

(2014) 01 MAD CK 0004

In the Madras High Court

Case No : Writ Petition No. 25862 of 2013

M/s. Sada Sukhi Electronic Pvt. Ltd.

APPELLANT

Vs

The Commissioner of Customs (Seaport Import), The
Additional Commissioner of Customs (SIIB), The Deputy
Commissioner of Customs (SIIB) and The Superintendent
(SIIB)

RESPONDENT

Date of Decision : 10-01-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 4A
Customs Act, 1962 — Section 110 110A 111 17 17(4)
Customs Tariff Act, 1975 — Section 3(2)

Citation : (2014) 1 CTC 640 : (2014) 304 ELT 42 : (2014) 44 GST 652 : (2014)
25 GSTR 253 : (2014) WritLR 176

Hon'ble Judges : V. Dhanapalan, J

Bench : Single Bench

Advocate : B. Kumar and Mr. B. Satish Sundar, for the Appellant; S. Xavier Felix,
Senior Central Govt. Standing Counsel, for the Respondent

Judgement

V. Dhanapalan, J.—Heard Mr. B. Kumar, learned Senior Counsel for Mr. B. Satish Sundar, learned counsel appearing for the petitioners and Mr. S. Xavier Felix, learned Senior Central Government Standing Counsel for the respondents. These writ petitions have been filed, seeking to quash the proceedings in File Nos. S. Misc. 144/2013-SIIB, S. Misc. 108/2013-SIIB, S. Misc. 128/2013-SIIB dated 26.08.2013, issued by the 3rd respondent with a consequential direction to the respondents to release the imported goods (live goods covered under Bill of Entry Nos. 2045972 dated 06.05.2013, 2014153 dated 02.05.2013 and already cleared goods on payment of appropriate duty as reassessed by the proper officer in terms of Section 17(4) of the Custom Act 1962) viz. Multi Media Speakers for Computers of varying models more particularly by lifting the Restraint Orders dated 07.05.2013 from the premises of the petitioner entity.

2. For the sake of brevity, facts are being taken from W.P. No. 25862 of 2013, as

common question of law and facts are involved in all these writ petitions.

3. The case of the petitioner in a nut-shell is as follows:--

(a) The petitioner-entity is a trader in electronics and computer/IT goods and procures goods both locally and from abroad on wholesale basis. The petitioner for the purpose of conducting the said business is favoured with an Import-Export Code No. 0405010532 issued by the office of the Zonal Joint Director General of Foreign Trade, Chennai and is duly registered with the Commercial Taxes Department of the State Government. The petitioner entity is also assessed to VAT with TIN No. 33400582017, that registered with Central Sales Tax in C.S.T. No. 789549/01.08.2003 and that also assessed to Income Tax with PAN No. AADCS9919C by the said department;

(b) The petitioner, which is in the business for more than 9 years, in the course of its business, had imported consignments of Multi Media Speakers for Computers from M/s. Kaybee International Ltd., Hong Kong and had filed Bills of Entry with the office of the respondent for the clearance of the same. Along with the Bills of Entry, relevant Commercial Invoice, Packing List, Bill of Lading, Product Literature etc., were also filed. After due examination and assessment to duty by the proper officer of Customs, the goods were released on collection of duty on enhanced values. The said authorities had issued Out of Charge order permitting clearance of goods in terms of Section 47 of the Customs Act, 1962. Pursuant to clearance of goods from the Customs fold, the same was kept at the petitioner's premises at No. 24, Sunkuwar Agraharam Street, Chintadripet, Chennai, for local sales;

(c) The petitioner, on the basis of its contract entered into with the foreign suppliers, received a consignment of imported goods in May, 2013 and had filed Bill of Entry No. 2045972 dated 06.05.2013 for assessment and clearance of goods viz., Multi Media Speakers for computers. The said consignment has not been cleared so far and the goods covered under the same are in the custody and control of the respondents;

(d) Acting on certain intelligence, the officers attached to the 3rd respondent commenced investigation into the imports of the petitioner entity on the allegation of mis-classification and mis-declaration. Pursuant to such investigation, the 4th respondent on the authorization of the 3rd respondent conducted search of the godown premises of the petitioner entity on 07.05.2013 and sealed the said premises along with stocked goods viz., Multi Media Speakers for Computers already cleared from customs, after drawing representative samples of three models at the premises. They drew a mahazar of even date and affixed customs seal on the godown on the reasonable belief that the stocked goods have been mis-classified. Further certain import documents, viz. Bills of entry, invoice, packing list, purchase order pertaining to the past imports were also seized under the said mahazar. This apart a Restraint Order dated 07.05.2013 was also served by the 4th respondent on the petitioner u/s 110 of

the Customs Act, 1962, restraining the petitioner from removing or otherwise dealing with the said goods without the permission of the respondent;

(e) Since the goods pertaining to the live bill of entry No. 2045972 dated 06.05.2013 were not assessed and the goods seized under mahazar pertaining to 4 Bills of Entry was not released, the petitioner had issued a letter through its counsel dated 10.05.2013, seeking assessment and release of the live consignment and for raising the restrain order in respect of the sealed godown premises, so as to deal with the stock of imported goods. It was pointed out that as the entire import documents have been seized by the respondents, as also drawal of representative samples of the goods completed and were already available with the respondent for causing necessary verification, further cause for the detention of the goods were not warranted. It was further stressed that the restrained goods cannot be kept on hold indefinitely, which would entail huge losses to the petitioner and the goods being highly sensitive in nature are prone to speedy deterioration and any further delay would make the goods obsolete within a short period in the market, due to enormous growth and every day change in the electronic sector;

(f) The petitioner was summoned for enquiry pertaining to past imports for the last two years, participated in the enquiry on 18.06.2013 and furnished all the details and documents as sought for by pleading release of the detained consignments as the same has caused unmitigated hardships to the petitioner. Despite the said pleadings and request, respondents failed to release the goods covered under Live Bill of Entry No. 2045972 dated 06.05.2013, so also failed to lift the restraint order from the premises of the petitioner. On the contra, the petitioner was shocked to receive a communication dated 26.08.2013, issued by the 3rd respondent, by stating as follows:

It is informed that the Commissioner (Imports) has allowed Provisional Release of the imported goods seized at your godown and for the pending Bill of Entry No. 2045972 dated 06.05.2013, u/s 110A of the Custom Act, 1962, subject to the fulfillment of the conditions given below:

1. Execute suitable Bond of Rs. 55 Lakhs for the value of the goods
2. Cash deposit of Rs. 12 lakhs towards duty
3. Submission of Bank Guarantee of Rs. 6 lakhs towards Adjudication levies.

(g) The petitioner failed to understand on what basis the said demand and conditions were made and sent a reply dated 27.08.2013 to the 3rd respondent seeking to know the assessable value, custom duty, CVD calculations for all the models. Further, the petitioner also sought to know the CIF value model wise, so also the RSP value adopted for arriving at the aforesaid calculation. But despite receipt of the same, the respondents have not furnished any justification for imposition of the conditions/demand.

4. The impugned communication dated 26.08.2013 has been challenged on the

following grounds:

1. that it is arbitrary, illegal and unconstitutional;
2. that the respondents have no authority under law to restrain or detain any goods, which have been subject matter of assessment and clearance at the hands of the proper officer of customs;
3. that the very same goods have been cleared by Mumbai Customs Commissionerate, Nhava Sheva @ USD 14.00 per piece, which is the price and classification at which the present imported goods have been assessed and cleared by the respondents and the same value has been uniformly adopted by other customs Commissionerate;
4. that there is no substantial basis for detaining the live consignment covered under Bill of Entry No. 2045972 dated 06.05.2013 so as restraining the petitioner entity from any manner dealing with the goods already cleared from the customs fold;
5. that the law as far as the valuation or the classification of the impugned goods is the same for the entire country and when the values adopted by the Nhava Sheva Customs during the preceding months are identical to the values adopted by the Chennai Customs, it becomes crystal clear that the communication dated 26.08.2013 attributable to the 3rd respondent is ex-facie illegal and unsustainable on facts and law.
5. The respondents in W.P. No. 25862 of 2013 have filed a counter affidavit, stating that based on intelligence received from the Directorate of Revenue Intelligence that multifunctional audio systems were being cleared by undervaluing the goods by misdeclaring them as Computer Peripherals, and misclassifying them under CTH heading 8518 through suppression of facts about the features available in the system and without resorting to Retail Sale Price (RSP) based assessment for payment of Countervailing Duty (CVD), the Intelligence Officers working under Central Board of Excise and Customs conducted mass raid on the major importers of these multifunctional audio systems on 7th May, 2013. Pursuant to which, the petitioner's office premises was also searched by the Officers of the Special Intelligence and Investigation Branch (SIIB) and 1646 sets of Target brand Multimedia Systems along with import clearance documents were seized. A restraint order u/s 110 of Customs Act, 1962 was served on the company. Meanwhile, the petitioner filed Bill of Entry No. 2045972 dated 06.05.2013 for the clearance of 1324 sets of Target brand Multimedia Systems, along with spare parts. The Officers of SIIB examined the consignment and the same was also seized;
- 5a. It is stated in the counter that the multifunctional audio systems imported by the petitioner were found to have features such as FM Radio and USB based MP3 audit player and SD slot and the petitioner never declared these features to the Customs while submitting self-assessed Bills of Entry u/s 17 of the Customs Act,

1962, thereby declaring ridiculously low values for the audit systems imported by them, taking advantage of liberalized self-assessment regime. The above mentioned classifications attract levy of CVD on the basis of their RSP, as required under proviso to Section 3(2) of the Customs Tariff Act, 1975 read with Section 4A of the Central Excise Act, 1944 and Central Excise Notification No. 49/2008-NT dated 24.12.2008 as amended. Under the provisions of the Legal Metrology Act, 2009 (1 of 2010) and the Legal Metrology (Packaged Commodities) Rules, 2011, the importers are required to declare on the package the retail sale price of the goods, to which the provisions of sub-section (2) of Section 4A of the Central Excise Act, 1944 are applicable. Here, Retail Sale Price is defined as the maximum price at which the excisable goods in packaged form may be sold to the ultimate consumer and includes all taxes, local or otherwise, freight, transport charges, commission payable to dealers and all charges towards advertisement, delivery, packing, forwarding and the like and the price is the sold consideration for such sale. The petitioner declared RSP ranging from Rs. 450/- to Rs. 1500/- for various models of multifunctional systems. However, the market enquiries reveal that the actual sale prices are 2.5 times or more on the declared RSPs.

5b. It is further stated in the counter that the Commissioner of Customs, vide powers conferred u/s 110A of the Customs Act, 1962, has allowed provisional release of the seized offending goods, subject to the following conditions:

1. Execute suitable Bond of Rs. 55 Lakhs for the value of the goods
2. Cash deposit of Rs. 12 lakhs towards duty and
3. Submission of Bank Guarantee of Rs. 6 lakhs towards Adjudication levies. Thus, the petitioner's averment that detention of the goods were not warranted, is contrary to legal provisions and the seized goods are liable to confiscation u/s 111 of the Customs Act, 1962.

5c. It is the stand in the counter that the averment of the petitioner that on the basis of the contract entered into by the petitioner with its foreign suppliers, the consignment of imported goods was received in the month of May, 2013 is untrue, as at no point of time, the petitioner has submitted any contract before the Assessment or Investigating Officer. During investigation, it was found that the goods imported by the petitioner were actually manufactured by Chinese manufacturers and the models akin to the petitioner's and in some cases supplied by the same manufacturer from China were imported through Chennai Port for the following prices:

- 2.1 systems US\$ 8.4 19.44 (FOB)
- 4.1 systems US\$ 17.4 20.45 (FOB)
- 5.1 systems US\$ 23.7 42.69 (FOB)

In comparison, the petitioner declared the following values:

2.1 systems US\$ 2.35 3.50 (CIF)

4.1 systems US\$ 4.30 4.75 (CIF)

5.1 systems US\$ 7.10 13.05 (CIF)

In view of the above wide variation of declared values and unreasonably low values declared by the petitioner, on the basis of import data available at Chennai, the value of each class of systems were computed and are as follows:

2.1 systems US\$ 14.6 (FOB)/14.8 (CIF)

4.1 systems US\$ 19.3 (FOB)/19.5 (CIF)

5.1 systems US\$ 32.9 (FOB)/33.3 (CIF)

On the basis of the above imported values, the corresponding RSPs for local market are arrived at;

2.1 systems Rs. 2000/-

4.1 systems Rs. 2700/-

5.1 systems Rs. 4600/-

On the basis of these values, it is found that the value of the offending goods under seizure works out to about Rs. 55 Lakhs and the differential duty to about Rs. 12 Lakhs.

5d. The stand of the respondents in the counter is that Customs Manual on Self-Assessment, 2011 specifies that declaration of the correct description of imported/export goods is necessary for determining their classification, eligibility of duty exemption notifications, applicability of import/export controls, etc. It is also important for valuation of imported goods since Rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 provides that the transaction value can be rejected on the ground of the non-declaration of parameters such as brand, grade specifications etc. Vide Custom House's Public Notice No. 68/2006 dated 26.05.2006, Trade has been directed to ensure that the details for every item in a Bill of Entry are precise, complete and unambiguous and warned that any misdeclaration in the Bill of Entry will be viewed seriously and Importer/CHA will be penalised according to law. Having aware of all the legal provisions, the petitioner has resorted to suppression of facts by misdeclaration and misclassification and having succeeded in concealing these features during past clearance and caught in the act now, as an after thought, the petitioner is trying to justify its actions, stating that the said features have been added to the systems as a marketing strategy only to attract public to buy the product.

5e. An additional counter affidavit has also been filed by the third respondent, wherein it has been stated that on examination of the models imported by the petitioner, prima facie it is found that the petitioner has been importing certain

models of 5.1 channel multifunctional systems from China that are manufactured by M/s. Enkor Electronics, Shenzhen, China and the said models from the same series of the same manufacturer have been imported through Chennai Port for much higher prices by concealing the Retail Sale Price with a view to evade the customs duty. M/s. Top Notch Infotronix, Chennai imported a model from H38 series of M/s. Enkor Electronics for a price of US\$ 23.70 to 24.00, whereas the petitioner imported the same by declaring the purchase prices between US\$ 8.00 and 8.10. Similarly, M/s. Top Notch Infotronix, Chennai imported two models from H58 series of M/s. Enkor Electronics for a price of US\$ 37.30, whereas the petitioner imported the same by declaring the purchase prices between US\$ 8.15 and 8.40 as also M/s. Top Notch Infotronix, Chennai imported a model from H68 series of M/s. Enkor Electronics for a price of US\$ 38.03, whereas the petitioner imported models from higher H78 series by declaring the purchase price at US\$ 9.05.

6. I have heard the learned Senior Counsel appearing for the parties and perused the material documents available on record.

7. On an analysis of the entire facts, it would reveal that the petitioner-Company imported Multi Media Speakers for Computers from Hong Kong at USD 11,182.19 CIF Chennai totally. The above goods were shipped from M/s. Kaybee International Limited, Hong Kong and claimed for clearance of goods. On the arrival of the subject goods at Chennai Port, the petitioner filed Bill of Entry for Home Consumption and sought for clearance of the goods. But to the contrary, the consignment has not been cleared so far and the petitioner was informed that the goods have been restrained from removing by the 4th respondent under Mahazar for the reason that the stocked goods have been mis-classified and mis-declared. The samples from the goods were taken by the 4th respondent in the presence of representatives. The petitioner requested the Deputy Commissioner of Customs (SIIB) through its counsel to provisionally release the goods after taking of samples and weighment of goods by raising the restrain order in respect of the sealed godown premises so as to deal with the stock of imported goods, as the petitioner's request for provisional release of goods was fully covered by Provisions of Section 110A of the Act, which inter-alia provides that any goods seized u/s 110 of the Act may be provisionally released pending adjudication. However, the petitioner company has received a communicated dated 26.08.2013 from the 3rd respondent granting provisional release of the consignment, subject to the following conditions:

1. Execute suitable Bond of Rs. 55 Lakhs for the value of the goods
2. Cash deposit of Rs. 12 lakhs towards duty
3. Submission of Bank Guarantee of Rs. 6 lakhs towards Adjudication levies.

Aggrieved by such onerous conditions, the petitioner sent a reply dated 27.08.2013 to the 3rd respondent seeking to provide necessary information, such as assessable value, custom duty, CVD calculations for all the modes, CIF

value (model wise) as also the RSP value adopted for arriving at the aforesaid calculation. Despite receipt of the same, the respondents have not furnished any justification for imposition of the conditions, which resulted in filing of the present writ petition before this Court.

8. It is the case of the respondents that the goods in question were imported by the petitioner by declaring low values for the audio systems by taking due advantage of liberalized self-assessment regime. The petitioner declared the Retail Sale Price (RSP) ranging from Rs. 450/- to Rs. 1500/-, which is much less when compared to actual sale price in the market. The actual value of the goods seized is Rs. 55 Lakhs with differential duty of about Rs. 12 Lakhs. Thus, by misclassification and mis-declaration of goods, the petitioner attempted to evade customs duty. Further investigation in the subject matter is in progress and hence, quashing of impugned communication dated 26.08.2013 as also provisional release of the goods, sought for by the petitioner could not be entertained.

9. While examining the claim of the petitioner for quashment of the communication dated 26.08.2013 and also the provisional release of goods, the circumstances under which the import was done, have to be looked into and thereafter, the value so declared by the petitioner is a matter to be taken into account. The petitioner declared the value of the goods as USD 11,182.19 CIF Chennai totally, which according to the respondents is low. Further investigation is yet to be completed and adjudication proceedings are also to be made thereafter. When such is the situation, what is the condition for provisional release to be made, has to be examined.

10. In this regard, the learned Senior Counsel for the petitioners relied on the following decisions of the Hon'ble Supreme Court as well as this Court:

i) the Hon'ble Supreme Court in the case of Commissioner of Customs v. Navshakti Industries Private limited, [2011 (269) ELT A146 (SC)], has held as follows:

...having considered the facts and circumstances of the case and also taking notice of the fact that the goods in question are newsprint which is perishable in nature, we issue a direction that the goods of the respondents shall be cleared by the appellants herein on the respondents' furnishing a bank guarantee of 30% of the differential duty to the satisfaction of the Commissioner of Customs. The goods shall be released in terms of this order immediately on furnishing of the aforesaid bank guarantee and satisfaction of the concerned Commissioner of Customs. We also direct the Commissioner of Customs to hear the adjudication proceedings pending before him as early as possible, preferably within a period of three months, from the date of receipt of a copy of this order.

In terms of the aforesaid order, the appeal stands disposed of. We, however, make it clear that while passing the aforesaid order, we have not expressed any opinion or views on the merits of the dispute which shall be independently

considered by the competent authority.

ii) Similarly, the Hon'ble Division Bench of this Court in the case of the Commissioner of Customs (Airport), Anna International Terminal, Chennai Airport, Chennai and others v. T. Elavarasan in W.A. No. 582 of 2011 decided on 01.04.2011, while modifying the order of the learned single Judge, directed the respondent therein to deposit 50% duty of the value of the goods instead of depositing entire customs duty and the redemption fine, and on such deposit being made, the goods shall be released forthwith in favour of the respondent therein. The same view has also been absorbed in the following recent judgments of this Court:

a) M/s. Sri Abhisek India, Rep. by its Proprietor Ram Dev Purva v. The Commissioner of Customs, Customs House, New Harbour Estate, Tuticorin and others in W.P. (MD) No. 1511 of 2012 decided on 22.02.2013;

b) M/s. Veetrag Enterprises v. The Commissioner of Customs in W.P. No. 3135 of 2013 decided on 19th March, 2013; and

c) Dhriti Enterprises Vs. Commissioner of Customs (Import) and Others, .

Therefore, the contention of the learned senior counsel is that the case of petitioners in the present case also stands on the same footing and their claim for provisional release of goods shall be considered along with a reasonable condition.

11. Refuting the above submissions, the learned counsel for the respondents contended that in the case of Commissioner of Customs v. Navshakti Industries Private limited, (2011 (269) ELT A146 (SC)), relied upon by the petitioners, the condition imposed for provisional release of the goods is only by a bank guarantee and in order to safeguard the interest of the Department, the petitioner has to pay 30% of the differential duty and shall furnish bank guarantee for 20% of the differential duty and for remaining 50%, the petitioner-Company should furnish a bond. The learned counsel further submitted that in case, the Department succeeds in the adjudication proceedings, it is not possible for the Department to recover any "amount" if the goods are released.

12. It is seen that in Notification No. 81/2011-Customs (N.T.), dated 25.11.2011 issued by the Government of India, Ministry of Finance, Department of Revenue (Central Board of Excise and Customs), the Customs (Provisional Duty Assessment) Regulations, 2011 were brought into force, which inter-alia provided the following:--

1. Short title and commencement: (1) These regulations may be called the Customs (Provisional Duty Assessment) Regulations, 2011.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. Conditions for allowing provisional assessment.-

(1) Where-

a) an importer or an exporter, as the case may be, is unable to make self-assessment under sub-section (1) of Section 17 of the Customs Act, 1962 (52 of 1962) and makes a request in writing to the proper officer for assessment; or

b) the proper officer on account of any of the grounds specified in sub-section (1) of Section 18 of the said Act, is not able to verify the self-assessment or make re-assessment of the duty on the imported goods or the export goods, as the case may be, he shall make an estimate of the duty to be levied (hereinafter referred to as the provisional duty).

13. Section 110A of the Customs Act, 1962 provides for provisional release of goods, documents and things seized pending adjudication. Any goods, documents or things seized u/s 110 of the Act, may, pending the order of the adjudicating officer, be released to the owner on taking a bond from him in the proper form with such security and conditions as the Commissioner of Customs may require.

14. The only reason for non-release of the goods is that the petitioners have misclassified and mis-declared the goods in question. The respondents, on investigation, found that the differential duty has to be paid even for the provisional release of the goods. The investigation has to be completed and thereafter, adjudication has to be done for assessment of the value. In the light of the above stated legal position and as the goods in question are not prohibitory items under the provisions of the Act and having regard to the foregoing reasons and discussions and considering the facts and circumstances of the case, provisional release of the goods in question is ordered, subject to the following conditions:--

(i) The petitioners shall deposit with the customs authorities the duty payable on the value declared by them.

(ii) The petitioners shall deposit with the customs authorities 50% of the differential duty i.e., the difference between the value declared by them and the value provisionally assessed by the Department in the light of the decision of the First Bench of this Court in W.A. No. 582 of 2011, dated 01.04.2011 and for the balance 50% of the differential duty, the petitioners shall furnish personal bond to the satisfaction of the customs authorities.

(iii) The investigation is yet to be completed and the adjudication has also to be done. Therefore, it is needless to state that this order shall not stand in the way of the respondents to proceed with the investigation and also the adjudication process. In such an event, the petitioners shall co-operate with the respondents for conclusion of the investigation as well as the adjudication proceedings.

With the above observations and directions, the Writ Petitions are disposed of. No costs. Consequently, connected miscellaneous petitions are closed.