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W.P.No.4005 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 29.11.2023

CORAM:

THE HONOURABLE Mr.JUSTICE KRISHNAN RAMASAMY

W.P.No.4005 of 2022

and

W.M.P.Nos.4150 and 4152 of 2022

Jeena & Company

A partnership firm registered under the

Indian Partnership Act, 1932 and

Having Head Office at

Jeena House, Plot No.170, OM Nagar,

Off Pipe Line Road, Andheri (E), Mumbai – 400 099.

And Regional Office at

520, MKN Road, Alandur, Chennai – 600 016

Represented by its Power of Attorney Holder

Mr.B.Sekar.

... Petitioner

-Vs-

1.Union of India, through

The Joint Secretary

Ministry of Commerce and Industry

Having its office at Udyog Bhavan

New Delhi – 110 011.

2.Additional Director General

Directorate of Revenue Intelligence

27, G.N. (Chetty) Road

T.Nagar, Chennai – 600 017.



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3. The Commissioner of Customs, Chennai – II
Commissionerate, Custom House,
No.60, Rajaji Salai, Chennai – 600 001.

4. The commissioner of Customs (Preventive)
55-17-3, C-14, 2nd Road, Industrial Estate
Auto Nagar, Vijaywada – 520 007.

... Respondents

**[Cause Title amended as per order dated 29.11.2023 made by
Hon'ble KRJ in WMP.No.17698 of 2023 in W.P.No.4005 of 2022]**

PRAYER : Writ Petition filed under Article 226 of the Constitution of India praying for a writ of Certiorari to call for the records of the Impugned Notice in F.No.DRI/CZU/VIII/26/33T/2018 and dated 24th November 2020 issued by the Respondent No.2 and to quash the same.

For Petitioner : Ms.Karthik Sundaram

For Respondents : Mr.A.Veeramani,
Central Govt. Counsel, for R1

Mr.V.Sundareswaran,
Senior Standing Counsel, for R2

Mr.Rajnish Pathiyil,
Senior Panel Counsel, for R3 & R4



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ORDER

This Writ Petition has been filed challenging the impugned show cause notice dated 24.11.2020 issued by the second respondent.

2.The case of the petitioner is that the Director General of Foreign Trade [DGFT] has issued a license under Section 9 of Foreign Trade Development and Regulation Act, 1992 [FTDR Act] and thereby issued SEIS Scrips [Service Exports from India Scheme] and the said scrips can be used either for the purpose of payment of import duty on the eligible goods and services or the same can be sold by the license holder [petitioner herein] to the third parties and the third parties can use the said Scrips for the purpose of payment of import duty at the time of import of goods.

3.The contention of the respondents was that the SEIS [Service Exports from India Scheme] Scrips were obtained by the petitioner from Director General of Foreign Trade [DGFT] by wilful misstatement and suppression of facts [mis-stating that foreign exchange remittances received towards air freight and sea freight as “freight transport agency”



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charges] for availing duty exemption under the Notification 25/2015-Cus.

Dated 08.04.2015 and such Scrips were being utilized for payment of customs duty by other persons on their imports. Hence, on receipt of source information, the respondents have conducted investigation. During the course of investigation and enquiry, according to the petitioner, the petitioner was compelled to deposit a sum of Rs.2,67,87,180/- towards the benefit availed out of sale of the Scrips [part payment by using the SEIS Scrips sold by the petitioner].

4.While so, the present Show Cause notice dated 24.11.2020 was issued by the second respondent in terms of the provisions of Section 28 AAA of the Customs Act, 1962. Prior to the issuance of the aforesaid show cause notice dated 24.11.2020, DGFT issued first show cause notice [1st SCN] to the petitioner on 21.10.2020 and further, an order dated 23.10.2020 came to be passed placing the petitioner under the Denied Entities List. Further, the Deputy Director General of Foreign Trade, Mumbai also issued two show cause notices [2nd SCN and 3rd SCN], both dated 03.02.2021 proposing to cancel the SEIS Scrips issued to the petitioner. However, during the course of the proceedings, the Deputy



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Director General of Foreign Trade informed the petitioner that the 1st SCN dated 21.10.2020, Order dated 23.10.2020, 2nd and 3rd SCN dated 03.02.2021 were withdrawn by virtue of a letter dated 20.09.2021 and it was further stated that a detailed show cause notice would be issued, if required, after thorough examination of the material available on record.

5.Learned counsel appearing on behalf of the petitioner would contend that in terms of the circular issued by the Department of Revenue, Ministry of Finance vide Circular No.334/1/2012-TRU dated 01.06.2012, the respondent will have to issue show cause notice to recover the duties in accordance with Section 28 AAA of the Customs Act from the person to whom an instrument such as SEIS Scrips was issued and where such instrument was obtained by means of collusion or wilful misstatement or suppression of facts for which DGFT/concerned regional authority initiates action for cancellation of an instrument but the matter may be decided only after the instrument has been cancelled by DGFT. Therefore, by referring to the aforementioned notification, learned counsel for the petitioner would submit that though the impugned show cause notice dated 24.11.2020 was issued in the interregnum, when show cause notices issued by DGFT to



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petitioner pertaining to cancellation of his license and other aspects and when the same were withdrawn in entirety by virtue of letter dated 20.09.2021, according to the petitioner, after withdrawal of the show cause notices issued on various dates, the respondents will not have any jurisdiction to issue show cause notices and proceed for recovery of duties in terms of Section 28 AAA of the Customs Act, 1962.

6.To support his contention, learned counsel for the petitioner relied on the decisions of the Hon'ble Apex Court reported in ***(2015) 10 SCC 581, Commissioner of Customs, Hyderabad v. Pennar Industries Limited and Another*** and ***(2003) 9 SCC 133, Titan Medical Systems (P) Ltd v. Collector of Customs, New Delhi*** and submitted that the respondent had issued notice without any jurisdiction.

7.Per contra, Mr.V.Sundareswaran, learned counsel appearing on behalf of the second respondent would submit that the respondent will have jurisdiction to issue show cause notice to recover the duties in terms of the provisions of Section 28 AAA of the Customs Act, 1962. In the event where an instrument was obtained by means of collusion or wilful



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misstatement or suppression of facts, the respondent is entitled to initiate action and recover the duties. In the instant case, the SEIS [Service Exports from India Scheme] Scrips were obtained by the petitioner from Director General of Foreign Trade [DGFT] by mis-stating that foreign exchange remittances received towards air freight and sea freight as “freight transport agency” charges and therefore, action has been taken to recover the duties in terms of Section 28 AAA of the Customs Act, 1962. Learned counsel would further submit that Circular No.334/1/2012-TRU dated 01.06.2012 will not apply to the facts of the present case. He would further submit that the law laid down by the Hon'ble Apex Court in the case of ***Commissioner of Customs, Hyderabad v. Pennar Industries Limited and Another*** reported in ***(2015) 10 SCC 581*** will apply to the facts of the present case, however it is to be noted that in the aforesaid case the Hon'ble Apex Court has not followed the principle laid down in the case of ***Titan Medical Systems (P) Ltd v. Collector of Customs, New Delhi*** reported in ***(2003) 9 SCC 133***.

8. Heard the learned counsel appearing on behalf of the petitioner and the learned counsels appearing on behalf of the respondents.



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9.The petitioner has come before this Court challenging the impugned show cause notice dated 24.11.2020 issued by the second respondent. According to the petitioner, notice has been issued under the provisions of Section 28 AAA of the Act without any jurisdiction. The impugned notice is contrary to the Circular No.334/1/2012-TRU dated 01.06.2012. Only the officers of DGFT have the jurisdiction to enquire into the eligibility and validity of SEIS Scrips and not the second respondent who had issued the impugned show cause notice. Notices have been caused against the petitioner by two different departments pertaining to the very same issue.

10.It is the contention of the learned counsel appearing on behalf of the petitioner that Director General of Foreign Trade [DGFT] has issued license to the petitioner under Section 9 of Foreign Trade Development and Regulation Act, 1992 [FTDR Act] and thereby issued SEIS Scrips [Service Exports from India Scheme] to the petitioner who sold the same to the third parties and the third parties had also availed the benefit by using the said Scrips for the purpose of payment of import duty at the time of import of goods. When that being so, the impugned Show Cause notice



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dated 24.11.2020 was issued by the second respondent [Directorate of Revenue Intelligence] in terms of the provisions of Section 28 AAA of the Customs Act, 1962. Prior to the issuance of the aforesaid show cause notice dated 24.11.2020, DGFT issued first show cause notice [1st SCN] to the petitioner on 21.10.2020 and further, an order dated 23.10.2020 came to be passed placing the petitioner under the Denied Entities List. Further, the Deputy Director General of Foreign Trade, Mumbai also issued two show cause notices [2nd SCN and 3rd SCN], both dated 03.02.2021 proposing to cancel the SEIS Scrips issued to the petitioner. However, during the course of the proceedings, the Deputy Director General of Foreign Trade informed the petitioner that the 1st SCN dated 21.10.2020, Order dated 23.10.2020, 2nd and 3rd SCN dated 03.02.2021 were withdrawn in entirety by virtue of a letter dated 20.09.2021.

11.It is the contention of the petitioner that in terms of the Circular No.334/1/2012-TRU dated 01.06.2012, the second respondent can initiate recovery proceedings only in the event if the DGFT have initiated any proceedings for cancellation of license or the license was also cancelled and that no recovery proceedings can be passed until the cancellation of



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the instrument. At this juncture, it would be apposite to extract the relevant portion of the said circular which reads as follows:

“11.2 Recovery of duty in case of instrument issued under Foreign Trade (Development and Regulation) Act:

Section 28AAA has been inserted in the Customs Act through Section 122 of the Finance Act, 2012 to provide for recovery of duties from the person to whom an instrument such as credit duty scrips was issued where such instrument was obtained by means of collusion or willful misstatement or suppression of facts. Since the provision now has the force of law, action for recovery of duty can be initiated under the said provision. Field formation are advised to issue demands as soon as DGFT/concerned regional Authority initiates action for cancellation of an instrument but the matter may be decided only after the instrument has been cancelled by DGFT.”

12.A reading of the above circular shows that the Customs authorities can initiate action for recovery in terms of Section 28AAA of the Customs Act, 1962 if the Scrips was obtained by means of collusion or willful



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misstatement or suppression of facts. However, action can be initiated for recovery of duty only after DGFT initiates action for cancellation of an instrument but the matter may be decided only after the instrument has been cancelled by DGFT.

13.In the instant case, though DGFT has issued show cause notices on various dates viz., 1st SCN on 21.10.2020, 2nd SCN and 3rd SCN on 03.02.2021 and an order dated 23.10.2020 came to be passed by DGFT placing the petitioner under the Denied Entities List, the same were withdrawn in entirety by virtue of letter dated 20.09.2021. The DGFT is the proper authority to issue license under Section 9 of Foreign Trade Development and Regulation Act, 1992 [FTDR Act] and to issue SEIS Scrips [Service Exports from India Scheme]. While so, after considering the eligibility and fulfilment of other terms and conditions, DGFT have issued the Scrips to the petitioner and the same has been sold to the third parties by the petitioner and the third parties had also utilised the same for payment of duties.

14.Therefore, until otherwise the DGFT has taken any action for



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cancellation, the Customs Act cannot assume the jurisdiction in terms of Section 28 AAA for the purpose of recovery of the customs duty alleging that the Scrips was obtained by means of collusion or wilful misstatement or suppression of facts. In the present case, obviously, after the cancellation, contrary to the circular dated 01.06.2012, the show cause notice dated 24.11.2020 came to be issued. Therefore, the show cause notice issued contrary to any of the provisions of the Act or the circular is liable to be set aside.

15.Learned counsels appearing on either side referred to the judgments made in *Commissioner of Customs, Hyderabad v. Pennar Industries Limited and Another* reported in (2015) 10 SCC 581 and *Titan Medical Systems (P) Ltd v. Collector of Customs, New Delhi* reported in (2003) 9 SCC 133. It is to be noted that the Hon'ble Supreme Court in the case of *Pennar Industries Limited* referred supra had stated that the law laid down in the case of *Titan Medical Systems (P) Ltd* referred supra will not be applicable to *Pennar Industries Limited case* wherein there was violation in notification No.30 of 1997 which provides for exemption to materials imported against advance license with actual user condition. The



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duty of the DGFT as per the notification was only to issue the advance license and thereafter, when the goods were imported, it is the duty of the customs department to verify whether in terms of the advance license issued, the goods are in actual user condition. In that circumstances, the customs department will assume the jurisdiction. Therefore, the Court held that the Customs Authorities can initiate appropriate legal action in terms of the provisions of the Customs Act. This is not the case under Section 28 AAA of the Customs Act. In these circumstances, the Hon'ble Supreme Court in the case of ***Titan Medical Systems (P) Ltd v. Collector of Customs, New Delhi*** reported in (2003) 9 SCC 133 has held as follows:

'12.As regards the contention that the appellants were not entitled to the benefit of the exemption notification as they had misrepresented to the licensing authority, it was fairly admitted that there was no requirement for issuance of a licence that an applicant set out the quantity or value of the indigenous components which would be used in the manufacture. Undoubtedly, while applying for a licence, the appellants set out the components they would use and their value. However, the value was only an estimate. It is not the respondents' case



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that the components were not used. The only case is that the value which had been indicated in the application was very large whereas what was actually spent was a paltry amount. To be noted that the licensing Authority has taken no steps to cancel the licence. The licensing authority has not claimed that there was any misrepresentation. Once an advance licence was issued and not questioned by the licensing authority, the customs Authorities cannot refuse exemption on an allegation that there was misrepresentation. If there was any misrepresentation, it was for the licensing authority to take steps in that behalf.'

16. In the above case, it was held that since the licensing authority has not taken any steps to cancel the license and the licensing authority also has not claimed that there was misrepresentation in which case once an advance license was issued and not questioned by the licensing authority, the customs authorities cannot interfere on allegation that there was misrepresentation. In that case, the fact was that even the customs authorities questioned about the advance license itself. Therefore, the Hon'ble Supreme Court held that if at all anybody wanted to question



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about the advance license, the appropriate authority could only be the authority which issued the license viz., DGFT and not the customs authorities. But in the case of ***Pennar Industries Limited*** referred supra, the facts are entirely different, that is the case where advance license was not questioned, but the terms and conditions at the time of import has to be complied by the importer, however the same was not complied. Therefore, the facts set out in both the cases are entirely different.

17.In the instant case on hand, the principle laid down in ***Titan Medical Systems (P) Ltd v. Collector of Customs, New Delhi*** would only be applicable. It is an undisputed fact that Director General of Foreign Trade [DGFT] has issued the license under Section 9 of Foreign Trade Development and Regulation Act, 1992 [FTDR Act] and thereby issued SEIS Scrips [Service Exports from India Scheme]. Though DGFT has issued show cause notices on various dates viz., 1st SCN on 21.10.2020, 2nd SCN and 3rd SCN on 03.02.2021 and an order dated 23.10.2020 came to be passed by DGFT placing the petitioner under the Denied Entities List, the same were withdrawn in entirety by virtue of letter dated 20.09.2021. It is also undisputed that till date, DGFT has not initiated any steps to cancel



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the license issued by them and hence, this Court is of the considered view that the show cause notice dated 24th November 2020 issued by the second Respondent is without any jurisdiction. Unless otherwise the DGFT initiates any proceedings to cancel the license, the customs authorities cannot assume any jurisdiction to issue notice under Section 28 AAA of the Customs Act, 1962 assuming the jurisdiction of the DGFT.

18. For the reasons stated above, this Court is of the considered view that the show cause notice dated 24th November 2020 issued by the second Respondent is not in consonance with the Circular No.334/1/2012-TRU dated 01.06.2012 and hence, the same is liable to be set aside and accordingly set aside and the Writ Petition stands allowed. Consequently, connected miscellaneous petitions are closed. No costs.

29.11.2023

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Neutral Citation : Yes/No

Internet : Yes/No

Index : Yes/No

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To

The Joint Secretary
Ministry of Commerce and Industry
Union of India
Udyog Bhavan
New Delhi – 110 011.



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KRISHNAN RAMASAMY, J.

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Dated : 29.11.2023

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