BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 14.06.2022
CORAM:
THE HONOURABLE **MR.JUSTICE M.NIRMAL KUMAR**
W.P.(MD)No.21458 of 2018
and
WMP(MD) Nos.19343,19344 of 2018 and 17313 of 2021

Shri Bhavesh Shah Kishore .. Petitioner

Vs

Additional Commissioner of Customs
Custom House, New Harbour Estate,
Tuticorin- 628 004 .. Respondent

PRAYER: Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari to call for the records pertaining to the impugned order in Original No.45/2013 dated 12.10.2012 issued by the respondent in C.No.VIII/10/100/2011-Adjn and quash the same.

For Petitioner : Mr. Hari Radhakrishnan
For Respondent : Mr. R.Aravindhan
Senior Standing Counsel

ORDER

This Writ Petition has been filed challenging the impugned order in Original No.45/2013, dated 12.10.2012, issued by the respondent in C.No.VIII/10/100/2011-Adjn.

2. The petitioner is the Managing Director of M/s.Innobiz Electronic Private Ltd., which had imported under BE No.3579164/23.05.2021 parts of 'Cookmate' brand induction cooker in semi knocked down condition. The goods were declared in the bill of entry as spare parts for induction cooker. The Directorate of Revenue Intelligence (DRI), Tuticorin examined the goods on 26.05.2011 and found that as against 250 cartons declared in the bill of entry, there are 274 cartons besides 5 numbers of PP bags and a newspaper bundle containing certain parts of induction cooker. The DRI on verification found that the values were mis-declared and issued show cause notice stating that MRP was not declared in the bill of entry. Statements were obtained from one Jithesh, representative of the petitioner as well as from the petitioner. Thereafter the DRI collected 62 documents downloaded from the E-mail ID Shah@cookmate.in on 30.05.2011 and during investigation it was found that apart from the above mentioned live consignments, M/s.Innobiz Electronic Pvt Ltd., has imported earlier under two

bills of entry viz.,457789/15.04.2009 and 281807/21.02.2011 through Tuticorin Port. The petitioner has produced the actual invoice to the DRI officers showing the unit price of model TIC 1001 at USD 9.35 and TIC 6006 at USD 11.78 per piece. The price has been adopted for the purpose of assessment by the DRI officials for live consignment as well for the goods imported as per BE No.2818097/21.02.2011. The DRI fixed the price based on the e-mail document titled "Cookmate Service to me". The DRI had fixed price much higher to the invoice produced by the petitioner.

3.Thereafter, the adjudication was conducted by the Additional Commissioner of Customs and the adjudicating authority by the impugned order in Original 45/2012 dated 12.10.2012 had found that induction cookers imported through Tuticorin Port Trust under Rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules 2007 r/w. Section 14(1) of the Customs Act,1962 were under valued and thereafter determined the value of imported goods and made demand of differential duty of Rs.12,90,942/-. Further, the adjudicating authority imposed a redemption fine of Rs.8,00,000/- under Section 125 of the Customs Act on the importer. In the order portion of the order dated 12.10.2012, in para (vii) the adjudicating authority had imposed a penalty of Rs.12,90,942/- on M/s. Innobiz Electronic Private Limited, Calicut under Section 114 A of the customs Act, 1962 and in para (viii) imposed penalty of Rs.5,00,000/- on Shri Bhavesh Shah Kishore Partner of M/s. Innobiz Electronics Private Ltd., Calicut under Section 112(a) and 114AA of the Customs Act,1962.

4.Against this order, M/s. Innobiz Electronics Private Ltd., filed an appeal in Appeal No.19/2013 and the appellate authority, Commissioner of customs, Central Excise, Tiruchirappalli by an order dated 21.02.2013, while dismissing the appeal observed as follows:-

> "the appellants has undervalued all the three consignments by suppressing the actual value and willfully mis-declaring the description of goods as spares in order to evade payment of duty. For such act, the goods imported by the appellants are liable to be confiscated under Section 111(m) of Customs Act, 1962. For such act, the appellants are liable for penalty under Sec.112 (a) and Sec.114A and Sec.114 AA of Customs act, 1962, However, the appellants are given option to redeem the same on payment of fine under Sec.125 of the Customs act,1962. Further the appellants are liable to pay duty on the enhanced value as determined by the department with interest. The confiscated goods can be redeemed on payment of fine, differential duty with interest. The

appellants are also liable for penalty as ordered by the lower authority. In view of the above findings, the order of the lower authority is sustainable without any interference and the appeal filed by the appellant is liable to be rejected.”

5.Against the order of Commissioner (Appeals), the petitioner had filed an appeal before Customs Excise and Service Tax Appellate, Tribunal Chennai (CESTAT) vide Appeal No.C/40714/2013 and the CESTAT by an order dated 19.07.2016 accepted the submission of the appellant by relying upon the decision of the Hon'ble Supreme Court in ***Collector of Customs, Bangalore v. Maestro Motors Ltd., [2004 (174) ELT 289 (SC)]***, and held that Rule 2(a) of General Rules of Interpretation of the Harmonized System of Nomenclature enables the classification 'knocked down' assemblies as the finished goods, which are incorporated in the Customs Tariff Act, 1975 specifically finding that goods imported with induction cookers are imported as parts and, being electrical consumer goods are required to be subjected to testing before they can be marketed. Hence the goods are, as yet, not subject to the provisions of Legal Metrology Act 2009 in its imported form. If further found that the imported products are not permitted for sale to the consumer as such without mandatory testing, the classification under the Customs Act, 1975 cannot provide the escapement from Legal Metrology Act, 2009. Goods that are not subject to the prescription of declaring the ‘maximum retail price’ under Legal Metrology Act, 2009 do not come within the ambit of Section 4 A of Central Excise Act, 1944. With the above finding the CESTAT set aside the order passed by the adjudicating officer.

6.This being the case, two years thereafter, a miscellaneous petition has been filed in the above petition in C/ROM/40343/2017 in appeal No.C/40714/2013-DB, wherein the department had sought rectification of final order in Order No.40577/2018 dated 19.07.2016. In the order in the original order in CESTAT in page 2 three lines from the bottom it has been noted that “The appeals of M/s.Innobiz Electronics Pvt Ltd and M/s.Shri Bhavesh Shah Kishore are taken up for disposal in this common order.” The petitioner has not preferred any appeal before the Commissioner as well as before the CESTAT, but the CESTAT has erroneously recorded as though the petitioner has also preferred the appeal and also set aside the penalty on him, hence the order suffered error apparent. The CESTAT by an order dated 17.07.2018 has modified the order to certain extent and the last sentence in page no.2 of the final order was modified as under:-

“The appeal of M/s.Innobiz Electronics Pvt. Ltd. is taken up for disposal in this order.

In sum and substance, reference to the petitioner has been deleted.

7.The petitioner further submitted that in view of that order, the petitioner is now imposed with a penalty of Rs.5 lakhs as per the orders of the adjudicating authority. In view of Section 128 of the Customs Act, the appeal to be filed within a period of 60 days with reason in another 30 days. In view of the above, the petitioner is denied the opportunity of filing appeal against the order of adjudicating authority. Further, he submitted that the valuation order passed by the adjudicating officer has been set aside by the CESTAT and the department has not filed any appeal and this order has become final. In view of the foundation fact of the case has been set aside, the penalty imposed on the petitioner is erroneous as the penalty imposed on the company has now been set aside. In view of the above, no useful purpose will be served by filing an appeal and it would only become a ritual. Further the petitioner relied upon the decision of the ***Electronic Corporation of India vs. Union of India in (2018)(361)E.L.T.22(A.P)*** and submitted that the power of judicial review by this Court under Section 226 of Constitution of India cannot be diluted or set out by applying statutory provisions and restrictions. Further, in this case, gross injustice would result in non consideration and therefore, the writ petition can be entertained.

8. Mr.R.Aravindan, learned Senior Standing Counsel appearing for the department submitted that the petitioner is a Director of M/s.Innobiz Electronics Private Limited, Calicut is not disputed. Further M/s.Innobiz Electronics Private Limited, imported induction stove vide B.E.No.03579164 dated 23.05.2011 in semi knocked down condition and not spares as declared by them. After due process of law, the Additional Commissioner of Customs vide his order in original dated 45/2012 dated 12.10.2012 has rejected the contention of the petitioner and re- determined the value of goods, demanded differential duty of Rs.12,90,942/- along with interest, confiscated the goods and allowed them to redeem under a fine of Rs.8 lakhs and imposed penalty. Further, they imposed penalty under Sections 114A, 112(a) and 114 AA of Customs Act,1962. Apart from that, a penalty of Rs.5 Lakhs has been imposed on the petitioner, since he has been the Managing Director of M/s. Innobiz Electronics Pvt Ltd. The Commissioner of Customs & Central Excise (Appeals) in A.No.C24/102/2012-TTN(CUS) vide order dated 21.02.2013, rejected the appeal confirming the order of the adjudicating officer. Thereafter, M/s.Innobiz Electronics Private Ltd. has filed an appeal before CESTAT vide appeal No.C/40714/2013 and the CESTAT vide its final order No.42254/2016 dated 21.11.2016, had set aside the order in original, thereby, setting aside the order of the lower authority and also set aside the penalty on the company as well as on the petitioner.

9.The fact that the petitioner has not filed any appeal before the Commissioner (Appeals) or CESTAT is not disputed. Further, it is the petitioner, who had represented the company, has given reply to the show cause notice, participated in the adjudication proceedings as well as before the Commissioner (Appeals). Further, the petitioner having actively participated in the proceedings cannot make a plea that by mistake he had not filed an appeal, on the other hand it can be construed that the petitioner having voluntarily participated in the proceedings has given up the right of appeal and in view of the same the above writ petition is not maintainable.

10. The Department finding that the CESTAT has passed an order which is error on the face of it, has filed the petition to rectify the same. Accepting the contention of the department, the CESTAT has deleted the portion referring to the petitioner and now in view of the above, the penalty imposed on the petitioner stands against him. Further, with regard to the statutory limitation of 60 days and with reasons of 30 days, the statutory period for filing appeal is 90 days and there is no question of relaxing the statutory period of limitation relying upon the limitation act. Hence, this petitioner, has to necessarily comply with the order of original authority and pay a fine of Rs.5,00,000/-. Further, no appeal has been filed against the order of the CESTAT. In support of his contention, the learned Senior Standing Counsel relied on the decision of ***Commissioner of Customs,Mumbai vs. Flame Proof Equipments Pvt Ltds., reported in [2004(168) ELT 329, Commissioner of Central Excise, Mangalor vs. L.P.Shenoy [2003(162) ELT 297 (Tri.Bang) and the Commissioner of Central Excise, Mangalore .vs. Raj Associates [208 (10)S.T.R.194***, where in it is stated that in the event of assessee not filing appeal and only the company files an appeal, the same benefit cannot be enured to the concerned person who fails to file an appeal.

11.Considering the submissions and perusal of the available materials, it is not in dispute that the M/s. Innobiz Electronics Private Ltd has imported induction cookers in the semi knocked down condition and the DRI officers have found the good to be mis-declared and thereafter, an enquiry has been conducted, documents were collected and on collection of documents, it was found that though it has declared as parts of the induction cookers, which were under semi knocked down condition, it is not so. Further, the invoice produced by the petitioner was also found to be improper and the value of the goods were refixed and penalty was demanded. Thereafter, adjudication was held by the adjudicating authorities and penalty was imposed and also goods were confiscated. For the company penalty of Rs.12,90,942/- was imposed and for the Managing Director penalty of Rs.5 lakhs was imposed and for redemption of confiscated goods a fine of Rs.8 lakhs was imposed. Thereafter, the company has preferred an appeal before the Commissioner (Appeals), which was dismissed, against which, the company has preferred an appeal before the CESTAT. In the proceedings before the Commissioner (Appeals) and CESTAT, the company has alone preferred the appeal and not the petitioner, but in the CESTAT order it has been referred as the petitioner and the company have preferred the appeal and thereafter, the appeal was allowed by setting aside the penalty imposed on the petitioner. Finding error apparent, the department has filed a petition and such reference of petitioner alone was deleted. In the CESTAT order, setting aside of penalty imposed has been accepted by the department and the department had not filed any appeal and hence, the CESTAT order has become final. The order of the CESTAT is that the imported products of the petitioner were not permitted for sale to the consumer before mandatory testing. The classification under the Custom Tariff Act, 1975 cannot provide the escapement from the legal metrology Act 2009. Goods that are not subject to prescription or declaration “maximum retail price” legal metrology Act, 2009 do not come within the ambit of Section 4 (a) of Central Excise Act 1944. In view of the same, the levy of differential duty in the order by the lower authority was set aside. Hence there is no mis-declaration.

12. In view of the above, the foundation aspect of the case proceeded by the department against the company as well as the petitioner is no more inexistence. The petitioner as managing director has been imposed penalty which is a consequent lapse on the part of the mis- declaration by the company. Further, the foundation aspect of the department is set aside. The petitioner, who was imposed consequential penalty, if proceeded, would be is eligible to the enure benefit of the order passed by the CESTAT. In view of the same, any further action on the petitioner would be only a ritual and hence, the penalty imposed to the petitioner in the order in Original Number 45/2012 dated 12.10.2012 is hereby set aside.

13.Accordingly, the Writ Petition stands allowed to the extend indicated above. No costs. Consequently connected Miscellaneous Petitions are closed. It is made clear that this order passed on the peculiar facts and circumstances of the case alone.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

/06/2022

Sub Assistant Registrar(CS)

aav

To

The Additional Commissioner of Customs
Custom House, New Harbour Estate,
Tuticorin- 628 004

+1 CC to M/s.R. ARAVINDAN, Advocate (SR-25897[F] dated 15/06/2022)

W.P.(MD)No.21458 of 2018
and
WMP(MD) Nos.19343,19344 of 2018
and 17313 of 2021
14.06.2022

_RD(27.06.2022) 7P 3C