IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 14.09.2022

PRONOUNCED ON : 01.11.2022

CORAM

THE HON'BLE MR. JUSTICE S.VAIDYANATHAN

AND

THE HON'BLE MR. JUSTICE C. SARAVANAN

W.P.No.10376 of 2004
and
W.P.M.P.No.12094 of 2004

The Commissioner of Customs,
(Sea), (Customs)
No.60, Rajai Salai,
Customs House,
Chennai 600 001. .. Petitioner

vs.

1.The Customs, Excise & Service Tax
Appellate Tribunal,
South Zonal Bench,
Shastri Bhavan Annexe,
1st Floor, 26, Haddows Road,
Chennai 600 006.

2.The Commissioner of Central Excise,
Office of the Commissionerate of
Central Excise,

Chennai III Commissionerate,
121, Mahatma Gandhi Road,
Nungambakkam,
Chennai 600 034.

3. Pan Electronics India Ltd.,
   Plot No.83, Sipcot Industrial Complex,
   Hosure 635 126. .. Respondents

Prayer: Petition under Article 226 of the Constitution of India praying for issue of a Writ of Certiorarified Mandamus to call for the records of the 1st respondent Tribunal in order dated 23.01.2004 vide Ref.No.C/COD/347/03 in C/SO/71/03 in C/104/03/MAS (arising out of order-in-original No.15/2002 dated 31.07.2003 passed by the Commissioner of Cental Excise, Chennai III Commissionerate made therein and to quash the same and consequently to direct the Commissioner of Central Excise to proceed further with the show cause notices in No.(i) 38/2001 vide C.No.V/1539/158/2001 CX-ADJ III Dt11/12/2001 (ii) 9/2002 vide C.No.V/15/39/27/2002-CX-ADJ III dated 11.02.2002 by adjudicating the same in accordance with law.

For Petitioner :: Mr.T.Pramodkumar Chopda

For R2 : Mr.A.P.Srinivas
Senior Standing Counsel

For R3 :: Mr.S.Ganesh Aravindh
for M/s.Lakshmi Kumaran

O R D E R

The petitioner has challenged the impugned order passed by the first respondent Appellate Tribunal dated 23.01.2004 (arising out of the Order in Original No.15/2002 dated 31.07.2002 passed by the Commissioner of Central Excise, Chennai III Commissionerate) in C/COD 347/03 in C/SO/71/03 IN C/104/03/MAS and to quash the same and consequently to direct the Commissioner of Central Excise to proceed further with the two show notices dated 11.12.2001 and 18.02.2002.

2. By the impugned order, the Miscellaneous Application filed for condoning the delay in filing the above appeal was dismissed. Relevant portion of the impugned order, reads as under:-

> *"We have considered the submissions made by both the sides. We do not find it necessary to grant any adjournment for the purpose of getting any report from the Commissioner of Customs (Port-Exports). We find that in this case, the Order in Original was passed by the Commissioner of Central Excise-Chennai III*

Commissionerate holding that Commissioner of Central Excise has no jurisdiction to issue a Show Cause Notice to demand Customs duty and hence the proper officer namely the Commissioner of Customs, Bangalore, only has to examine the matter and take appropriate action as per law to demand customs duty, if any payable by M/s.Panel, with reference to the imports made by them through Bangalore. The Commissioner of Customs, Bangalore has sent the file containing the order in Original along with Show cause notice etc., to the Chennai Commissionerate since the imports were made through Chennai Customs".

3. Heard the learned counsel for the petitioner; learned Standing counsel for the second respondent and the learned counsel for the third respondent.

4. The facts on record indicate that the third respondent herein had imported goods from within the jurisdiction of the Chennai Port. The third respondent availed the benefit of concessional rate of duty at 5% on the imports made under Notification No.64/95-Cus dated 16.03.1995 as amended by Notification No.48/96-Cus dated 23.07.1996, 13/97-Cus dated 01.03.1997 and 25/99-Cus dated 28.02.1999 as amended by Notification No.20/2001-Cus dated 01.03.2001.

5. Under such circumstances, two show cause notices were issued to the third respondent by the second respondent as detailed below:-

S.No.	Show Cause No. and Date	Particulars	Demand
1	38/2001 11.12.2002	Plain Polypropylene/polyester film	Rs.2,92,88,507/-
2	9/2002 18.02.2002	Plain Polypropylene/polyester film	Rs. 55,59,982/-

6. These show cause notices were issued by the second respondent Commissioner of Central Excise, Chennai III, Commissionerate, within whose the jurisdiction, the third respondent was registered as a Central Excise Assessee. These show cause notices ultimately culminated in Order in Original No.15/2002 bearing Reference No.C.No.V/15/39/35/158/2001 CEx.Adj III/ V.15/39/27.02.2002 dated 31.07.2002 of the second respondent, the Commissioner of Central Excise, Chennai III, Commissionerate. The proceedings initiated in the above mentioned Show Cause Notices were dropped by the second respondent on the ground that the second respondent Commissioner of Central Excise has no

jurisdiction to demand customs duty and only the Commissioner of Customs, Bangalore was competent to examine the issue and take appropriate action. Relevant portion of the order dated 31.07.2002, reads as under:-

> " *I have carefully gone through the records of the case including replies to Show Cause Notices record of Personal Hearing as well as additional submissions given by M/s.PANEL. I find from the records that the assessee (M/s.PANEL) has contested not only the demand based on merits but have questioned the jurisdiction of the Commissioner of Central Excise in issuing this Show Cause Notice. They have also quoted the case law namely, M/s.Modi Xerox Ltd vs. Collector of Central Excise 1990(50) ELT 397 (Tribunal) in this regard. Accordingly, I am of the view that the main question to be decided, before going of Central Excise is empowered to demand the Customs duty under Section 28 of the Customs Act, 1962.*
>
> *In order to answer the above question it is necessary for me to go through the proviso to Section 28 of the Customs Act, 1962. As per this provision only Commissioner of Customs can invoke the provision of the said Section, as the clearance of imported goods/materials were done under the jurisdiction of customs. Hence, the invocation of proviso to Section 28 of the Customs Act, 1962 for the assessments, which had already been done by the Customs Authority, cannot be questioned or reopened by the Commissioner of Central Excise as he has no*

jurisdiction to do so. The case law cited by M/s.PANEL clearly supports this point and is very much applicable to the case. So, I therefore hold that this case cannot be decided by a Commissioner of Central Excise as its relates to demand of customs duty.

9. Incidentally, I may mention that even the Rule (8) of the Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996 gives power to Commissioner of Central Excise for demanding duty only in case of misuse of the materials imported under the said Rules and not otherwise. As there is no allegation in the Show Cause Notice about any misuse by M/s.PANEL, even by invoking the said Rule 9 of Customs, (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) this Show Cause Notice cannot be issued by Commissioner of Central Excise.

10. On merit, I find the allegation of the department is that M/s.PANEL are not eligible for the benefit of Notification No.64/95 – Cus dated 16.03.1995 as amended by Notification No.48/96 – Cus dated 23.07.1996, Notification No.13/97 dated 01.03.1997 and Notification No.25/99 Cus dated 28.02.1999 as amended inasmuch as they had imported corona treated biaxially oriented polypropylene/polyester film instead of plain plastic film of thickness 12 microns or below which alone is eligible for the concessional rate of customs duty in terms of the above mentioned Notifications.

11.The assessee (M/s.PANEL) have contested the notice by stating inter alia, that :-

a) For the purpose at manufacture on electronic capacitor grade metalized plastic film, the input has to be necessarily a biaxially oriented polypropylene film subjected to corona treatment, and hence the expression plain plastic film of thickness 12 microns or below would over a biaxially oriented polypropylene film subjected to corona treatment as well.

b) Notification No.25/98 – Cus dated 28.02.99 was amended by Notification No.20/2001 Cus dated 1.3.2001 adding an explanation to Sl.No.52 clarifying that for the removal of doubts plain film includes biaxially oriented polypropylene film. In view of the above clarification, the contravention raised in the Show Cause Notices trying to differentiate between a plain plastic film and a biaxially oriented plastic film, does not survive and therefore the proceedings initiated in the Show Cause Notices are liable to be terminated straightaway.

c) They also quoted the clarification given by the ministry of information and technology stating that the biaxial orientation is only a stretching process of making a very thin plastic film, it is to be construed that the expression plain plastic film of less than 12 microns indicated in the notification would include a biaxially oriented polypropylene film which conclusion is also reflected in the amendment to the Notification carried out in 2001.

d) The demand is time barred (with reference *to Show Cause Notice dated 11.12.2001) as there is not suppression of facts.*

12. As I have already stated above, the Commissioner of Central Excise has no jurisdiction to issue a Show Cause Notice to demand customs duty. Hence, the proper officer namely Commissioner of Customs, Bangalore only has to examine the matter and take appropriate action as per law to demand customs duty, if any , payable M/s.PANEL with reference to the imports made by them through Bangalore.

13. In view of the above discussion, I pass the following Order".

7. The order was reviewed by the Commissioner of Customs in terms of Section 129 (A) sub-section (2) of Customs Act, 1962 by the Commissioner of Customs (Port – Export), Chennai vide Order dated 103/2003, pursuant to which, the Customs Appeal No.C/104/03 was filed with a condone delay petition. The petition came to be dismissed by the Tribunal vide impugned order dated 23.01.2004. A parallel review order was also made by the Central Board of Excise and Customs in the exercise of power conferred under Section 35 E(1) of the Central Excise Act, 1944. By an order dated 24.07.2003 bearing Reference No.258-R/03, Central Board of Excise and Customs concluded that there was no error in the show cause notice issued by the Central Excise Authorities as

there was a dual control both by the Customs and Excise Department in terms of Customs Import of Goods at Concessional Rate at duty for Manufacture of Excisable Goods Rules, 1996 .

8. Under such circumstances, the Board authorized the second respondent Commissioner of Central Excise III Commissionerate to file a statutory Appeal before the Customs, Excise and Service Tax, Appellate Tribunal in E/786/03/MAS. Thus, an appeal came to be filed against the Order in Original No.15/2002 dated 31.07.2002 passed by the second respondent Commissioner of Central Excise, Chennai III Commissionerate dated 15.10.2003 before the Tribunal. By a separate order dated 31.10.2007 vide Final order No.1409 of 2007 in E/786/MAS, the Customs, Excise and Service Tax Appellate Tribunal dismissed the appeal with the following observations:-

> " 6. We have carefully studied the case records and the submissions by both sides. We find that the Commissioner of Customs, Chennai or proper officers subordinate to him are the authorities competent to demand duty short levied on goods imported through Chennai port. The ICRDMEG Rules provide for demand/recovery of concession allowed in duty on goods which are found to have been diverted

> for other use after import availing concession. The Rule 8 of the ICRDMEG Rules enables the Central Excise authorities having jurisdiction over the importer's manufacturing facility to demand the short levy in such a situation. As per Notification No.27/97-Cus (NT) dt.7.7.1997 as amended by No.40/97-Cus.(NT) dated 10.09.07 and 6/98-Cus.(NT) 03.02.08, issued under Section 4 of the Customs, Chennai Port area. These powers cannot be exercised by the Commissioner of Central Excise, Chennai-III. The Tribunal cannot direct the Commissioner of Central Excise to transfer proceedings pursuant to a notice issued by him to another Commissioner after issuing a suitable addendum to the Show Cause Notice. Unless the Board specifically authorities a different officer to issue notice for recovery of short levy and to adjudicate the same in terms of Section 5 of the Customs Act, only the proper officer of customs, Chennai Port, can issue and adjudicate a proposal to demand duty short levied on goods imported through Chennai Port. The Commissioner of Central Excise, cannot issue a Show Cause Notice containing proposals to be adjudicated by another Commissioner. Of Course, in terms of Section 4 of the Act, CBEC is competent to assign a notice issued by any Commissioner for adjudication by any other Commissioner. Accordingly, the appeal filed by the Revenue is dismissed as devoid of merit".

9. The specific case of the petitioner in the present writ petition is that the order passed by the Appellate Tribunal dated 23.01.2004 was

erroneous inasmuch as an Officer of the Central Excise Department was a Officer of the Customs under notification issued under Section 4(i) of the Customs Act, 1962. A reference was invited to Notification No.58/92-Cus (N.T) dated 31.7.1992). It is submitted that specifically the Collector of Central Excise , Madras was later renamed the Collector of Customs and Collector of Central Excise and therefore show cause notices issued by the Commissioner of Central Excise referred to supra were in order. It is therefore submitted that the order passed by the Tribunal on 23.01.2004 dismissing the appeal was incorrect.

10. It is submitted that the Commissioner of Central Excise is also a proper Officer within the meaning of Section 2(34) of the Customs Act, 1962. The impugned order of the Tribunal by the first respondent stating that the impugned order is well reasoned and requires no interference.

11. It is submitted that against the order in Original No.15/2002 dated 31.07.2002 passed by the Commissioner of Central Excise, Chennai-3 within whose jurisdiction the petitioner's factory was situated. Two appeals were filed as mentioned the above under the provisions of

the Central Excise Act, 1944 and the Customs Act, 1962.

12. On behalf of the third respondent, it was submitted that even if the order passed by the Commissioner of Central Excise was incorrect, both the Customs Department and Central Excise Department have taken a chance by filing the statutory appeals before the Appellate Tribunal. It is therefore submitted that the present writ petition is liable to be dismissed as the third respondent has been subjected to appeal.

13. We have considered the arguments advanced by the learned counsel for the petitioner ; learned Standing counsel for the second respondent and the learned counsel for the third respondent.

14. Two show cause notices came to be issued by the Commissioner of Central Excise, Chennai III, Commissionerate within whose jurisdiction to the third respondent has its factory to demand the customs duty in terms of Rule 8 of Customs (Import of goods at concessional rate of duty for manufacture of excisable goods) Rules, 1996. The said Rule reads as under:-

Rule 8 : Recovery of duty in certain case:- The (Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise) shall ensure that the goods imported are used by the manufacturer for the intended purpose and in case they are not so used take action to recover the amount equal to the difference between the duty leviable on such goods but for the exemption and that already paid, if any, at the time of importation, along with interest, at the rate fixed by notification issued under Section 28AB of the Customs Act, 1962 for the period starting from the date of importation of the goods on which the exemption was availed and ending with the date of actual payment of the entire amount of the difference of duty that he is liable to pay".

15. Thus, it is only the "Central Excise Officer" as defined Section 2(b) of the Central Excise Act, 1944 and not a "Proper Officer" as defind in Section 2(34) of the Customs Act, 1962 who is empowered to demand duty payable by the third respondent to recover duty under Section 28 of the Customs Act, 1962 .

16. In our view, Show Cause Notices dated 11.02.2001 and 18.02.2002 seeking to recover the customs duty together with interest

thereon issued by the second respondent Commissioner of Central Excise, Chennai III, Commissionerate was within the four corners of law.

17. The second respondent Commissioner of Central Excise, Chennai III, was also competent authority to decide and pass order on the improts made by the petitioner under the resepctive customs notification in terms of Rule 8 of Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996.

18. Therefore, the order passed by the second respondent Commissioner of Central Excise, Chennai III vide Order in Original No.15 of 2002 dated 31.07.2002 dropping a demand was not in accordance with the provisions of Rule 8 of Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996.

19. Since the order was passed by the second respondent, Commissioner of Central Excise, Chennai III, appeal was only to be filed before the Tribunal in Form AE-3 under Section 35(B) of the Central Excise Act, 1944 and not under Section 129(A) of the Customs Act, 1962. Therefore, the Customs Appeal filed by the petitioner in C/104/03/MAS

against an order passed by the Commissioner of Central Excise, Chennai III was not proper.

20. It is noticed that the Central Excise Appeal in E/786/03/MAS dismissed. The second respondent Commissioner of Central Excise, Chennai III ought to have filed an appeal against final order No.1409 of 2007 dated 31.10.2007 of the first respondent, Appellate Tribnal under Section 35 G of the Central Excise Act, 1944.

21. Leakage of revenue by the third respondent cannot be condoned. The third respondent cannot benefit from such confusion regading the jurisdiction. Therefore, it is for the second respondent Commissioner of Central Excise, Chennai III to take steps to ameliorate the situation, by filing appeal, if advised.

22. While dismissing the writ petition, we make it clear that the observation contained in the impugned order dated 23.01.2004 casting aspersion on the then Commissioner of Customs was however unnecessary. Therefore, the observation in paragraph 6 of the impugned order of the Tribunal are expunged.

23. We are of the view, the present writ petition is liable to be dismissed. Therefore, this writ petition stands dismissed with the above observation. No costs. Consequently, connected miscellaneous petition is closed.

(S.V.N.J.,) (C.S.N.J.,)

01.11.2022

Index : Yes/No
Internet : Yes/No
Speaking : Non-speaking Order
kkd

To

1.The Customs, Excise & Service Tax
Appellate Tribunal,
South Zonal Bench,
Shastri Bhavan Annexe,

1st Floor, 26, Haddows Road,
Chennai 600 006.

2.The Commissioner of Central Excise,
Office of the Commissionerate of
Central Excise,
Chennai III Commissionerate,
121, Mahatma Gandhi Road,
Nungambakkam,
Chennai 600 034.

S.VAIDYANATHAN,J.
AND
C. SARAVANAN,J.

kkd

Pre-delivery Order in
W.P.No.10376 of 2004

01.11.2022