IN THE HIGH COURT OF JUDICATURE AT MADRAS
Dated : 13.09.2023
Coram

The Hon'ble Mr.Justice **C.Saravanan**

W.P.No.9614 of 2022
\and
W.M.P.No.9355 of 2022

M/s. Ram Nath & Co. Pvt. Ltd.,
rep. By its Director,
Mr.V.Harinarayanan,

...Petitioner

Vs.

1. The Deputy Commissioner of Customs (GR.2)
   No.60, Customs House,
   Rajaji Salai, Chennai – 600 001.

2. The Joint Commissioner of Customs(GR.2)
   No.60, Customs House,
   Rajaji Salai, Chennai – 600 001.

3. The Additional Commissioner of Customs (GR.2)
   No.60, Customs House,
   Rajaji Salai, Chennai – 600 001. ...Respondents

Writ Petition filed under Article 226 of the Constitution of India to issue a writ of certiorari, call for records pertaining to the impugned Order-in-Original No.87695/2022, dated 31.01.2022 issued by the third respondent and to quash the same.

For Petitioner : Mr.Hari Radhakrishnan
For Respondents : Mr.K.Mohana Murali
Senior Panel Counsel

O R D E R

The petitioner has challenged the Order-in-Original, dated 31.01.2022 passed by the third respondent by which the proposal contained in the Show Cause Notice dated 26.12.2014 has been confirmed.

2. The learned counsel for the petitioner assails the impugned order on the ground that the same has been passed beyond the limitation prescribed under Section 28 (9) of the Customs Act, 1962 (hereinafter, referred to as 'the Act'). It is submitted that during the period in dispute, i.e. when the show cause notice dated 26.12.2014 was issued, provisions of Section 28 (9) read differently. In this connection, learned counsel has placed reliance on a recent decision rendered by the Hon'ble Division Bench of Delhi High Court, in the case of **Swatch Group India Pvt. Ltd., Vs. Union of India and others, dated 16.08.2023**, wherein, the said provision was interpreted as follows:-

" **33.** The phrases "as far as possible and "as far as practicable" appear in other statutes as well came up for consideration before the Apex Court in C.N.Paramasivam and another Vs. Sunrise plaza; (2013) 9 SCC 460. It is observed that the words 'possible" and "practicable" are more or less interchangeable along with the other words such as feasible, performable etc. The incorporation of such words gives certain degree of flexibility to the Department such as if the recourse unpracticable or not possible, the authorities can deviate from what was required to be done in terms of the statute. When the challenge is laid to the act of the authorities deviating from the rule, the onus shifts on the authority to prove that it was not practicable or possible to follow the rule. The same is to be adjudicated on the facts and circumstances of the case.

34. The flexibility, at the same time, in our opinion, cannot be equated with the lethargy of the Department or its Officers. The legislature had mandated show cause notice to be adjudicated within six months or one year as the case may be, it has provided flexibility only to the extent that, if the same is not practicable/possible, the period can be extended. The phrase, 'where it is possible to do so' would only mean that wherever, it is not possible/possible to do certain act, the period can be extended. The same, however, cannot be an endless period without any plausible justification.

...

46. In our view, there is no material to show that it was not possible for the proper officer to determine the amount of duty within the prescribed period. The mention of the words, "where it is not possible to do so" in our opinion, does not enable the Department to defer the determination of the notices for an indeterminate period of time. The legislature in its wisdom has provided a specific period for the authority to discharge its functions. The indifference of the concerned officer to complete the adjudication within the time period as mandated, cannot be condoned to be detriment of the assessee. Such indifference is not only detrimental to the interest of the taxpayer but also to the exchequer. "

2.1 It is further submitted that identical provision came up for consideration before the Hon'ble High Court of Delhi, in the case of

Sunder System Pvt. Vs. Union of India and others, rendered in **W.P.(C) No.8675 of 2017,** which was also considered by the Division Bench of Delhi High Court, in the decision referred to supra, viz., in **Swatch Group India Pvt. Ltd.** It is, therefore, submitted that Explanation 4 to Section 28 of the Act as it stood at the time of issuance of show cause notice would govern, hence, the delay in adjudication of show cause notice is fatal.

2.2 It is further submitted that Show Cause Notice dated 26.12.2014 was issued in respect of Bill of Entry No.7021417, dated 10.10.2014. It is submitted that the said Bill of Entry was the subject matter of Order-in-Original dated 12.05.2015. It is therefore submitted that the first respondent has confirmed the proposals contained in the Show Cause Notice dated 26.12.2014 in respect of Bill of Entry No.7021417 dated 10.10.2014. It is submitted that the petitioner's Appeal before the Appellate Commissioner against Order-in-Original dated 12.03.2015 was dismissed vide Order-in-Appeal No.776 of 2015, dated 30.08.2015 and that the Second Appeal filed before Customs, Excise and Service Tax

Appellate Tribunal (in short ' CESTAT') is pending from 07.12.2015. It is therefore submitted that the delay in adjudication of the Show Cause Notice dated 26.12.2014 which has culminated in the Impugned Order confirming the demand proposal in respect of Bill of Entry dated 10.10.2014 was fatal and therefore, on this ground also, the impugned order is liable to be quashed.

3. Per contra, the learned counsel for the respondents would submit that the Show Cause Notice, dated 26.12.2014 was not adjudicated earlier as the issue was pending before the CESTAT against the Order-in-Appeal No.776 of 2015 dated 30.08.2015 in the appeal filed by the petitioner before CESTAT and the Department was awaiting for orders of the CESTAT. It is therefore submitted that the Writ Petition is liable to be dismissed and the petitioner should be asked to workout its remedy before the Appellate Commissioner, as was done by the petitioner on the earlier occasion in respect of Order-in-Original dated 12.05.2015.

4. I have considered the arguments advanced by the learned counsel for the petitioner and the respondents.

5. The principle ground, on which, the impugned order is attacked is that it has been passed beyond the limitation period prescribed under Section 28 (9) of the Act. Section 28 (9) of the Act has been amended. When the Show Cause Notice dated 26.12.2014 was issued, Section 28 (9) of the Act, provision read differently. At the time of adjudication of the said Show Cause Notice dated 26.12.2014 vide impugned Order-in-Original No.87695/2022, dated 31.01.2022, Section 28 (9) of the Act read differently. They read as under:-

During the issuance of show cause notice	**Before the adjudication of show cause notice**
28. Recovery of [duties not levied or not paid or short-levied or short-paid] or erroneously refunded. (9) The proper officer shall determine the amount of duty or <u>interest under sub-section (8)-</u> (a) within six months from the date of notice, [**where, it is possible to do so]**, in respect of case falling under clause (a) of sub-section (1);	28. Recovery of [duties not levied or not paid or short-levied or short-paid] or erroneously refunded. (9) The proper officer shall determine the amount of duty or interest under sub-section (8)- (a) within six months from the date of notice, in respect of case falling under clause (a) of sub-section (1); (b) within one year from the date

During the issuance of show cause notice	**Before the adjudication of show cause notice**
(b) within one year from the date of notice, [**where it is possible to do so**].	of notice,, in respect of case falling under sub-section (4); (provided that where the proper officer fails to determine within the specified period, any officer senior in rank to the proper officer may, having regard to the circumstances, under which, the proper officer was prevented from determining the amount of duty or interest under sub-section (8), extend the period specified in clause (a) to a further period of six months and the period specified in clause (b) to a further period of one year; provided further that where the proper officer fails to determine within such extended period, such proceedings shall be deemed to have concluded as if no notice had been issued].

5.1 The above amendment in the 2nd Column came into force only on 29.03.2018. Explanation 4 to Section 28 was also amended. In the year, 2018, Explanation 4 read different from Explanation 4, as it reads now. They read as under :-

Explanation 4: For removal of doubts, it is hereby declared that, in cases, where notice has been issued for non-levy not paid, short-levy or short-paid or erroneous refund after 14th day of May, 2015, but before the date on which, the Finance Bill 2018 receives the assent of the President, they shall continue to be governed by the provisions of Section 28 as it stood immediately before the date on which, such assent is received.	Explanation 4: For the removal of doubts, it is hereby declared that, notwithstanding anything to the contrary contained in any judgment, decree or order of the Appellate Tribunal or any Court or any other provisions of this Act or the rules or regulations made thereunder, or in any other law for the time being in force, in case where, notice has been issued for non-levy, short-levy, non-payment, short payment or erroneous refund prior to 29 days of March, 2018, being the date of commencement of the Finance Act, 2018 (13 of 2018) such notice shall continue to be governed by the provisions of Section 28 as it stood immediately before such date.

5.2 Thus, it is evident that the show cause notice, dated 26.12.2014, had to be examined in the light of Section 28 (9) as it stood prior to the amendment w.e.f. 29.03.2018. Therefore, the show cause notice was required to be adjudicated within six months from the date of issuance of such notice. The above limitation was qualified with expression " **Wherever, it is possible, to do so**". Prima facie, it appears that the Department was not precluded from adjudicating the show cause notice beyond six months.

5.3 If it is the case of the Department that the pendency of the Appeal before CESTAT against the Order-in-Appeal dated 30.08.2015 was a reason for not passing orders earlier, it remains to be explained, as to why, the impugned order has been passed eventhough the petitioner's appeal is still pending adjudication before CESTAT.

5.4 This ought to have been explained properly in the impugned order. Admittedly, the impugned order passed by the third respondent is bereft of such reasons. Only in the counter affidavit filed in this Writ Petition, the respondents have stated that the delay was on account of the pendency of the Appeal before the CESTAT for the earlier Bills of Entry, dated 10.10.2014. That apart, the impugned order has also not factored, as to how, the demand in respect of earlier Bills of Entry No.7021417, dated 10.10.2014 which was part of the Show Cause Notice dated 26.12.2014 has culminated in the impugned Order-in-Original dated 31.01.2022.

6. In these circumstances, Court is inclined to interfere with the impugned order by quashing the same and remits the case back to the third respondent to pass a fresh order on merits. The third respondent shall pass orders on merits in the light of the above observations made by this Court and the law laid down by the Hon'ble Division Bench of Delhi High Court, in the case of **Swatch Group India Pvt. Ltd., (cited supra).** The said exercise shall be completed by the third respondent within three months from the date of receipt of a copy of this order. Needless to say that the petitioner shall be heard before orders are passed. No costs. Consequently, connected Miscellaneous Petition is closed.

13.09.2023

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Index : Yes/No
Speaking Order/
Non speaking order

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C.Saravanan,J.
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