
(2014) 10 MAD CK 0035

In the Madras High Court

Case No : W.P. No. 18337 of 2013 and M.P. No. 1 of 2013

Yashavi Enterprises

APPELLANT

Vs

Cus. & C. Ex. Settlement Commission, Chennai

RESPONDENT

Date of Decision : 16-10-2014

Acts Referred:

Customs Act, 1962 — Section 123, 123(2), 123(ii), 127B, 127B(1)

Citation : (2015) 315 ELT 490 : (2015) 50 GST 339

Hon'ble Judges : T.S. Sivagnanam, J

Bench : Single Bench

Advocate : P. Saravanan, Advocates for the Appellant; N. Senthil Kumar, Advocates for the Respondent

Judgement

T.S. Sivagnanam, J.—The petitioner has filed this writ petition challenging the order passed by the first respondent, namely, Customs & Central Excise Settlement Commission, Additional Bench, II Floor, Narmada Block, Custom House, 60, Ra-jaji Salai, Chennai, in Final Order No. 11/2013-Cus., dated 1-5-2013, by which the Settlement Commission rejected the petitioner's application filed under Section 127C(1) of the Customs Act. Heard Mr. P. Saravanan, learned counsel for the petitioner and Mr. N. Senthil Kumar, learned Standing Counsel appearing for the respondents.

2. The facts which are necessary for the disposal of the writ petition are that the petitioner filed four Bills of Entry and declared that the goods were purchased on a High Sea Sale from M/s. Devashi Overseas and the goods were Polyester Fabrics (relevant Processed Man-made fabrics) (100% Polyester Dyed/Printed Fabrics) and the petitioner sought for clearance of the goods duty free under DFIA licences which covered "Relevant Processed Man-made Fabrics" (100% Polyester Dyed and Printed Fabrics) and the goods were subjected to examination and on testing, it was found that the fabrics were different composition and GSM than what was declared in the bills of entry. Therefore, the goods were seized under mahazar. Further, it was found that apart from the

misdeclaration of value, the goods were found to be misdeclared in respect of description and hence, the goods imported were found to be not covered by DFIA licences submitted by the importer for clearance of the fabrics covered under four Bills of Entry.

3. In the said background, a show cause notice dated 15-3-2012 was issued to the petitioner. The petitioner did not submit his reply, but, they approached the Commissioner and filed an application for settlement, by application dated 18-9-2012. On receipt of the application, the Settlement Commission issued a notice to the petitioner dated 21-9-2012. In the said notice, the petitioner was informed that they have to fulfill all the criteria as laid down under Section 127B of the Customs Act, which are as under:

- (i) Whether a Bill of Entry or a Shipping Bill in respect of import or export of such goods has been filed;
- (ii) Whether the show cause notice has been issued by the proper officer;
- (iii) Whether the additional amount of duty accepted by the applicant in his application exceeds Rs. 3 lakhs;
- (iv) Whether the applicant has paid the additional amount of customs duty accepted by him along with interest due under Section 28AB;
- (v) Whether any case is pending in the Appellate Tribunal or any Court;
- (vi) Whether the application contains a full and true disclosure of the manner in which additional duty liability has been derived as required under Section 127B.
- (vii) Whether any application is pending in the Appellate Tribunal or any Court under this sub-section.
- (viii) Whether the goods are covered under Section 123 of Customs Act/NDPS Act.

4. The relevant provision which the petitioner had to satisfy in the instant case was clause (viii), wherein, the petitioner had to state whether the goods are covered under Section 123 of the Customs Act/NDPS Act. The petitioner, by its reply dated 28-9-2012, while answering the notice insofar as clause (viii) is concerned, stated that Section 123 of the Customs Act and NDPS Act are not applicable to the goods imported by the petitioner. It is to be noted that the Revenue was not heard and the Settlement Commission proceeded based on the reply given by the petitioner dated 28-9-2012. Accordingly, an order was passed on 4-10-2012, allowing the application to be proceeded with. Pursuant thereto, notice was issued to the Department and the Department entered appearance and put forth their submissions. The Department pointed out that the petitioner's goods fell under Section 123 of the Customs Act, since the items imported under four Bills of Entry were fabrics made wholly or mainly of synthetic yarn and there is a statutory prohibition under Section 123(ii) of the Act which lays down the prohibition on certain goods like gold and certain other

goods notified under the said Section and the Fabric made wholly or mainly of synthetic yarn is covered under Customs Notification No. 204, dated 20-7-1984 and hence, there is a bar for the Settlement Commission to entertain the application in terms of Proviso to Section 127B. Further, it was stated that the petitioner was attempting to mislead the Commission by referring to Interpretative Rules which are governed by the FTP Policy as per Para-II of Notification 98/2009; that DFIA licenses produced by the applicant provided for import of GSM of Polyester Fabric 95 to 108 + or - 10%. But, on subsequent examination and test by the Textile Committee, it was found that Fabric imported was different from what was declared in the Bill of Entry on account of percentage composition and GSM.

5. Further, it was stated that the petitioner is not entitled to import the utilizing items under DFIA Scheme. Further, it was stated that there was a clear evidence on record in the form of load port invoices obtained by the steamer agents from the load port shippers. Such stand was taken by the Commissioner before the Settlement Commission. Thereafter, the Settlement Commission afforded an opportunity of personal hearing to the petitioner as well as the Revenue, wherein also, the jurisdictional Commissioner reiterated that the application is not maintainable in terms of the Proviso under Section 127B(1)(c) of the Customs Act. After hearing both parties, the Settlement Commission took up for consideration the preliminary objection and clearly found that the Department invoked Section 123 of the Customs Act and in view of the statutory bar under Proviso to Section 127B(1), rejected the petitioner's contention.

6. The petitioner has challenged the impugned order on two grounds, firstly, by contending that the Settlement Commission issued a notice on 21-9-2012, for which, the petitioner gave a written explanation on 28-9-2012 and being satisfied with the same, the Settlement Commission passed an order dated 4-10-2012 and allowed the application to be proceeded with and thereafter, subsequently, objection was raised and hence, the application cannot be rejected. Secondly, the learned counsel by placing reliance on a decision of the Special Bench of the Settlement Commission, reported in 2005 (186) E.L.T. 356 (Settlement Commission) submitted that merely because Section 123(2) of the Customs Act has been invoked, cannot ipso facto be a ground to throw out the petitioner's application for Settlement Commission.

7. So far as the first contention raised by the petitioner is concerned, the same does not merit acceptance, in view of the fact that in response to the notice dated 21-9-2012, while giving explanation, the petitioner did not disclose full facts and the petitioner made a false statement to clause (viii) as specified in the notice dated 21-9-2012 and the petitioner falsely stated that Section 123 is not applicable to the goods imported by the applicant. The fact remains that Section 123 of the Customs Act was invoked by the Jurisdictional Commissioner. Therefore, the petitioner should have made a full and true disclosure stating that Section 123 of the Customs Act was invoked and if it is the case of the petitioner

that on account of the interpretation given by the Special Bench of Settlement Commission, the case could be entertained and they should have given the explanation. Thus, it is clear that the petitioner had made a false statement. Therefore, based on such statement, order was passed on 4-10-2012 to allow the application to be proceeded with. That does not mean that the Commission is barred from considering the issue, after the Department entered appearance and pointing out the same. Further, it is to be noted that at the time of issuance of show cause notice dated 21-9-2012, the Department was not heard in the matter, therefore, the first ground raised by the petitioner does not merit acceptance.

8. So far as the second ground, by relying upon the decision of the Special Bench is concerned, the Commission took note of the said submission, which is evident from Para 17.10 of the impugned order and the Settlement Commission took note of the decision of the Special Bench, with regard to the following question which was answered accordingly.

"Question: Whether for application in respect of such goods which have been cleared under a Bill of Entry, the aforesaid bar would come into play on subsequent seizure of such goods.

Answer: The bar laid down in the third proviso to the sub-section (1) of Section 127B of the Act could come into play in respect of the specified goods which have been cleared under a Bill of Entry but are subsequently seized under the provisions of the Act on the reasonable belief that they are smuggled goods, if the revenue holds that goods do not tally with the particulars contained in such Bill of Entry, on which the said goods had been admittedly got cleared."

9. Further, the Settlement Commission noted that the petitioner has admitted and paid a sum of Rs. 8,98,887/- a portion of the duty demanded in the show cause notice along with interest which clearly established that the particulars furnished by him in the Bills of Entry were not tallying.

10. In the light of the above facts, the Settlement Commission was fully justified in rejecting the petitioner's application that too after taking note of the order passed by the Special Bench of the Commission. In the above facts and circumstances, this Court is of the view that the order impugned in the writ petition is valid in law. Accordingly, the writ petition fails and the same is dismissed. No costs. Consequently, connected miscellaneous petition is closed.