Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench : Ahmedabad

REGIONAL BENCH - COURT NO. 3

Customs Appeal No. 100 of 2011

[Arising out of OIO-KDL/COMMR/22/2010-11 passed by Commissioner of CUSTOMS-KANDLA]

M/s Metco Export International .... **Appellant**
Matoshree Residency, A/2, Ground Floor,
Prathana Samaj Road,
Vile Parle,E , Mumbai,
Maharashtra- 400057

VERSUS

C.C.-Kandla .... **Respondent**
Custom House,
Near Balaji Temple,
Kandala, Gujarat

APPEARANCE:
Sh. R. Subramanya, Advocate for the Appellant
Sh. S. K. Shukla, Authorized Representative for the Respondent

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. RAJU, MEMBER (TECHNICAL)

FINAL ORDER NO. A/ 11619 / 2019

DATE OF HEARING: 19.08.2019
DATE OF DECISION: 19.08.2019

RAMESH NAIR

The brief facts of the case are that the appellant filed 2 shipping bills for export of de-oiled mustard/rape seed oil, classifying the same under Customs Tariff Heading 23069021 of the Customs Tariff Act, 1975 under the scheme of VKGUY. The goods were examined by the Customs Officer on 31.05.2009 and it was alleged that goods do not conform to the description declared in the shipping bill, they alleged that the export goods were mustard/rape seed meal extraction which is classifiable under CTH 23069021 or 23064900 of the Customs Tariff Act. The samples were drawn on 06.08.2009 in the presence of representative of CHA and forwarded to the Custom House-kandla. The chemical examiner confirmed the sample is in form of mustard/meal having oil contain 0.48% & 0.65% respectively. It was alleged that customer has attempted to avail the export benefit under Vishesh Krishi and Gram Udyog Yojana (VKGUY) scheme @ 5% under CTH 21033000. It was alleged that they have mis-declared with intention to avail VKGUY scheme for which goods are not eligible, therefore liable to confiscation under Section 113(i) and (ii) of the Customs Act, 1962. Consequently, the exporter were liable to penalty under Section 114(iii), the goods were accordingly seized under panchnama dated 07.08.2009. The seized goods were provisionally released to M/s Metco Export International on execution of bond of Rs. 1,17,48,657/- and bank guarantee for Rs. 17,62,300/-. During the investigation, the summons issued to CHA and exporter under the provision of 108 of Customs Act, 1962. In the statement recorded, it was confirmed that the content of the documents VKGUY scheme having filed by the CHA on their behalf. He confirmed that there is no export benefit of VKGUY scheme for export of mustard/meal therefore, the appellant waive the SCN. Accordingly, the adjudicating authority ordered for confiscation of goods of Rs. 1,17,48,657/- with an option to redeem the same on payment of redemption fine of Rs. 13 lacs. The penalty of Rs. 4 lacs was also imposed under Section 114(iii) of customs act, 1962. Being aggrieved by the Order-In-Original, the appellant filed the present appeal.

2. Sh. R. Subhramanya Ld. Counsel appearing on behalf of the appellant submits that as per Section 110 (ii), in case of seizer of goods, the department is under obligation to issue SCN within 6 months and further period of 6 months as may be extended by the competent authority. In the present case even though the SCN was waived by the adjudication order without issuing any SCN was passed on 10.01.2011 i.e. almost after 17 months. He submits that even though SCN was waived, the proceeding should have been concluded within the period of 6 months. He submits that the identical issue has been considered by the Hon'ble Delhi High Court in the case of Shiv shakti Trading Company Vs. CCP 2016 (336) ELT 415 (Delhi).

3. Sh. S. K. Shukla Ld. Superintendent (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order. He submits that the goods were seized and released provisionally. The appellant have categorically stated in the letter dated 11.11.2009 for waiver of SCN, therefore, the imposition of redemption fine and penalty is legal and correct. He submits that the judgment of Shiv shakti Trading Company (Supra) is not applicable in the present case for the reason that in that case the goods were seized and were not released provisionally whereas in the present case goods had been released provisionally.

4. We have carefully considered the submission made by both the sides and perused the records. We find that though the appellant vide letter dated 11.11.2009 waived the SCN, as per statutory provision under section 110(ii), the Revenue was supposed to issue SCN within 6 months and further period of 6 months as may be extended by competent authority. Even though the appellant have waived SCN, atleast adjudicating authority should have adhered to time limit as prescribed in section 110(ii) and proceeding should have been concluded within 6 months or 1 year if it is extended. However, the adjudication order was passed after almost 17 months. The identical issue has been considered by Hon'ble Delhi High Court in the case of Shivshakti Trading Company (Supra) wherein the Hon'ble High Court ruled as under:

> *"4. The questions that arise for consideration: (i) Whether there could be any valid waiver of the right to be given a SCN under Section 124 (a) of the Act; and (ii) If the answer to (i) above is in the affirmative, is there a corresponding obligation on the Customs Department to pass an adjudication order within a reasonable period and what is the consequence of the Customs Department failing to do so?*
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> *15. Circular 290/6/97- CX dated 20th January 1997 issued by the CBEC emphasized that where prima facie offences of serious nature or high stakes and/or legal questions are involved, the SCN must not be permitted to be waived. However, where a party requires expeditious adjudication for any reasons, they may file their replies and request for their case to be heard expeditiously. In the subsequent Circular No. 7/2013-CUs dated 19th February 2013, reference was made to the decision of this Court in Jatin Ahuja v. DRI (supra) which held that even though the seized goods may have been released provisionally under Section 110A, if no SCN was issued under Section 110 (2) of the Act within the initial period of six months or the extended period if any of a further six months, the goods shall be released unconditionally to the person from whom they were seized. 16. The above circulars acknowledge that although there is no time limit provided under Section 124 (a) of the Act for the issuance of an SCN, the release of goods for non-compliance of provisions of Section 110 (2) of the W.P. (C) 11641/2015 Page 9 of 13 Act "is bound to create complications like difficulties in realization of duty leviable on goods under reference and of fine and penalty amounts." Therefore, it is stated that SCN is to be issued to the owner of the goods or such person under Section 124 (a) of the Act within six months from the date of seizure or within the extended period in terms of the proviso to Section 110 (2) of the Act.*
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> *17. The net result of the above discussion is that except where offences of serious nature or high stakes and/or legal questions are involved, it is permissible for the Customs Department to act upon the statement made under Section 108 of the Act waiving the right to be given a SCN under Section 124 (a) and have the adjudication proceedings expedited. Question (i) is answered accordingly.*

21. In the instant case, the stage of issuing the SCN has not been crossed. Even if it were to be taken that the Petitioner validly waived the right to be given an SCN, an adjudication order had to be passed within a reasonable time after the seizure. Here, not only has the initial period of six months after the date of seizure lapsed, but the next six months also has without any order having being passed in respect of extension of the period of six months for the reasons indicated in Section 110 (2) of the Act. Merely because there was a waiver by the Petitioner of the right to be given an SCN, it did not mean that the Respondents could indefinitely postpone the adjudication order without which the Respondents cold not have, in terms of Section 124 (a) proceeded to confiscate the seized goods.

22. The waiver by the Petitioner of the right to be given an SCN was in the expectation of expeditious adjudication. At this juncture it requires to be noticed that the Petitioner imported three consignments under three different B/Es. In respect of all the three B/Es, the Petitioner waived the right to be given an SCN. In respect of two of the B/Es an adjudication order was passed, and the Petitioner paid the demand without demur. It is only in respect of the third B/E, which forms the subject matter of the present writ petition, that the Respondents neither issued an SCN nor passed any adjudication order for a year after the seizure of the goods. The W.P. (C) 11641/2015 Page 12 of 13 explanation offered by the Respondents for not passing the adjudication order is not at all convincing. Even assuming that the Sole Proprietor of the Petitioner did not continue to appear before the Officer concerned, there was no justification for not completing the proceedings and passing an adjudication order within a reasonable time. The Petitioner is right in contending that it cannot be worse off for having waived the right to be given an SCN under Section 124 (a) of the Act. That waiver was plainly in the expectation of expeditious adjudication. However, as a result of the inaction of the Respondents, the Petitioner has been denied the release of the seized goods indefinitely.

23. Considering that the time limits for issuance of an SCN in terms of Section 110 (2) are sacrosanct, if at the time of seizure of the goods there is waiver by the person from whom the goods were seized, or the owner of the right to be given an SCN, in the expectation of an expedited adjudication, then the reasonable time within which the adjudication should be completed should be six months from the date of such seizure. If, despite the waiver of the right to be given an SCN, no adjudication order is passed within the period of six months from the date of seizure, the person waiving the right to be given an SCN can no longer be held bound by such waiver. The consequence would be the same as is envisaged by Section 110 (2) of the Act i.e., the immediate unconditional release of the goods in favour of the person from whom the goods have been seized. Notwithstanding such unconditional release, it will still be open to the Department to proceed under Section 124 and complete the adjudication for which there is no specified time limit.

24. Another possible scenario is where, despite the waiver, no adjudication order is passed within a period of six months of the seizure. In such event, W.P. (C) 11641/2015 Page 13 of 13 it may still be open to the Department to issue an SCN before the expiry of six months, or within the extended period as envisaged in Section 110 (2) of the Act. In such event, it will *be open to the Petitioner to avail the procedure under Section 110A of the Act to seek provisional release of the goods.*

25. In the present case, despite the waiver by the Petitioner of the right to be given an SCN in terms of Section 110 (2) of the Act, no adjudication order was passed for a period of one year after the seizure. The Petitioner could, therefore, not be bound by such waiver after the expiry of the time limit under Section 110 (2) of the Act. In the circumstances explained hereinabove, there was no justification for the Respondents to continue to detain the goods seized.

26. The Court accordingly directs that the goods seized be forthwith released unconditionally to the Petitioner. This will, however, not preclude the Respondents from proceeding under Section 124 of the Act ad passing an adjudication order in accordance with law."

5. In the aforesaid judgment of Hon'ble Delhi High Court, Hon'ble High Court has observed that even though there is waiver of SCN by the assessee, the adjudication should have been completed within reasonable period i.e. period provided under section 110(ii), therefore, the observation taken by the Hon'ble High Court is applicable in the present case. As regard the submission of Ld. AR that in the judgment of Shiv shakti Trading Company (supra), the goods were seized and were not released provisionally whereas, in the present case goods had been released provisionally.

6. In our considered view, that fact will not matter for the reason that Hon'ble High Court has decided the issue on the basis that the adjudication should have been completed within the reasonable period, therefore, the difference of this fact will not have any impact in applicability of this judgment in the present case. Accordingly, following the judgment of Hon'ble High Court as cited above, we set aside the impugned order and allow the appeal.

(Dictated & pronounced in the open court)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

Seema