March, 2013 to September, 2013 under Special Focus Market scheme. "New Era" had filed 203 Shipping bills declaring FOB value of Rs. 102,25,88,997/- for purported export to Azerbaijan, Kazakhstan, Sudan and Ethiopia under SFMS (as detailed in Annexure-A attached to the SCN). Further, it was also noticed that against the said exports, the exporting firm was issued duty credit scrips/authorisation under SFMS for export of product to notified market/countries (as listed in Appendix 37C of HBP vol.1) by DGFT, Delhi, as per para 3.14 of FTP 2009-2014 and same were sold to various importers in India for availing duty exemption for import of goods.”

(emphasis supplied)

Thus, from a reading of the SCN, it appears that the petitioner had filed 203 shipping bills declaring FOB value of **Rs.102,25,88,997/-** for purported export to Azerbaijan, Kazakhstan, Sudan and Ethiopia under SFMS. All these shipping bills were to be verified by the Department by cross-checking with the other concerned Departments/Officers. Similarly, during the course of investigation, TR-I/TR-II copies of the shipping bills were to be verified. As the port of discharge and the country of destination were found manually changed, further investigation was done and information was sought from Additional Commissioner of Customs

(Exports), ICD, Tughlakabad, New Delhi. The signatures of the Officer endorsed on the shipping bills as well as the customs stamps, etc. were to be verified. This was time consuming process and thus prima facie we do not find merit in the contention of the petitioner that the SCN was barred by time. It goes without saying that investigation to unearth fraud and/or collusion with respect to as many as 203 shipping bills, with the involvement of several Departments cannot be completed overnight. Looking at the allegations in the SCN and the details of the investigations carried out as well as the provisions of **Section 28AAA of the Customs Act, 1962**, we are of the prima facie view that the SCN is not time barred.

5. The other contention raised by the counsel for the petitioner is that under Section 28 (1) (a) of the Customs Act, 1962 where any duty has not been levied or not paid or has been short levied or short paid or erroneously refunded for any reason other than reasons of collusion or any wilful mis-statement or suppression of facts then within two years of the relevant date a SCN is required to be served and under Section 28 (4) the time limit for demand is five years in case of collusion etc. The present impugned notice has proposed to demand and recover the duty relatable to 32 duty credit authorisations issued by DGST under **Section 28AAA of the Customs Act, 1962**. A reading of the provisions, according to counsel for the Petitioner shows that the limitation to demand and recover the duty ended on 11.09.2018 or 22.03.2019 since the exports were made between 08.03.2013 and 12.09.2013 and FMS Authorisation was issued between 19.06.2013 to 23.04.2014 and thus the SCN issued on 24.01.2020 is time barred.

6. Learned counsel for the respondent on the other hand has relied on the

Section 28AAA of the Customs Act to contend that the SCN is not time barred inasmuch as the petitioner is guilty of suppression of facts and wilful mis-statements in claiming the benefits under the Scheme. Prima facie we find merit in the contention of the respondent.

7. Hon'ble Supreme Court in the case of Commissioner of Customs, New Delhi v. C.T. Scan Research Centre (P) Ltd., (2003) 11 SCC 25 has held as under:-

“3. A contention was raised by the respondent that notice was issued after five years and therefore, the demand of duty was time-barred as per the provisions of Section 28 of the Customs Act. That contention was accepted by the Tribunal on the ground that as the notice was issued beyond the permissible limit of five years provided under Section 28 of the Customs Act, the demand was time-barred. The Tribunal also arrived at the conclusion that show-cause notice was issued by invoking the provisions of extended period of limitation by the Assistant Commissioner and hence it was without jurisdiction as per Section 28(1) of the Customs Act.

4. At the time of hearing of this matter, learned counsel for the appellant submitted that in such cases Section 28(1) is not applicable and the issue is decided by the decision rendered by this Court in Commr. of Customs (Import) v. Jagdish Cancer and Research Centre [(2001) 6 SCC 483].

5. In the aforesaid decision, this Court specifically held that in such cases provisions of Section 28(1) of the Customs Act were not attracted because the said section covers cases of duty not levied, short-levied or erroneously refunded etc. Hence, the impugned judgment and order passed by the Tribunal requires to be set aside as there was no question of complying with the provisions of Section 28(1) of the Customs Act.

(emphasis supplied)

8. We are also of the view that the present writ petition is premature as the petitioner is yet to file reply to the SCN. Hon'ble Supreme Court in the case of Union of India and Ors. v. Coastal Container Transporters Association & Ors. reported in (2019) 20 SCC 446, has held as under:-

“30. On the other hand, we find force in the contention of the learned Senior Counsel, Shri Radhakrishnan, appearing for the appellants that the High Court has committed error in entertaining the writ petition under Article 226 of the Constitution of India at the stage of show-cause notices. Though there is no bar as such for entertaining the writ petitions at the stage of show-cause notice, but it is settled by a number of decisions of this Court, where writ petitions can be entertained at the show-cause notice stage. Neither it is a case of lack of jurisdiction nor any violation of principles of natural justice is alleged so as to entertain the writ petition at the stage of notice. The High Court ought not to have entertained the writ petition, more so, when against the final orders appeal lies to this Court.

31. The judgment of this Court in Union of India v. Guwahati Carbon Ltd.; (2012) 11 SCC 651 relied on by the learned Senior Counsel for the appellants also supports their case. In the aforesaid judgment, arising out of the Central Excise Act, 1944, this Court has held that excise law is a complete code in order to seek redress in excise matters and held that entertaining writ petition is not proper where alternative remedy under statute is available. When there is a serious dispute with regard to classification of service, the respondents ought to have responded to the show-cause notices by placing material in support of their stand but at the same time, there is no reason to approach the High Court questioning the very show-cause notices. Further, as held by the High Court, it cannot be said that even from the contents of show-cause notices there are no

factual disputes.”

(emphasis supplied)

Hon’ble Supreme Court in the case of **Malladi Drugs and Pharma Limited v. Union of India & Anr.** reported in (2020) 12 SCC 808, has held as under:-

“2. The High Court, has, by the impugned judgment held that the appellant should first raise all the objections before the authority who have issued the show-cause notice and in case any adverse order is passed against the appellant, then liberty has been granted to approach the High Court.

3. The High Court’s order was passed way back in 1997. Neither party knows whether the Department has proceeded further and/or whether any order has been passed pursuant to the show-cause notice. Even otherwise, in our view, the High Court was absolutely right in dismissing the writ petition against a mere show-cause notice. We see no reason to interfere. The appeals stand dismissed. There will be no order as to costs.”

(emphasis supplied)

Hon’ble Supreme Court in the case of **Commissioner of Central Excise, Haldia v. Krishna Wax Private Limited** reported in (2020) 12 SCC 572, has held as under:-

“14. It has been laid down by this Court that the excise law is a complete code in itself and it would normally not be appropriate for a writ court to entertain a petition under Article 226 of the Constitution and that the person concerned must first raise all the objections before the authority who had issued a show-cause notice and the redressal in terms of the existing provisions of the law could be taken resort to if an adverse order was passed against such person. For example in Union of India v. Guwahat

Carbon Ltd., it was concluded; “The Excise Law is a complete code in order to seek redress in excise matters and hence may not be appropriate for the writ court to entertain a petition under Article 226 of the Constitution”, while in Malladi Drugs & Pharma Ltd. v. Union of India, it was observed:

“... The High Court, has, by the impugned judgment held that the appellant should first raise all the objections before the Authority who have issued the show-cause notice and in case any adverse order is passed against the appellant, then liberty has been granted to approach the High Court ...

... in our view, the High Court was absolutely right in dismissing the writ petition against a mere show-cause notice.”

(emphasis supplied)

9. Since the matter is at the stage of SCN, which in our prima facie opinion is not time barred, especially looking to Section 28 AAA of the Customs Act, 1962 and the facts of this case. We are not inclined to entertain the petition at this stage. It is open to the petitioner to file a reply in response to the SCN and a decision shall be taken thereafter by the respondents, in accordance with law and taking into account the stand of the petitioner. It is also open to the petitioner to raise the grounds taken in the present petition in reply to the SCN including the objection to the jurisdiction, power and authority of the concerned respondent to issue the SCN which is one of the grounds urged in the petition.

10. Respondents are hereby directed to take a decision pursuant to the SCN dated 24.01.2020 in accordance with law, Rules, Regulations and Government Policies applicable to the facts of the case and also keeping in

mind the evidence on record, as early as possible and practicable. The issues raised herein with respect to the SCN being time barred, applicability of Section 28 (1) or Section 28AAA as well as the jurisdiction of the concerned authority are also left open to be decided by the concerned respondent.

11. Needless to state that the decision shall be taken without being influenced by this order including the prima facie view taken on the question of limitation.

12. Writ petition is hereby disposed of with the above observations.

CHIEF JUSTICE

JYOTI SINGH, J

JANUARY 21, 2021
a/kks