
(2007) 07 AHC CK 0014
In the Allahabad High Court

Novamet Industries (A 100% Export Oriented Unit), Sh.
Vinay Jain (Partner Novamet Industries), Smt. Sangeeta
Bhalla and Satish Kumar Bhalla

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 06-07-2007

Acts Referred:

Customs Act, 1962 — Section 108, 14

Citation : (2008) 227 ELT 363 : (2009) 13 STR 108

Hon'ble Judges : H.L. Gokhale, C.J.; R.K. Agrawal, J

Bench : Division Bench

Final Decision : Allowed

Judgement

H.L. Gokhale, C.J.—Heard Mr. G.L. Kawal, Senior Advocate, and Mr. Pankaj Bhatia in support of tins petition and Dr. A.K. Nigam, learned Additional Solicitor General, with Mr. A.K. Singh, appearing for the respondents.

2. By consent of parties, rule made returnable.

3 The respondents have filed their counter affidavit.

4. The first petitioner herein is a partnership firm running a 100% export oriented unit, satiated in Greater Noida district of Uttar Pradesh. The petitioners No. 2 and 3 its partners and the petitioner No. 4 is the husband of the petitioner No. 3.

5. The first petitioner has been engaged in the extraction of copper, aluminum, iron, lead and other scrap from copper cable scrap and copper lead cable scrap, imported from outside India. They were availing of exemption of duty from import under the Export Promotion Policy. On receiving an intelligence report that the first petitioner indulged into under valuation and clandestine removal for evasion of custom and excise duty, the officers of the Department of Revenue Intelligence (DRI), New Delhi, raided the premises of the first petitioner on 24.8.2004. They seized the computers and various other voluminous records of

the first petitioner.

6. At the time of the search, statement of one Sri Vinay Jain, partner of the first petitioner, was recorded u/s 108 of the Customs Act. Sri Vinay Jain, partner of the first petitioner, is stated to have admitted that the first petitioner had resorted to under-valuation of the imported goods but the data contained on the four computers appeared to be deleted prior to submission to the DRI and the same were got scanned with the help of special software from the computer, claimed to be in the presence of Sri Vinay Jain and Sri Satish Bhalla. The data was scrutinised in their presence and the data contained incriminating documents including e-mails, confirming under-valuation of the imported goods. When confronted, Sri Vinay Jain is stated to have confirmed that the raw materials were under-valued.

7. In view of this material, the DRI, prima facie, was of the view that the petitioner resorted to mis-declaration of the imported goods and, therefore, the value of the goods had to be fixed u/s 14 of the Customs Act, 1962 read with Rule 3(ii) of the Customs Valuation Rules, 1988.

8. The DRI was of the view that the scheme of duty free import for the purpose of export promotion was misused by mis-declaring the value of the imported goods at Rs. 16.91 crores instead of actual value of Rs. 27.99 crores. Methods, such as, mis-declaration of the value of the imported goods, manipulation of statutory records and clearing the differential copper contents without payment of duty, were resorted to.

9. Accordingly, a show cause notice dated 10.3.2006 was issued to the first petitioner, amongst others, asking as to why the value of the imported goods be not revised to Rs. 57.99 crores, the benefit under the beneficial notification should not be denied to the petitioner and the duty should not be imposed under the Customs Act, the material imported should not be confiscated and central excise duty amounting to Rs. 25.95 lacs should not be imposed with interest and penalty under the Central Excise Act. The notice also asked them to show cause as to why a sum of 1.5 crores should not be appropriated towards duty payable and bank guarantee of Rs. 50 lacs, already given, should not be enforced and adjusted towards the dues.

10. It is the case of the petitioner that when their premises were raided, all their documents and four computers were seized. They required the documents for filing their reply with a view to defend the notice.

11. It is their case that in spite of repeated requests, the documents were not made available. They relied upon a government circular dated 2.2.1996 issued by the Department of Revenue concerning seizure of books and records. The circular directs the officers of the Excise Department that the non-released seized goods and documents should be released to the assessee, in cases where show cause notice is not issued, within six months from the date of the seizure. The circular further states that-

3. Once the show cause notice is issued to the party, the document/records which have not been relied upon may be returned to the party under proper receipt. The assessee may also be allowed to obtain photocopies of the documents relied upon. The above measures would help substantially reduce the time taken by the party for inspection of seized documents.

12. The petitioner also relied upon a subsequent circular of the Central Board of the Central Board of Excise and Customs, dated 8.9.2006, which states, in Clause 2 thereof, as follows:

In this regard, your attention is invited to the Board's Circular No. 42 88-CX, dated 24.5.1988 and No. 48/88-CX. 6, dated 10.6.1988. As per these circulars, the documents records which are not relied upon in the show cause notice are required to be returned under proper receipt to the persons from whom they are seized. I wish to reiterate compliance of these instructions. In fact, the show cause notice itself may incorporate a clause that unrelied upon records may be collected by the concerned persons within 30 days of receipt of the show cause notice. The designation and address of the officer responsible for returning the relied upon records should also be mentioned in the show cause notice.

13. It is their case that in spite of repeated requests, the documents were not given and since the documents were not being given, ultimately they filed this petition on 26.2.2007 and it is their case that their counsel submitted an application to the respondent No. 2 before whom the matter was pending, in the afternoon on that very day, requesting him to adjourn the matter. The prayer in the main petition is to direct the respondent to decide the applications made for return of the documents relied upon in the show cause notice as well as the non-relied document.

14. In paragraph 17(d) of the application for amendment, it is specifically stated that the counsel for the petitioner appeared and submitted a copy of letter dated 26.2.2007 and submitted that the petition had been filed before the High Court and requested for the adjournment.

15. In paragraph 6 of the counter affidavit filed to this application, it is stated that the contents of that paragraph are misconceived. There is, however, no specific denial to the statement made in paragraph 17(d).

16. It appears that the respondent No. 2 proceeded with the notice and thereafter has passed the impugned order on 28.2.2007/13.3.2007, confirming the notice in its entirety. In the order passed by the respondent No. 2, it was specifically stated in paragraph 4 that no reply had been made to the show cause notice and reminders were sent and that was without any effect. In paragraph 4.1 of the order, it is stated that the party was not interested in submitting the reply to the show cause notice. It is further relevant to note that at the end of paragraph 4, it is stated in the order as follows:

On that date (26.2.2007) the party were represented by Shri Rakesh Nautiyal

Advocate and it was stated that the party would be going to file writ petition in the Hon"ble High Court of Allahabad in the said matter as such adjudication proceedings should (be) kept in abeyance.

17. As far as the plea of the petitioner that the documents which were relied in support of the notice, were not supplied, the respondents have annexed the acknowledgement of the petitioner, dated 22.3.2006, to the counter affidavit filed to the petition, which records that the documents relied upon were supplied to the petitioner.

18. As far as the plea of the petitioner that the documents not relied upon were not being returned, it is the stand of the respondents that many such documents are sometimes required for other investigation and the first circular dated 2.2.1996, relied upon, merely stated that such documents may be returned. It does not say that they shall be returned. In any case, the respondents are ready to make available the photocopies of such non-relied documents and they relied upon three such letters of 23.6.2006, 29.1.2007 and 9.2.2007. They also relied upon the fact that it is recorded that the petitioners have collected copies of the non-relied documents may be after the passing of the order, i.e., on 7.3.2007.

19. Mr. Rawal, learned senior Counsel, appearing for the petitioners, submitted that the petitioners were seriously prejudiced in their defence. The circular is very clear that non-relied documents are to be returned. They may not be relied upon by the Department but are relevant for the petitioners to file the reply. It was submitted that they had to be returned in original. In any case, specific averment was made in paragraph 13 of the petition that the petitioners were directed to collect the relevant documents on a working day for the first time by letter dated 5.2.2007 and instead of twice approaching the respondent No. 3, the documents were not supplied on one pretext or the other. The reply stated that the documents which are relied upon, have been given. It does not say anything about the non-relied documents.

20. The submission of" the petitioners is limited that the principles of natural justice have been violated and they have been denied opportunity to defend properly.

21. As against that, the stand of the respondents is that the documents relied upon were available to the petitioners and they were supplied to them and copies of the non-relied documents were offered but the petitioners did not collect them and they purposely did not want to proceed with the hearing.

22. in view of this scenario, we asked Mr. Rawal, learned senior Counsel, to look into the inventory of the documents seized and inform about the copies of which document were not made available. He stated that the petitioners required mainly the print out of the data from the four central processing unit (CPU) of the computers. That was specifically referred and made the basis of conclusion of undervaluation. That can be seen from paragraph 2.2 of the impugned order. The copies of these data are available with the respondents and they can certainly

make available the copies thereof and also return the four CPU.

23. To safeguard the interest of the Revenue, the petitioners have given the undertakings of the two partners of the first petitioner firm that they will not alienate and encumber the petitioners' property and all machinery therein. They also stated that there is no third party claim over the property and, if any claim is made by any body, it will be informed to the party as well as the authority that the proceedings are pending before the respondent No. 2 and that the petitioners have undertaken to this Court to keep this property unencumbered.

24. Amongst other submissions, Dr. Nigam, learned Additional Solicitor General, submitted that the petitioners have a remedy to file an appeal to the Central Excise Service Tribunal and that when an alternative remedy is available, this Court should not interfere.

25. As far as this submission of Dr. Nigam is concerned, we must note that exhaustion of alternative remedy is a principle of self-limitation. It is not a pre-condition for resort to the writ jurisdiction but more of a rule of policy, convenience and discretion on the part of the High Court as laid down in A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhwani and Another, . Again as held by the Apex Court, in exceptional circumstances, certiorari may be issued notwithstanding that statutory remedy is not exhausted. This is held in The Collector of Monghyr and Others Vs. Keshav Prasad Goenka and Others,

26. In the present case, the petitioner is relying upon the circulars of the Central Government. In any case, they are binding on the Department, as held by the Apex Court in Collector of Central Excise, Vadodara v. Dhiren Chemical Industries 2002 (439) E.L.T. 3 (see para 9)

27. From the last part of para 4 of the impugned order, it is clear that on 26.2.2007 the petitioner did point out that a petition was being filed, as stated in that order, though the petitioners are contending that they informed the respondent No. 2 that the petition had already been filed. In any case, even if we accept what is recorded in that order, the respondent No. 2 could have adjourned the matter to await the direction of the Court, which was expected to be moved. The show cause notice has been given in March, 2006. The matter was otherwise also pending for quite sometime. The respondent No. 2, surely, could have accommodated the petitioners at least by a couple of weeks.

28. That apart, OWQ fails to see as to why the documents which were not relied upon, were not returned to the petitioners. Some of the non-relied documents appear to have been given subsequent to the orders passed by the respondent No. 2, as can be seen from the acknowledgement of the documents which is relied upon by the respondents.

29. In this state of affairs, it will be appropriate to interfere with the order which the second respondent has passed and to direct him to make available the copies

of the data stated to have recovered from the computers, which have become the basis of the conclusion of undervaluation. The respondent No. 2 ought to return the four CPU also, which are now no longer required after the data is retrieved by the DRI. In the meantime, the interest of the Revenue will be protected in view of the undertaking given by the petitioner.

30. In the circumstances, we allow the petition, quash and set aside the order dated 28.2.2007/13.3.2007 and restore the revived notice to the file of the respondent No. 2. The respondents are further directed to make available copies of the data retrieved from the computer within four weeks hereof as also the four CPU. The petitioners will not encumber the property of their factory, situate at Property Nos. 4 and 4A, Mahila Udhami Park, Greater Noida, in the meanwhile and the same will stand charged to the Revenue until the decision on the show cause notice, as per the undertaking given by them. The respondent No. 2 will endeavour to hear and decide the revived notice expeditiously. The rule made absolute, as above, without any order as to costs.