

\$~3

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

%

Date of Decision: 11.01.2023

+ **CUSAA 155/2022 and CM No. 47698/2022**

DIRECTORATE OF REVENUE
INTELLIGENCE (HQRS.)

..... Appellant

Through: Mr Harpreet Singh, Advocate.

Versus

M/S SPRAYTEC INDIA LTD.

..... Respondent

Through: Ms Anjali Jha Manish, Mr
Priyadarshi Manish and Ms
Divya Rastogi, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J.

1. The appellant (Directorate of Revenue Intelligence, (Hqrs.), New Delhi - hereafter 'DRI') has filed the present appeal under Section 28KA of the Customs Act, 1962 (hereafter 'the Customs Act') impugning an order dated 08.08.2022, passed by the Customs Authority for Advance Ruling (hereafter 'CAAR'), whereby the representations made by DRI for treating the CAAR's order dated 05.10.2021 as *void ab initio*, was rejected. DRI had made representations contending that the said order dated 05.10.2021 had been obtained by the respondent by

“*fraud and misrepresentation of facts*” and therefore, was entitled to be declared as *void ab initio* in terms of Section 28K(1) of the Customs Act.

2. DRI claims that it had not disclosed that the investigation in respect of the import of goods made by the respondent was being conducted by DRI. It claims that if such disclosure was made by the respondent in its application, the application would be rejected in terms of the proviso to Section 28-I of the Customs Act.

3. The respondent had imported actuator and aerosol valves meant for perfumes and toilet sprays. According to the respondent, the said goods were classified by the respondent under various sub-heads of Chapter 84 of HSN Code. According to the respondent, the same were covered under the Customs Tariff Heading (CTH) 84248990. According to DRI, the goods were required to be classified under CTH 9616 and were subject to higher rate of custom duty than the goods classified under CTH 84248990.

4. It is stated that the office premises of the respondent were searched by DRI on 15.01.2019. Thereafter, various summons were issued by DRI between the period of January to June, 2019. According to the respondent, the last summon issued by DRI in the year 2019, was on 16.05.2019. It is material to note that the petitioner had imported certain goods against a Bill of Entry dated 14.01.2019. The said consignment was not released. Aggrieved by the same, the respondent had filed a writ petition [being WP(C) No.916/2019] before this Court.

Admittedly, at a hearing held on 06.02.2019, Mr. Harpreet Singh, the learned counsel who appeared on behalf of Revenue in that matter, confirmed that the Bill of Entry would be assessed and the provisional order would be passed shortly. The Coordinate Bench of this Court had disposed of the said writ petition by directing the Revenue to issue a provisional assessment order at the earliest and preferably, within a period of two weeks from that date.

5. Admittedly, the concerned authority passed the final assessment order dated 08.02.2019 assessing the goods imported against the bill of entry dated 14.01.2019 as covered under the CTH 84248990.

6. Thereafter, the respondent filed an application before the Authority for Advance Ruling (AAR), seeking a ruling on the classification of goods in question under the Custom Tariff Act, 1975. In terms of Section 28F(3) of the Customs Act, the respondent's application was transferred to the CAAR on the said Authority being constituted

7. The CAAR issued a ruling dated 05.10.2021 in favour of the respondent, accepting its classification of the goods in question. DRI did not issue any summons immediately after May, 2019; it once again issued the summons in March, 2022 (summons dated 02.03.2022 and 09.03.2022). The respondent challenged the said summons by filing a writ petition, WP(C) No.4629/2022 captioned ***Spraytech India LTD. v. Additional Director General Directorate of Revenue Intelligence and Ors.*** The said petition is pending before this Court. In the meanwhile,

further consignments of the goods imported by the respondent were also withheld by the custom authorities. These are subject matter of another writ petition filed by the respondent being WP(C) No.11960/2022 captioned *Spraytech India LTD. v. Additional Director General Directorate of Revenue Intelligence and Ors.* The said petition is also pending consideration before this Court.

8. Mr. Harpreet Singh, learned counsel who appears for DRI, submitted that the CAAR has passed the order on an erroneous premise that the goods imported under two Bills of Entry filed with ICD Garhi Harsaru, at the material time, had been detained at the instance of DRI. He submitted that the customs authorities had detained the said goods and no order was passed by DRI in respect of the said Bills of Entry. The respondent had disclosed in its application that the goods imported under the two Bills of Entry at ICD Garhi Harsaru, had been detained at the instance of DRI, were subsequently released.

9. The CAAR had considered DRI's representation and found that there was no misrepresentation or suppression of facts on the part of the respondent. The relevant extract of the impugned order setting out the CAAR's reasoning for its aforementioned conclusion is set out below:-

“9.3 On careful perusal of the case file, I find that the applicant in para 6 of Statement of relevant facts having a bearing on the question(s) on which advance ruling is required had clearly mentioned that goods covered under two bills of entry dated 14.01.2019 at ICD Garhi-Harsaru had been detained by the Customs authority on the instance of DRI Headquarters, and the said goods were

eventually released without taking any bond or bank guarantee and the goods were cleared under CTH 84248990. Therefore, the contention of the DRI, New Delhi regarding non-disclosure of the fact regarding investigation is not correct. Thereafter, during the procedure prescribed under the Customs Act and CAAR Regulations, 2021, this Authority had ascertained from DRI, Jaipur whether any show cause notice had been issued to the applicant since there was a reference to difference of opinion between the concerned Commissioner of Customs Preventive, Jodhpur and DRI, Jaipur, which had vide letter dated 01.04.2021 had informed this Authority that "as per the records available, this office has not issued any SCN to MIs Spraytech India Limited.

- 9.4 It is not in dispute that no Show Cause Notice had been issued to the applicant by DRI, New Delhi regarding the past clearances at the time of the applicant filing application before the erstwhile AAR, even if it is acknowledged that DRI, New Delhi was investigating the issue of appropriate classification of aerosol valves allowed final clearance by the jurisdictional customs officers. Therefore, the question before me narrows down to whether the brief declaration regarding the investigation by DRI, New Delhi by the applicant (in para 6 of Annexure -1 of the application) and subsequent non-elaboration thereof tantamount to fraud or misrepresentation of facts by the applicant."

10. At the material time, the respondent believed that the goods imported under the Bill of Entry, which were pending clearance in January, 2019, had been withheld on account of an investigation commenced by DRI. It had, accordingly, disclosed the same. Even if

Mr. Singh's contention is accepted that the consignment in question had not been withheld at the instance of DRI, it cannot be disputed that the respondent's statement, that clearance of its goods had been withheld at the instance of DRI, did indicate an investigation had been initiated by DRI. The reasons for so indicating may be erroneous but the factum that investigation had been initiated by DRI was disclosed. There is no reason to doubt that the respondent believed that the matter was closed as neither any pre-consultation notice nor any other show cause notice was issued by DRI at the material time.

11. Since DRI had not issued any show cause notice, it cannot be stated that the question of classification of goods was pending before any officer of customs, appellate tribunal, or any court.

12. The impugned order also indicates that the CAAR had not only issued notice to the Commissioner of Customs (Preventive), Jodhpur but it also issued notice to DRI, Jaipur, inviting their comments. Undisputedly, the officer of the concerned Commissionerate as well as DRI, Jaipur participated in the proceedings before the CAAR.

13. It is relevant to note that the CAAR had also concluded to the effect that even if it was disclosed that there was an on-going investigation by DRI, the same would not be relevant to the outcome of the proceedings. Concededly, no pre-consultation notice or show cause notice had been issued by DRI or any other Authority and it would be erroneous to hold that the question of classification was pending before any Custom officer, Appellate Tribunal or any Court.

14. Section 28-I of the Customs Act provides for the procedure post filing of the application under Section 28H of the Customs Act. Section 28-I is set out below:-

“28-I. Procedure on receipt of application –

(1) On receipt of an application, the Authority shall cause a copy thereof to be forwarded to the 1 [Principal Commissioner of Customs or Commissioner of Customs] and, if necessary, call upon him to furnish the relevant records :

Provided that where any records have been called for by the Authority in any case, such records shall, as soon as possible, be returned to the 2 [Principal Commissioner of Customs or Commissioner of Customs].

(2) The Authority may, after examining the application and the records called for, by order, either allow or reject the application :

Provided that the Authority shall not allow the application 3 [***] where the question raised in the application is -

(a) already pending in the applicant's case before any officer of customs, the Appellate Tribunal or any Court;

(b) the same as in a matter already decided by the Appellate Tribunal or any Court :

Provided further that no application shall be rejected under this sub-section unless an opportunity has been given to the applicant of being heard:

Provided also that where the application is rejected, reasons for such rejection shall be given in the order.

(3) A copy of every order made under sub-section (2) shall

be sent to the applicant and to the 4 [Principal Commissioner of Customs or Commissioner of Customs].

(4) Where an application is allowed under sub-section (2), the Authority shall, after examining such further material as may be placed before it by the applicant or obtained by the Authority, pronounce its advance ruling on the question specified in the application.

(5) On a request received from the applicant, the Authority shall, before pronouncing its advance ruling, provide an opportunity to the applicant of being heard, either in person or through a duly authorised representative.

Explanation. - For the purposes of this sub-section, "authorised representative" shall have the meaning assigned to it in sub-section (2) of section 146A.

(6) The Authority shall pronounce its advance ruling in writing within 5 [three months] of the receipt of application.

(7) A copy of the advance ruling pronounced by the Authority, duly signed 6[***] and certified in the prescribed manner shall be sent to the applicant and to the 7 [Principal Commissioner of Customs or Commissioner of Customs], as soon as may be, after such pronouncement."

15. The proviso to Sub-Section (2) of 28-I of the Customs Act proscribes the CAAR from allowing any application filed for advance ruling, where question raised in the application is pending in the applicant's case before "*any officer of customs, the Appellate Tribunal or any Court*" or if the said question has already been decided by the Appellate Tribunal or any Court. In the present case, DRI had not issued

any pre-consultation notice or show cause notice which would indicate that the question regarding classification of any goods was pending before DRI. Thus, even if it is accepted that an officer of DRI is an officer of Customs, it cannot be accepted that the question raised by the respondent in its application under Section 28H of the Customs Act was pending 'in the applicant's case' before DRI. In order for a question to be considered as pending before any officer of customs, it would be necessary for the question to be raised in any notice enabling the assessee to respond to the said issue. It is only after this stage that it would be necessary for the officer of customs to render its decision on the question. Merely because an officer of customs contemplates that a question may arise, does not mean that the question is pending consideration. For a question to be stated to be pending, the concerned officer must formally set forth the same for the assessee to contest the same. Any preliminary exercise done by an officer of customs, to consider whether any question for consideration arises, would not preclude the CAAR from giving its advance ruling on that question. The possibility that a question would arise for consideration of a customs officer, appellate tribunal or court, is not a ground contemplated under Clause (a) of the proviso to Section 28-I(2) of the Customs Act. Clearly, a distinction must be made between that question pending consideration and a possibility of a question arising consideration.

16. The CAAR had also examined the aforesaid aspect and had observed as under:-

“9.6 Let us for argument sake consider the course of events that would have been followed by this

Authority had the applicant made a fuller disclosure regarding the on-going investigation by DRI, New Delhi (noting that the applicant states that they were not aware of the continuation of such investigation). Noting the indisputable facts that the previous clearances had been allowed finally, i.e. without recourse to provisional assessment by the jurisdictional customs officers and no pre-consultation notice or show cause notice had been issued by any of the competent authority, this Authority would not have invoked the proviso (a) to section 28-1 (2) of the Customs Act, 1962. In a recent ruling in the application of MIs HQ Lamps Manufacturing Co. Pvt Ltd., this Authority has opined that *an application may be considered "pending" before any officer only if it is pending before an officer informal manner before an officer who is competent to answer the said question in terms of specific powers vested with the officer under the Customs Act, An illustrative list of such situations would include cases wherein a Show Cause Notice has been issued; bill of entry has been provisionally assessed under section 18 of the Customs Act, 1962; the matter is pending before the Special Valuation Branch of the Customs Commissionerate for the purpose of valuation of the goods in question; or the proper officer has held the pre-notice consultation with the applicant in terms of the proviso of subsection (a) of Section 28(1) of the Customs Act. 1962. Therefore, in cases, such as the extant case, wherein an officer of customs is engaged in an investigation that may result in formulation of a question that would be posed before another competent officer would not qualify as "pending before an officer."*

17. We concur with the view of the CAAR and find no infirmity with

the impugned order rejecting the representations made by DRI.

18. The appeal is unmerited and, accordingly, dismissed.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

JANUARY 11, 2023/Ch

