IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 16.03.2023

CORAM

THE HONOURABLE **DR. JUSTICE ANITA SUMANTH**

W.P.No.14776 of 2020 and
WMP.No.18358 of 2020

M/s.Ericsson India Private Limited,
Represented by its Head of Tax, Rajesh Gosain
No.7A, 3rd & 4th Floor, DLF Cyber Citi,
Sector 25A, Gurgaon - 122 002 ... Petitioner

Vs

1.Deputy Commissioner of Customs, Group-5
New Custom House, Chennai-VII Commissionerate,
Air Cargo Complex, Meenambakkam, Chennai-600 027

2.Joint Commissioner of Customs, Group-5
New Custom House, Chennai-VII Commissionerate,
Air Cargo Complex, Meenambakkam, Chennai-600 027

3.The Principal Commissioner of Customs,
Chennai-VII Commissionerate
Air Cargo Complex, New Customs House,
Meenambakkam, Chennai-600 016.

4.Union of India,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi-110001 ... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus to call for the records pertaining to final assessment in Bills of Entry Nos.5679605 dated 22.03.2018 and 6023989 dated 18.04.2018 passed in the letter F.No.S.Misc.383/2020/GR-5-ACC dated 04.08.2020 issued by the 1st Respondent and quash the same as illegal, arbitrary and in violation of principles of natural justice and to direct the Respondent to finalize the provisional assessments after granting the Petitioner an opportunity of being heard.

For Petitioner : Mr.Raghavan Ramabadran

For Respondents : Mrs.R.Hemalatha (for R1 to R3)
Senior Standing Counsel

Mr.T.L.Thirumalaisamy (for R4)
Central Government Standing Counsel

O R D E R

The petitioner is a Telecommunications Solutions provider and a manufacturer of telecom equipment engaged in rendering services to Telecom Operators. The petitioner, for this purpose imports hardware including Blade Server Platforms (BSP). While so, in January 2019, the Directorate of Revenue Intelligence (DRI) initiated investigation into the imports of BSP from its related overseas party, Ericson AB, Sweden (EAB) through the Chennai Air Cargo Complex.

2.The petitioner had been called upon to produce certain particulars and duly complied. Nothing further was known to the petitioner about this enquiry. It appears that, unknown to the petitioner, the DRI had continued its investigation, though it had changed the basis of the enquiry to classification of the BSP platform, on the premise that such classification would be under Customs Tariff Entry 8517 62 90 instead of Customs Tariff Entry 8471 50 00.

3.The former Entry attracts basic customs duty at 10% and in such circumstances, there would be a component of differential duty, that would arise. The DRI appears to have made an investigation and filed a report forwarding the same directly to the attention of the Customs Assessing Officer. This report has not, till date been produced in the matter and, more importantly, never made available to the petitioner.

4.Thereafter, it appears that on the basis of investigation report of the DRI dated 09.04.2020, bills of entry 5679605 dated 22.03.2018 and 6023989 dated 18.04.2018 had been provisionally assessed in the Indian Customs EDI System (ICES).

5.These facts have come to light only from the counter of the respondent dated 03.03.2021 between paragraphs 2(a) to 2(e) thereof, reading thus:-

> *'2.Prior to dealing with averments made in the affidavit filed in support of the above writ petition, the following facts are placed before this Hon'ble Court:*

(a) At the outset it is submitted that the issue involved in the impugned case is limited to the finalization of Provisional assessments only and it does not have any wider ramifications. The Petitioner has arraigned Union of India as 4th respondent against whom no pleadings or grounds are raised. It is submitted that the issue Involved in the present Writ Petition relates to proceedings of 1st and 2nd respondents who is under the jurisdiction of the 3rd respondent. But the Petitioner has unnecessarily arraigned Union of India as 4th respondent and, therefore, it is prayed that the name of the 4th respondent should be deleted as party in the said writ petition.

(b) I respectfully submit the facts relating to the issue raised in the Writ Petition along with the rebuttal to the points raised in the affidavit is to the effect that the petitioner is engaged in the provision of Telecommunication solutions and is a major manufacturer of Telecom equipment. They provide managed services to major Telecom operators. For the said purpose, the petitioner imports various hardware including Blade server Platforms (BSP).

(c) I further submit that the petitioner had filed two Bills of Entry in Bills of Entry No.5679605/22.03.2018 and 6023989 dated 18.04.2018 for import of Blade Server Platform 8100 under CTH 84715000 and availed BCD exemption under Notification no.24/2005-Cus dated 01.03.2005. The Bs/E were assessed provisionally for related party transaction and the goods were cleared. Subsequently, the Bills of Entry were taken up for Investigation by DRI, Bangalore ZonalUnit .

(d) I state that on the completion of investigation, DRI, BZU had forwarded an Investigation Report dated 09.04.2020 in F.No.DRI/BZU/S-IV/ENQ-01 (INT-NIL)/2019. In the Investigation Report it was concluded that the importer has mis-classified the Ericsson Blade Server Platform 8100 under CTH 84715000 instead of the correct CTH 85176290, which attracts BCD @10% and also undervalued the Imported BSP8100 nodes, thereby making them liable to pay a differential duty of Rs.3,91,60,068/-. Based on this Investigation report, the

aforesaid two Bills of Entry were finalized for the above said duty liability.

(e) It is further respectfully stated that the subject Bills of Entry were investigated by DRI, BZU for mis-classification and undervaluation and after completion of investigation, it was concluded by DRI that the Importer has mis-classified and undervalued the impugned goods, resulting in short levy of duty to the tune of Rs.3,91,60,068/-. On the basis of the Investigation Report dated 09.04.2020 in F.No.DRI/BZU/S-IV/ENQ-01(INT-NIL)/2019, the subject provisional Bills of Entry were finalized in the ICES system. The finalization of the provisional assessment is an order of assessment in itself.'

6.To be noted, that the admitted position, as fairly stated by the learned Senior Standing Counsel is that to this date, no document representing an assessment, provisional or otherwise, has never been produced in the matter, not even before the Court.

7.Impugned communication dated 04.08.2020 constitutes a demand that had been raised on the petitioner for the differential duty of Rs.3,91,60,068/- along with interest under Section 28AA of the Customs Act, 1962 (in short 'Act'). The communication, styled as a letter, refers to the provisional assessment on the bills of entry and the alleged misclassification of the imported BSP platforms.

8.In light of the admitted position that the demand has not been preceded by either a show cause notice or order revising the bills of entry (self assessments) such demand has no basis in law and is set aside. The question of bills of entry having been assessed as stated in the counter thus does not arise.

9.In the course of the hearing, yet another argument advanced, relates to the fact that the impugned communication carries Document Identification Number (DIN). For this purpose, learned counsel would rely on two circulars, one, Circular No.37/2019 dated 05.11.2019 and the second, Circular No.43/2019 dated 23.12.2019. There is some background to the Circulars.

10.Departments of the Centre and the State have been stepping up efforts towards transparency and accountability in their systems. To such end, the Central Board of Indirect Tax of Customs has mandated widespread use of information technology by implementation of the system for electronic generation of DIN for all orders/communications issued by its officers.

11.The purpose of the DIN was to ensure that every paper that emanated from the system of an officer for transmission to an assessee would be authenticated with a digital print. The mandate was implemented in a phased manner and per Circular dated 05.11.2019, the documents to be covered included summons, arrest memo, inspection notices and letters issued in the course of enquiry.

12.The objective is to create a digital directory, and to maintain a proper audit trail for all official communications issued. Technological coverage was extended by Circular dated 23.12.2019 to all communications issued by the department, including e-mails. These instructions came into effect, on and with effect, from 24.12.2019.

13.The impugned communication is dated 04.08.2020, long after the issuance of the aforesaid instructions, since it contains no DIN it is assailed on the ground that it is contrary to the guidelines issued by the CBIT, that bind the officers unequivocally.

14.Per contra, learned Senior Standing Counsel would draw attention to the provisions of Section 151A of the Act, in terms of which, the said instructions have been issued. She submits that while the Instructions are, undoubtedly binding upon the officers of the Department, they do not bind this Court.

15.That apart, she would submit that the spirit and object of the Circulars is merely to ensure that the communications issued are genuine. In the present case, there was no apprehension or allegation that the communication is not genuine.

16.She relies on the judgment of the Hon'ble Supreme Court in the case of *Union of India v. Madras Steel Re-Rollers Association* [(28) S.T.R. 193 (S.C.)] followed by this Court in *Cairn Energy India (P) Ltd. v. Union of India* [2015 (40) S.T.R. 444 (Mad.)]. She also relies on *Givaudan India Pvt. Ltd. v.*

Union of India [2013 (292) E.L.T. 161 (Mad.)] and two judgments of the Hon'ble Supreme Court in *Varsha Plastics Private Limited and another v. Union of India and others* [(2009) 3 SCC 365] and *Commissioner of Central Excise, Bolpur v. Ratan Melting & Wire Industries* [(2008) 13 SCC 1], all in the context of stating that the Circulars do not bind the Court.

17.The judgments also support the proposition, according to her, that the standing orders were issued for the smooth functioning of the department and merely prescribe a pattern of assessment. They are not intended to interfere with the discretion of the assessing/appellate authority in the conduct of assessment.

18.Having heard learned counsel, I am of the categoric view that the non-generation of a DIN is fatal to the communication itself. Section 151A of the Act enables the Board to issue Instructions to officers of Customs and such Instructions bind the officers, barring in two situations.

19.The exceptions are, that no order, instruction or direction will require any officer of Customs to make a particular assessment or dispose a particular case in a specified manner and no instructions shall be issued so as to interfere with the discretion of the Commissioner of Customs (Appeals) in the exercise of appellate functions. Both exceptions thus concern the conduct of judicial duties only. As far as administrative duties are concerned the Board has the final word to prescribe guidelines that are mandatory qua the officers. In fact, the judgments cited by learned Standing Counsel stand testimony to the aforesaid settled position of law. The respondents cannot thus attempt to wriggle out of the requirements imposed under Circular Nos.37/2019 and 43/2019.

20.The argument of the respondents that a lenient view should be taken of since the impugned communication has been issued during the Corona pandemic also does not appeal. Reference is made to the judgment of the Hon'ble Supreme Court *In Re: Cognizance for extension of limitation,* Suo Motu Writ Petition (C) No. 3 of 2020, where limitation for the passing of orders and issuance of notices has been extended. This judgment, in any view, has no application in the present matter, as what is impugned in a demand issued without the authority of law. This submission is rejected as being misconceived.

21.The Circulars issued invest the officers of the Department with responsibility qua the issuance of official proceedings/communications. There are no exceptions contemplated and the stand of the Department in this case illustrates, more effectively than anything the assessee might say, the necessity for the DIN.

22.The Hon'ble Supreme Court in the case of *Pradeep Goyal v. Union of India* [2022 (63) G.S.T.L. 286 (S.C.)] was concerned with a prayer for mandamus by a Chartered Accountant in a Public Interest Litigation. A direction to the respective States and the GST Council was sought, to implement a system for electronic generation of DIN for all communications sent by the State Tax Officers to taxpayers. The prayer was well taken, and the Court reiterated the necessity for the Council and States to take remedial action in relation to transparency and accountability in all proceedings.

23.The Court has, at paragraphs 6 and 7, stated as follows:

> *'6. It cannot be disputed that implementing the system for electronic (digital) generation of a Document Identification Number (DIN) for all communications sent by the State Tax Officers to taxpayers and other concerned persons would be in the larger public interest and enhance good governance. It will bring in transparency and accountability in the indirect tax administration, which are so vital to efficient governance. Even the Central Government has also taken a decision and as such implemented the DIN system of Central Board of Direct Taxes and on and from 01.10.2019, as every CBDT communication will have to have a Document Identification Number (DIN). But, as on today, only two States, namely, the States of Karnataka and Kerala have implemented the system for electronic (digital) generation of a DIN in the indirect tax administration, which is laudable and to be appreciated.*
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> *7. In view of the implementation of the GST and as per Article 279A of the Constitution of India, the GST Council is empowered to make recommendations to the States on any matter relating to GST. The GST Council can also issue advisories to the respective States for implementation of the DIN system, which*

shall be in the larger public interest and which may bring in transparency and accountability in the indirect tax administration. Therefore, we dispose of the present writ petition by directing the Union of India/GST Council to issue advisory/instructions/ recommendations to the respective States regarding implementation of the system of electronic (digital) generation of a DIN in the indirect tax administration, which is already being implemented by the States of Karnataka and Kerala. We impress upon the concerned States to consider to implement the system for electronic (digital) generation of a DIN for all communications sent by the State Tax Officers to taxpayers and other concerned persons so as to bring in transparency and accountability in the indirect tax administration at the earliest.'

24.Incidentally, Circulars issued on 05.11.2019 and 23.12.2019 by the Board have not been brought to the notice of the Hon'ble Supreme Court. The thrust of the exercise is to ensure that every communication issued by the State, including e-mails, must contain an authorisation. The move is a progressive one backed by the avowed objects of transparency and accountaibility, the crying need of the day.

25.In light of the discussion as above, impugned communication dated 04.08.2020 is set aside and this writ petition, allowed. No costs. Connected miscellaneous petitions are closed.

16.03.2023

vs
Index : Yes / No
Speaking Order
Neutral Citation : Yes

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4.Union of India,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi-110001

Dr.ANITA SUMANTH,J.

vs

W.P.No.14253 of 2020 and
WMP.Nos.17728 & 17731 of 2020

16.03.2023