(2009) 12 CAL CK 0034

Calcutta High Court

Case No: Writ Petition No. 526 of 2002

A.S. Syndicate (Warehousing) P. Ltd. and Another		APPELLANT
	Vs	
Commissioner of Customs (Port) and Others		RESPONDENT

Date of Decision: Dec. 4, 2009

Acts Referred:

- Customs Act, 1962 - Section 11A, 11A(3), 18, 28, 28(1)

Citation: (2010) 4 CALLT 375 : (2011) 1 CHN 381 : (2011) 267 ELT 469

Hon'ble Judges: Indira Banerjee, J

Bench: Single Bench

Judgement

Indira Banerjee, J.

The Petitioners carry on business of import of "Vatted Malt and Grain Spirit Compound", hereinafter referred to as the said goods, which is sold to different distilleries for manufacture of whisky.

2. Prior to 1st January, 1996, the said goods admittedly fell under Tariff Heading 2208.10 and were finally assessed to duty as "Compound Alcoholic preparations of a kind used for the manufacture of beverages", under Tariff Heading 2208 of the first schedule to the Customs Tariff Act, 1975. Goods which fell under Tariff Heading 2208 were freely importable and no licence was required for importation of the same.

3. After the amendment of the Customs Tariff Act, 1975 with effect from 1st January, 1996, alcoholic preparations (other than those based on Odoriferous substance), used in the manufacture of beverages, with an alcoholic strength exceeding 0.5% was transferred from Heading 22.08 to Heading 21.06.

4. Between March, 1997 and October, 2000, consignments of the said goods imported by the Petitioners, covered by 54 bills of entry, were provisionally assessed

under Heading 21.06 as per the order of the Commissioner of Customs (Port) in File No. S202 Gr. I (P) 29/97A dated 27th March, 1997.

5. However, after provisional assessment, the Department contended that the goods imported by the Petitioners should be classified under residuary item 2208.90 and since the Petitioners did not have the licence required for import of goods falling under the aforesaid tariff item, the said goods became liable to confiscation.

6. Even before finalization of assessment, a demand-cum-show cause notice dated 4th July, 2001 was issued to the Petitioners u/s 28of the Customs Act, 1962, inter alia demanding Rs. 4,15,03,279/- along with penalty and interest.

7. The short question involved in this writ application is whether any show cause notice u/s 28 of the Customs Act, 1962 can be issued, unless there has been final assessment.

8. In International Computers Indian Manufacturers Ltd. and another Vs. Union of India and others, cited on behalf of the Petitioners, the Division Bench of Delhi High Court inter alia held that section 28 was not attracted in case of provisional assessments, but in case of completed assessments, when duty had not been levied or had been short levied.

9. In Commnr. Central Excise and Customs, Mumbai and Others Vs. I.T.C. Ltd. and Others, the Supreme Court held as follows:

Section 11A of the Act provides for a penal provision. Before a penalty can be levied, the procedures laid down therein must be complied with. For construction of a penal provision, it is trite, the golden rule of the literal interpretation should be applied. The difficulty which may be faced by the Revenue is of no consequence. The power u/s 11A of the Act can be invoked only when a duty has not been levied or paid or has been short-levied or short-paid. Such a proceeding can be initiated within six months from the relevant date which in terms of Sub-section (3)(ii)(b) of section 11A of the Act (which is applicable in the instant case) in a case where duty of excise is provisionally assessed under the Act or the Rules made thereunder, is the date of adjustment of duty after the final assessment thereof. A proceeding u/s 11A of the Act cannot, therefore, be initiated without completing the assessment proceedings.

....

The question as to non-levy or short-levy of an excise duty would arise only when the levy had been levied in accordance with law. When a duty is levied, it becomes payable which in turn would mean legally recoverable.

....

Concededly, in terms of the provisions of the Act and the Rules framed thereunder, the amount becomes payable only in the event the Assessee does not deposit the

amount levied within a period often days from the date of completion of the order of assessment. A provisional assessment is made in terms of Rule 9B inter alia at the instance of the Assessee. Such a recourse is resorted to only when the conditions laid down therein are satisfied viz. where the Assessee is found to be unable to produce any document or furnish any information necessary for assessment of duty on any excisable goods.

Whereas provisional duty is levied in terms of Sub-rule (1) of Rule 9B, final assessment is contemplated under Sub-rule (5) thereof by reason of which the duty provisionally assessed shall be adjusted against the duty finally assessed and in the event the duty provisionally assessed falls short of or is in excess of the duty finally assessed, the Assessee will pay the deficiency or will be entitled to a refund, as the case may be. Ultimately, thus, the liability of the Assessee would depend upon the undertaking of exercises by the assessing officer to complete the assessment proceedings as contemplated under the Rules.

On a plain reading of the provisions of the Act and the Rules framed thereunder, we have no doubt in our mind that the Tribunal was correct in its finding that the impugned show cause notices were illegal.

10. In Ujagar Prints Vs. Union of India (UOI) and Others etc. etc., relied upon in Commissioner of Central Excise and Customs, Mumbai and Ors. v. ITC Ltd. and Ors. (supra), the Supreme Court held that the word "levied" was a wide and generic expression and the question of non-levy or short levy could arise only when there was levy in accordance with law. There could be no levy where there was no final assessment and consequently any demand-cum-show cause notice for recovery of a nonexistent levy would clearly be without jurisdiction.

11. In Union of India (UOI) and Another Vs. Vicco Laboratories, cited on behalf of the Petitioners, the Supreme Court held that, where a show-cause notice was issued without jurisdiction, or in abuse of the process of law, the Writ Court would not hesitate to interfere even at the stage of issuance of show-cause notice.

12. The Petitioners also contend that in this case, there has been flagrant violation of principles of natural justice, in as much as relevant documents such as the order of provisional assessment of the Commissioner dated 12th March, 1997, as also copies or even the reference of books and encyclopaedia, referred to in the show-cause notice, had not been supplied to the Petitioners in spite of requests.

13. Dealing with the allegation of the Petitioner of violation of natural justice, Mr. Swapan Dutta, appearing on behalf of the Respondents, submitted that the Petitioner''s Advocate had duly been allowed inspection of documents. Moreover, the Petitioner had given detailed reply to the show-cause notice. No case was made out of any prejudice caused by reason of non-supply of any particular document.

14. Even assuming that there has been no violation of natural justice, no show-cause notice could be issued, since admittedly, there were doubts regarding classification of the said goods.

15. Counsel for the Respondents further submitted that the Petitioners had the option to challenge the show-cause notice in this Court or alternatively to reply to the show-cause notice. The Petitioners opted to reply to the show-cause notice.

16. Counsel for the Respondents argued that having replied to the show cause notice, the Petitioners submitted to the jurisdiction of the Commissioner of Customs (Port), being the adjudicating authority. It was not open to the Petitioners to approbate and reprobate at the same time. The Petitioners could not now question the show cause notice by invoking the writ jurisdiction of this Court.

17. The submission on behalf of the Respondents is difficult to accept. The fact that the Petitioners might have replied to the show-cause notice, does not debar the writ Petitioners from challenging the impugned show-cause notice as without jurisdiction. The Respondents did not drop the proceedings on consideration of the reply of the Petitioners to the show-cause notice.

18. The submission of the Respondents, that what is relevant is the substance of the show cause notice and not its form, may be correct. It is, however, difficult to accept the argument that the show cause notice is, for all practical purposes, u/s 18 of the Customs Act, 1962.

19. As rightly argued by counsel appearing on behalf of the Petitioners, there is no provision for issuance of show-cause notice for finalization of assessment. Moreover, it is patently clear that a demand in terms of section 28 (1) has been raised. The nomenclature also shows that the impugned notice is a demand-cum-show cause notice.

20. The argument that by the impugned show cause notice, the Petitioners were only given an opportunity to make their submissions before final assessment, cannot be accepted, since the Petitioners have also been directed to show cause why the goods should not be held confiscableand why penalty should not be imposed. There could be no question of confiscation, penalty or interest till after final assessment.

21. Mr. Datta''s argument of there being an element of finality attached to provisional assessment, is difficult to appreciate. There can be no question of any demand, and in any case no interest or penalty until final assessment. In any case the Petitioners accepted that provisional assessment had correctly been made under heading 21.06.90.

22. There being no final assessment, the impugned demand-cum- show cause notice is without jurisdiction and the same is set aside and quashed.

23. The writ application is disposed of accordingly.