



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Order reserved on	26.07.2024
Order pronounced on	30.10.2024

CORAM

THE HONOURABLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY

W.P.No.2166 of 2024

&

WMP Nos.2359 & 2360 of 2024

M/s.Huawei Telecommunications India Co. Pvt. Ltd.
 Having its registered office at 9th Floor, Capital Cyberspace,
 Gurugram Manesar Urban Complex,
 Sector 59, Ullahwas, Gurugram, Haryana 122 011
 and local office at Survey No.:106104, Door No./Plot No.:146, 148
 149, 6th Main Road, Sidco Industrial Estate,
 Thirumazhisai, Poonanamallee Taluk,
 Thiruvallur District-600 124
 Represented by its Authorized Signatory
 Mr.Alok Singh
 DGM-Legal

... Petitioner

-VS-

Principal Commissioner of Customs, Air Cargo,
 Chennai, VII Commissionerate,
 New Custom House, Meenambakkam,
 Chennai-600016.

... Respondent

PRAYER: Writ petition filed under Article 226 of the Constitution of

India, to issue a writ of Certiorari , to call for the records of the



WEB.COM

Impugned Notice No.204/2023 dated 10.11.2023 under File No.GEN/ADJ/CIMMR/680/2023-GR 5A bearing DIN 20231173MU0000666B35 issued by the Respondent, and to quash the same.

For Petitioner : Mr.Vijay Narayan, Senior Advocate
Mr.Tarun Gulati, Senior Advocate
Mr.Rajat Bose
Mr.Ankit Sachdeva
Ms.Amoolya S.Vinjamur

For Respondents : Mr.Sai Srujan Tayi,
Senior Standing Counsel

ORDER

Background

By this writ petition, show cause notice No.204/2023 dated 10.11.2023 is challenged.

2. The petitioner is engaged *inter alia* in the import of various telecommunication-related goods from its parent company in pursuance of its business activities. Between 15.11.2018 and 16.12.2022, the petitioner imported various products such as base



WEB CODE

stations and modules, servers and modules, long term evolution (LTE) products and modules, multiple input-output (MIMO) products, optical transport network (OTN) products and modules, plain old technology services (POTS) products, private telecommunication network (PTN) products and modules, session border controller and modules, soft switch and modules, media gateway (modules) and voice-over Internet protocol (VoIP) equipment and modules as well as spare parts relating thereto. These goods were imported by self-classification under Customs Tariff Heading (CTH) 8517 and 8471. In respect of these imported goods, the petitioner filed bills of entry for home consumption and paid the appropriate customs duty based on the aforesaid classification under the Customs Act, 1962 (the Customs Act). The Customs Department did not challenge the classification of the petitioner in the relevant bills of entry upon verification and prior to clearance or by way of appeal thereafter.

3. While importing the above mentioned goods, the petitioner



WEB.COM

availed of Exemption Notifications, namely, Sl.No.427 of Notification No.50/2017-Cus-dated 30.06.2017, Sl.Nos 5, 8, 20 and 22 of Notification No.57/2017-Cus. dated 30.06.2017 and Sl.Nos.8, 10, and 13 of Notification No.24/2005-Customs, dated 01.03.2005. As a consequence, basic customs duty was paid at the rate of 0% or 10%, as applicable, at the time of clearance of the goods.

4. Summons was issued to the petitioner by the Senior Intelligence Officer on 31.01.2022 in relation to the import of servers. In response, on 15.02.2022, Shri Deepak Kumar Jain, Senior Product Manager of the petitioner, appeared before the Senior Intelligence Officer on 16.02.2022 and submitted a statement. Pursuant to summons dated 24.02.2022, Shri Vivek Kumar, Head of Data Solutions and Planning of Bharti Airtel Ltd., the petitioner's customer, appeared and provided a statement. Thereafter, the impugned show cause notice was issued to the petitioner on 10.11.2023. The said notice states that the petitioner had misclassified the goods whereas the same should have been classified under CTH 85176100 or



85176290, as the case may be. The petitioner was also called upon to show cause as to why it is not liable to pay basic customs duty at 10% till 11.10.2018 and at 20% thereafter. Such notice was issued by invoking the enlarged period of limitation under sub-section (4) of Section 28 of the Customs Act. By letter dated 08.12.2023, the petitioner informed the respondent that it requires eight weeks' time to respond to the notice since it was consulting its legal experts and consultants. The present writ petition was filed in the above facts and circumstances.

Counsel and their contentions

5. Oral arguments on behalf of the petitioner were advanced by Mr.Vijay Narayan, learned senior counsel, and by Mr.Tarun Gulati, learned senior counsel. Arguments on behalf of the respondent were advanced by Mr.Sai Srujan Tayi, learned senior standing counsel.

6. The first contention of Mr. Vijay Narayan was that the bills of



entry were assessed by accepting the petitioner's self-classification.

By relying on Sections 17 and 18 of the Customs Act, learned senior counsel contended that an elaborate mechanism is provided for assessment, including provisional assessment. While sub-section (1) of Section 17 enables an importer to self-assess the duty, if any, leviable on such goods, learned senior counsel submitted that sub-section (2) thereof enables the proper officer to verify such self-assessment. He also pointed out that the proper officer is entitled to examine or test any imported goods for purposes of verification. Learned senior counsel pointed out that, after verification, if it is concluded that the self-assessment was not done correctly, the proper officer may re-assess the duty leviable on such goods. Therefore, he contended that the Customs Act contains sufficient safeguards to enable the proper officer to verify and reject the classification made on self-assessment basis. In this case, he submits that such verification was not carried out.

7. By referring to Section 47, learned senior counsel submitted



WEB COPY

that the said provision enables clearance of goods for home consumption upon the proper officer being satisfied that goods intended for home consumption are not prohibited goods. He also pointed out that permission for such clearance is required to be granted after being satisfied that the importer had paid the import duty assessed thereon. According to learned senior counsel, the proper officer could and should have resorted to the procedure prescribed under sections 17 and 47 if such officer entertained any doubts with regard to the self-classification by the petitioner.

8. In the alternative, learned senior counsel submitted that sub-section (1) of Section 128 enables the customs authorities to file an appeal against the self-assessment of the petitioner. He pointed out that such appeal[s] were not filed by the customs authorities in respect of goods imported by the petitioner under the relevant bills of entry. By referring to sub-section (2) of Section 129D, he pointed out that the said provision enables the Principal Commissioner of Customs or Commissioner of Customs to *suo motu* examine the



WEB CODE

record of any proceeding in which a subordinate adjudicating authority passed any decision or order. Pursuant thereto, he submitted that the above mentioned officers may direct any subordinate officer of the customs to appeal against the decision or order before the Commissioner (Appeals). He contended that recourse was not taken, in this case, either to sub-section (1) of Section 128 or sub-section (2) of Section 129D.

9. Consequently, learned senior counsel submitted that the impugned show cause notice is liable to be interfered with because the respondent is endeavouring to reopen assessments, which became final on account of the proper officer not undertaking assessments under Section 17 or, in the alternative, filing an appeal either under sub-section (1) of Section 128 or under sub-section (2) of Section 129D. In support of these contentions, learned senior counsel referred to and relied upon the following judgments:

(i) *ITC Ltd. v. CCE, 2019 (368) ELT 216 (SC) (ITC)*, particularly paragraphs 29 to 31 and 41 to 43.



WEB COPY

(ii) *Escorts Ltd. v. Union of India*, 1998 (97) ELR 211

(SC)(*Escorts*), particularly paragraph 6 thereof.

(iii) *CCE v. Flock (India) Pvt. Ltd*, 2000 (120) ELT 285 (SC) (*Flock*),

particularly paragraphs 8 to 10 thereof.

(iv) *Eveready Industries Ltd. v. CESTAT, Chennai*, 2016 (337) ELT

189 (Mad) (*Eveready Industries*), particularly paragraphs 28 to 39 thereof.

(v) *CCE v. Jellalppore Tea Estate*, 2011 (268) ELT 14 (Gau),

particularly paragraphs 13 to 15 thereof.

10. Mr.Tarun Gulati, learned senior counsel, made submissions next on behalf of the petitioner. He opened his submissions by pointing out that imports were made between 15.11.2018 and 16.11.2022, whereas the first summons was issued on 31.01.2022 and the show cause notice followed on 10.11.2023. In these circumstances, learned senior counsel contended that the self-assessments had become final because verification was not done



under sub-section (2) of Section 17. As a consequence, he contended that proceedings cannot be initiated under sub-section (4) of Section 28.

11. His next contention was that the bills of entry did not contain any misstatement. By referring to the show cause notice, he pointed out that such show cause notice is based on inferences drawn from facts set out in the bills of entry, and is not based on misstatements made by the petitioner. According to him, it cannot be concluded that there was a misstatement by the petitioner on the basis of such inferences by the respondent. By referring to the judgment of the Hon'ble Supreme Court in *Calcutta Discount Co. Ltd. v. Income Tax Officer, Companies District 1, Calcutta and another* 1960 SCC Online SC 10, especially paragraphs 10 and 25 thereof, he submitted that inferences of fact and law may be drawn by the assessing officer, but such inferences cannot form the basis of a conclusion of misstatement. He also relied upon paragraph 10 of the judgment of the Hon'ble Supreme Court in *Parashuram Pottery Works Co. Ltd. v. ITO* (1977) 1 SCC 408, and that of the Customs, Excise and



Gold Control Appellate Tribunal (CEGAT) in *Asian Paints (India) Ltd.*

v. Collector of Central Excise, Bombay, 1994 (73) ELT 433 (Tribunal)

(*Asian Paints*), to contend that the extended period of limitation cannot be invoked on the basis of inferences.

12. Mr.Sai Srujan Tayi, learned senior standing counsel, responded to the above contentions. His first submission was that the exporter and importer are related parties and, therefore, the documents submitted by them cannot be accepted at face value. According to him, the show cause notice deals with about 1870 bills of entry pertaining to multiple products, which were classified under different customs tariff headings, such as 85176100 and 85177090. He next submitted that the importer had earlier imported the same goods under a different CTH and changed the classification once the exemption in respect of the earlier classification was withdrawn. In order to substantiate this contention, he relied upon paragraph 10.17 of the show cause notice. With further reference to such show cause notice, he contended that allegations of wilful suppression and wilful



misstatement are contained in multiple paragraphs thereof. He further submitted that it is entirely open to the customs authorities to invoke sub-section (4) of Section 28 read with Section 110 AA even after the assessment.

13. In support of his contentions, he relied upon the following judgments:

(i) *Priya Blue Industries Ltd. v. Commissioner of Customs*, AIR 2004 SC 5115 (*Priya Blue*), especially paragraph 6 thereof, for the proposition that review of assessment is permissible under Section 28.

(ii) *Union of India v. Jain Shudh Vanaspati Ltd*, (1996) 10 SCC 520 (*Jain Shudh Vanaspati*), especially paragraphs 4 and 7 thereof, regarding the implications of clearance under Section 47 of the Customs Act.

(iii) *Canon India Private Limited v. Commissioner of Customs* (2021) 18 SCC 563 (*Canon India*), especially paragraph 13 thereof.



WEB COPY

14. As regards judgments cited by Mr.Vijay Narayan, learned senior standing counsel contended that all those judgments pertain to refund applications and that, in that context, the Hon'ble Supreme Court held that re-assessment should not be undertaken to decide an application for refund. He next contended that the power under Section 28 is not controlled by the power under Section 17 or Section 47. As regards the judgment of CESTAT Mumbai in *Huawei Telecommunication Private Limited v. Commissioner of Customs (Appeals), Mumbai III, 2023 (10) TMI 323 (Huawei)*, he submitted that the said decision pertained to a single product. He also pointed out that such decision was made after inquiry and not at the show cause notice stage. As regards the judgment in *Collector of Central Excise, Baroda v. Cotspun, 1999 taxmann.com_667 (SC)*, he submitted that the classification list was expressly approved by the Central Excise Department in that case.

15. By way of rejoinder, Mr.Tarun Gulati, learned senior



WEB COPY

counsel, submitted that queries were raised in respect of the relevant imports and such queries were responded to by the petitioner before clearance. By way of substantiation, he referred to the documents at pages 14 to 16, 21, 23, 24 to 41 of volume III of the compilation of documents and case law. On this basis, he submitted that it is incorrect to state that verification under Section 17 was not possible. He denied the contention that the petitioner had changed the classification earlier after the exemption was withdrawn.

16. As regards the power under Section 28, by referring to the judgment in *Priya Blue*, he pointed out that the factual context in that case was the filing of a refund application in the teeth of an assessment order. As per the judgment in *Canon India*, he pointed out that such power may only be exercised by the same proper officer because it is a power of review. He also pointed out that section 28(4) can only be invoked if there is fraud, collusion or wilful misstatement. By referring to the judgment of the CESTAT in *Huawei*, he submitted that the classification adopted herein was upheld. With reference to the judgment in *Eveready Industries*, he pointed out that



this Court distinguished the judgment in *Jain Shudh Vanaspati* and explained the scope of *Asian Paints*. By relying on the judgment in *Jayaraj International v. Union of India*, 2019 (370) ELT 118 (Punjab and Haryana), especially paragraphs 15 and 16 thereof, he pointed out that the judgment of the Hon'ble Supreme Court in *ITC* was relied on therein.

Discussion, analysis and conclusion:

17. At the outset, it should be borne in mind that the challenge is to a show cause notice. Except under exceptional circumstances, the writ court does not entertain a challenge to a show cause notice. One of the exceptions is if the show cause notice was issued without jurisdiction. Both the learned senior counsel for the petitioner contended that the respondent does not have the jurisdiction to issue a show cause notice in respect of goods that were previously assessed unless such order of assessment is challenged successfully in appeal. Therefore, the said contention warrants close scrutiny.



18. Since the above contention was raised by relying on Section

17 of the Customs Act, the said provision is set out below:

"17. Assessment of duty

(1) An importer entering any imported goods under section 46, or an exporter entering any export goods under section 50, shall, save as otherwise provided in section 85, self-assess the duty, if any, leviable on such goods.

(2) The proper officer may verify [the entries made under section 46 or section 50 and the self-assessment of goods referred to in sub-section (1)] and for this purpose, examine or test any imported goods or export goods or such part thereof as may be necessary:

[PROVIDED that the selection of cases for verification shall primarily be on the basis of risk evaluation through appropriate selection criteria.]

[(3) For [the purpose of verification] under sub-section (2), the proper officer may require the



WEB COPY



importer, exporter or any other person to produce any document or information, whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained and thereupon, the importer, exporter or such other person shall produce such document or furnish such information.]

(4) Where it is found on verification, examination or testing of the goods or otherwise that the self-assessment is not done correctly, the proper officer may, without prejudice to any other action which may be taken under this Act, re-assess the duty leviable on such goods.

(5) Where any assessment done under subsection (4) is contrary to the self-assessment done by the importer or exporter and in cases other than those where the importer or exporter, as the case may be, confirms his acceptance of the said re-assessment in writing, the proper officer shall pass a speaking order on the re-assessment, within fifteen days from the date of re-assessment



WEB COPY



of the bill of entry or the shipping bill, as the case may be."

19. As is evident from the above, sub-section (1) of Section 17 enables an importer to self-assess the duty, if any, leviable on the imported goods. It is common ground between the parties that the petitioner self-assessed the duty in respect of the relevant bills of entry. Sub-section (2) of Section 17 empowers the proper officer to verify the self-assessment. For such purpose, the proper officer is entitled to examine or test such imported goods or part thereof. As per the proviso to sub-section (2), the selection of cases for verification shall primarily be on the basis of risk evaluation through appropriate selection criteria. Sub-section (3) enables the proper officer to call upon the importer or any other person to produce any documents or provide information in relation to such verification. As per sub-section (4), the proper officer is empowered to re-assess the duty, if it is concluded on verification that the self-assessment was not done correctly. The right to re-assess is qualified in sub-section (5) by providing that a speaking order of re-assessment should be



WEB COPY

issued within 15 days from the date of re-assessment. Thus, it is clear that the proper officer is empowered to undertake verification in respect of goods imported by self-assessment and to re-assess the duty leviable on such goods. The question that arises is whether the failure of the proper officer to undertake such verification, and, consequential re-assessment, would denude the customs authorities of the right to initiate proceedings under Section 28. This entails an examination of Section 28.

20. Sub-sections 1 to 4 of Section 28 are set out below:

"28. Recovery of [duties not levied or not paid or short-levied or short-paid] or erroneously refunded

(1)When any [duty has not been levied or not paid or has been short-levied or short paid] or erroneously refunded, or any interest payable has not been paid, part paid or erroneously refunded, for any reason other than the reasons of collusion or. any wilful mis-statement or suppression of facts,-



WEB COPY



(a) the proper officer shall, within [two years) from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied [or paid] or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

[PROVIDED that before issuing notice, the proper officer shall hold pre-notice consultation with the person chargeable with duty or interest in such manner as may be prescribed.)

(b) the person chargeable with the duty or interest, may pay, before service of notice under clause(a) on the basis of,-

(i) his own ascertainment of such duty, or

(ii) the duty ascertained by the proper officer, the amount of duty along with the interest payable thereon under section 28AA or the amount of interest which has not been so paid or part-paid: [PROVIDED that the proper officer shall not serve such show cause notice, where the amount involved is less than rupees one



WEB COPY



hundred.) (2) The person who has paid the duty along with interest or amount of interest under clause (b) of sub-section (1) shall inform the proper officer of such payment in writing, who, on receipt of such information shall not serve any notice under clause (a) of that sub-section in respect of the duty or interest so paid or any penalty leviable under the provisions of this Act or the rules made thereunder in respect of such duty or interest:

[PROVIDED that where notice under clause (a) of sub-section(1) has been served and the proper officer is of the opinion that the amount of duty along with interest payable thereon under section 28AA or the amount of interest, as the case may be, as specified in the notice, has been paid in full within thirty days from the date of receipt of the notice, no penalty shall be levied and the proceedings against such person or other persons to whom the said notice is served under clause (a) of sub-section(1) shall be deemed to be concluded.]

(3) Where the proper officer is of the



WEB COPY



opinion that the amount paid under clause (b) of sub- section (1) falls short of the amount actually payable, then, he shall proceed to issue the notice as provided for in clause (a) of that sub-section in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of [two years shall be computed from the date of receipt of information under sub-section(2).

(4) Where any duty has not been [levied or not paid or has been short-levied or short-paid] or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of,-

(a) collusion; or

(b) any wilful mis-statement; or

(c) suppression of facts,

by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been [so levied or not paid] or which has been so short-levied or



short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in th notice."

21. From the plain language of sub-section (1) of Section 28, it appears that proceedings may be initiated under any of the following circumstances:

- (i) Where any duty has not been levied
- (ii) Where any duty has not been paid
- (iii) Where any duty has been short levied
- (iv) Where any duty has been short paid
- (v) Where any duty was erroneously refunded
- (vi) Where any interest, which is payable, has not been paid
- (vii) Where any interest, which is payable, has been part paid
- (viii) Where any interest was erroneously refunded.

In all the above circumstances, such non-levy, non-payment, short levy, short payment, erroneous refund, etc. should be for reasons other than collusion or wilful misstatement or suppression of facts.

As regards sub-section (4), it may be invoked in the same



circumstances as those listed above except that non-levy, non-payment, short levy, short payment, erroneous refund, etc., should be by reason of collusion or any wilful misstatement or suppression of facts. The other difference between sub-sections (1) and (4) is that the period of limitation under sub-section (1) is two years from the relevant date, whereas it is five years from the relevant date as regards sub-section (4).

22. The relevant date is defined as under in Explanation 1 to Section 28:

“Explanation 1: For the purposes of this section, 'relevant date' means,-

(a) in a case where duty is (not levied or not paid or short-levied or short-paid] or interest is not charged, the date on which the proper officer makes an order of the clearance of goods;

(b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof or re-assessment, as the case may be;



(c) in a case where duty or interest has been erroneously refunded, the date of refund;

(d) in any other case, the date of payment of duty or interest."

Under sub-section (5) of Section 28, the recipient of a notice under sub-section (4) may pay the duty demanded under such notice in full or in part, i.e., to the extent admitted by him. Such payment is required to be made within 30 days from the date of receipt of the notice. If payment is made in terms of sub-section (5), the determination of duty by the proper officer is to be done in accordance with sub-section (6). Sub-section (8) enables the proper officer to determine the duty after providing an opportunity of being heard to the person concerned and after considering the representation, if any, by such person. As per sub-section (9), this exercise is to be carried out within six months from the date of notice, if such notice was issued under sub-section (1) and within one year from the date of notice, if such notice was issued under sub-section (4).



WEB COPY 23. Since sub-sections (8) and (9) of Section 28 are also relevant

for the purposes of this case, the said subsections are set out below:

"(8) The proper officer shall, after allowing the concerned person an opportunity of being heard and after considering the representation, if any, made by such person, determine the amount of duty or interest due from such person not being in excess of the amount specified in the notice.

(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 of notice, in respect of cases falling under sub-section(4):

PROVIDED that where the proper officer fails to so 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 he 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 proceeding shall be deemed to have concluded as if no notice has been issued."

24. The conclusion that flows from the text of sub-sections (5), (6), (8) and (9) of Section 28 is that the proper officer is empowered to determine the amount payable as customs duty, including interest liability, under this provision. It is significant to notice that there is nothing in the text of Section 28 which indicates that the exercise of power under Section 28 is subject to the assessment being reopened by appellate proceedings or otherwise. Indeed, conspicuous by its absence from the text of Section 28 is any reference to Section 17 or to assessment under the said provision.



WEB COPY

25. Keeping in mind the above statutory context, it is relevant to consider the judgments relied upon by the petitioner. In *ITC*, the question that arose for consideration was whether the refund application could be entertained in the absence of a challenge to the order of assessment. In that context, the Hon'ble Supreme Court examined Sections 17, 27 and 28. Thereafter, the Court recorded the following conclusions in paragraphs 41 to 43 thereof:

"41. It is apparent from provisions of refund that it is more or less in the nature of execution proceedings. It is not open to the authority which processes the refund to make a fresh assessment on merits and to correct assessment on the basis of mistake or otherwise.

42. It was contended that no appeal lies against the order of self-assessment. The provisions of Section 128 deal with appeals to the Commissioner (Appeals). Any person aggrieved by any decision or order may appeal to the Commissioner (Appeals) within 60 days. There is a provision for condonation of delay for another



WEB COPY



30 days. The provisions of Section 128 are extracted hereunder:

"128. Appeals to [Commissioner (Appeals)].(1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a (Principal Commissioner of Customs or Commissioner of Customs) may appeal to the [Commissioner (Appeals)] [within sixty days) from the date of the communication to him of such decision or order.

[Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of Thirty days]

[(1A) The Commissioner (Appeals) may, if sufficient cause is shown, at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing. Provided that no such adjournment shall be



WEB COPY



granted more than three times to a party during hearing of the appeal.]

(2) Every appeal under this section shall be in such form and shall be verified in such manner as may be specified rules made in this behalf.

43. As the order of self-assessment is nonetheless an assessment order passed under the Act, obviously it would be appealable by any person aggrieved thereby. The expression 'Any person' is of wider amplitude. The revenue, as well as assessee, can also prefer an appeal aggrieved by an order of assessment. It is not only the order of re- assessment which is appealable but the provisions of Section 128 make appealable any decision or order under the Act including that of self-assessment. The order of self-assessment is an order of assessment as per Section 2(2), as such, it is appealable in case any person is aggrieved by it. There is a specific provision made in Section 17 to pass a reasoned/speaking order in the situation in case on verification, self-assessment is not found to be satisfactory, an order of re-assessment has to be



WEB COPY



passed under Section 17(4). Section 128 has not provided for an appeal against a speaking order but against "any order" which is of wide amplitude. The reasoning employed by the High Court is that since there is no lis, no speaking order is passed, as such an appeal would not lie, is not sustainable in law, is contrary to what has been held by this Court in Escorts (supra)."

26. The basis of the Hon'ble Supreme Court's judgment is evident from paragraph 41 wherein it is recorded that proceedings for refund are more or less in the nature of execution proceedings and that it is not open to the authority which processes the refund claim to make a fresh assessment on merits and correct the assessment on the basis of mistake or otherwise. As discussed earlier, by contrast, the power under Section 28 clearly takes within its fold the power to determine duty or interest. In that respect, the power under Section 28 cannot be equated with or compared to the power under Section 27. The judgment in *Escorts* also arose in the factual context of an application for refund. After noticing the period of



WEB COURT

limitation under Section 27 of the Customs Act, the Hon'ble Supreme Court affirmed the rejection of the refund application. Except for recognizing that self-assessment qualifies as assessment, these judgments do not advance the cause of the petitioner.

27. The petitioner also relied on *Flock* and *Eveready Industries* to contend that a show cause notice cannot be issued without challenging the order of assessment. As in the case of *ITC* and *Escorts*, *Flock* also arose in the context of a refund claim under the Central Excise and Salt Act, 1944 (as it was then named). In *Eveready Industries*, the Division Bench of this Court was called upon to decide whether it was permissible for the Central Excise authorities to take recourse to Section 11A of the Central Excise Act without taking recourse to the provisions of Section 35E. Section 11A is analogous to Section 28 of the Customs Act and Section 35E is analogous to Section 129D. The Division Bench concluded that these two provisions are required to be considered harmoniously by citing with approval the judgment of the CEGAT in *Asian Paints*. The Division Bench further



WEB COM

concluded that Section 11A cannot be invoked in respect of an alleged erroneous refund in a case where the application for refund was allowed under Section 11B. Thus, none of these judgments lay down the proposition that Section 28 cannot be invoked without reopening the self-assessment under Section 17 or by way of appeal.

28. Learned senior standing counsel for the respondent relied on *Priya Blue*, particularly paragraph 6 thereof, with regard to the power under Section 28. In paragraph 6, the Hon'ble Supreme Court concluded that an order of assessment could be reviewed under Section 28 of the Customs Act. He also relied on the judgment of the Hon'ble Supreme Court in *Jain Shudh Vanaspati*. In paragraph 7 of the said judgment, the Hon'ble Supreme Court concluded that the power under Section 28 can be invoked only subsequent to the clearance of goods under Section 47 and that the High Court had erred in concluding that a show cause notice could not be issued under Section 28 unless the order under Section 47 had been first revised under Section 130. In *Canon India*, which is another judgment relied



upon by learned senior standing counsel, the Hon'ble Supreme Court equated the power under Section 28 to the power of review.

29. Upon consideration of the language of Sections 17 and 28 and the judgments relied upon by the contesting parties, I conclude that the power under Section 28 is a power to determine duty and interest. Such power is not subject to or conditional upon the assessment being reopened or set aside. Consequently, it cannot be concluded that the respondent does not have the jurisdiction to invoke Section 28 either on account of not having verified the self-assessment in terms of Section 17 of the Customs Act or not appealing against such self-assessment.

30. The next question that falls for consideration is whether the respondent had jurisdiction to invoke the enlarged period of limitation under sub-section (4) of Section 28. As is noticeable from the language of sub-section (4), such power may only be exercised if the non-levy, non-payment, short levy, short payment, erroneous refund, etc., was by reason of collusion or wilful misstatement or



WEB COPY

suppression of facts. The contention of the petitioner was that the relevant goods were cleared by classifying such goods under CTH 8517 over a period of about four years, i.e. between 15.11.2018 and 16.12.2022, and that the enlarged period of limitation cannot be invoked in those circumstances. From paragraph 6 of the petitioner's affidavit, it appears that multiple goods, such as base stations and modules, servers and modules, LTE products and modules, MIMO products, OTN products and modules, POT products, PTN products and modules, session border controllers and modules, soft switches and modules, media gateway (modules) and VoIP equipment and modules were imported by the petitioner. This is also evident from the impugned show cause notice which expressly refers to the relevant bills of entry.

31. According to the respondent, these goods are liable to be classified under CTH 85176100 or CTH 85176290. If classified under the tariff headings indicated by the respondent, the petitioner would not be entitled to the benefit of the exemption notifications referred to in paragraph 8 of the affidavit of the petitioner. This leads to the



question whether the petitioner classified the goods in the bills of entry based on the *bona fide* belief that the goods are classifiable under the CTH specified by the petitioner or whether the petitioner resorted to misclassification so as to unjustly enjoy the benefit of exemption.

32. The show cause notice is detailed and deals extensively with the nature of goods imported by the petitioner, and the self-classification thereof in the relevant bills of entry. Mr. Tarun Gulati contended that the show cause notice is replete with inferences of fact and that such inferences cannot be the basis for invoking jurisdiction under sub-section (4) of Section 28 on the ground of wilful misstatement or suppression of facts. The said contention is not entirely devoid of merit inasmuch as a finding of wilful misstatement cannot be recorded without some basis to hold that the petitioner's statements, as opposed to the inferences therefrom, were made with knowledge of falsity. It bears repetition, however, that the matter is at the show cause notice stage and only allegations have



been made as on date.

WEB COPY

33. On examining the show cause notice, it is apparent that such allegations of wilful misstatement and suppression of facts have been made in several paragraphs. In order to interfere at this stage, a conclusion should be reached that the petitioner definitely did not indulge in suppression of facts or make wilful misstatements while importing the goods. Without closely and carefully considering disputed facts and documents relating to the import of multiple telecommunication-related products under a large number of bills of entry, the veracity of the respondent's allegations cannot be determined. Such detailed consideration is inappropriate at this juncture for multiple reasons.

34. Hence, at this preliminary stage, in the factual matrix outlined above, especially in exercise of discretionary and summary jurisdiction, it cannot be concluded that the respondent invoked subsection (4) of Section 28 without jurisdiction. In this regard, it should



also be noticed and recognized that it appears *prima facie* that the notice was issued within the period of five years specified therein.

The upshot of this discussion is that the petitioner has failed to make out a case to interfere with the show cause notice. Since the hearing pursuant to the impugned show cause notice was deferred in view of this case, it is, however, just and appropriate that the petitioner be granted time to respond to the show cause notice.

35. For reasons aforesaid, W.P.No.2166 of 2024 is disposed of by refusing to interfere with the show cause notice but by permitting the petitioner to respond thereto within one month from the date of receipt of a copy of this order. Upon receipt of such reply, it will be open to the respondent to proceed with the matter in accordance with law. Consequently, connected miscellaneous petitions are closed. No costs.

30.10.2024

Index :Yes/No

38/41



Internet :Yes/No

Neutral Citation :Yes/No

kal

To

Principal Commissioner of Customs, Air Cargo,
Chennai, VII Commissionerate,
New Custom House, Meenambakkam,
Chennai-600016.

SENTHILKUMAR RAMAMOORTHY J.
kal



WEB COPY



Pre-delivery order made in
W.P.No.2166 of 2024
&
WMP Nos.2359 & 2360 of 2024

30.10.2024