

M/S. Spraytec India Ltd vs Additional Director General, ... on 14 September, 2022

Author: Rajiv Shakdher

Bench: Rajiv Shakdher

\$~19

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ W.P.(C) 4629/2022 & CM APPLs. 13928/2022, 40489/2022

M/S. SPRAYTEC INDIA LTD Petition
Through: Ms Anjali J. Manish, Adv.

versus

ADDITIONAL DIRECTOR GENERAL, DIRECTORATE OF
REVENUE INTELLIGENCE & ORS. Respon
Through: Mr Harpreet Singh, Sr. Standing
Counsel with Ms Suhani Mathur
Arunesh Sharma and Mr Jatin G
Advs. for R-1.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MS. JUSTICE TARA VITASTA GANJU
ORDER

% 14.09.2022 [Physical Hearing/Hybrid Hearing (as per request)]

1. This is an application moved on behalf of the petitioner pursuant to the detailed hearing held by this Court on 24.08.2022.

2. Issue notice.

2.1. Mr Harpreet Singh accepts notice on behalf of the non- applicants/respondents.

3. Via the application, the applicant/petitioner not only seeks to assail the show-cause notice dated 08.07.2022; but also, assertions have been made to the effect that the amendments brought about in the Customs Act, 1962 by virtue of Finance Act 2022, violate the provisions the Constitution [i.e., Articles 14 and 19(1)(g) of the Constitution].

4. The amendments that the applicant/petitioner seeks are adverted to in paragraphs 6, 7, 8 and 9 of the application. 4.1 In the application, averments are also made to the effect that certain prayers need to be substituted. The reference to the substituted prayers is made in paragraph 9 of the application.

4.2. To be noted, a challenge to the show-cause notice is contained in prayer clause (c) in paragraph 9 of the application.

5. Mr Singh says that he does not wish to file a formal reply, so long as the respondents are given an opportunity to file a counter-affidavit to the amended writ petition.

6. Accordingly, the prayers made in the application are allowed.

7. The amended writ petition is taken on record. W.P.(C) 4629/2022 & CM Appl.13928/2022[Application filed on behalf of the petitioner seeking interim relief]

8. Although a separate application seeking stay of the operation of show- cause notice dated 08.07.2022 has not been filed, our attention has been drawn by Ms Anjali J. Manish, who appears on behalf of the petitioner, to prayer clause (d) of the amended writ petition.

9. It is also noticed that the abovementioned show-cause notice has been issued by the Commissioner of Customs (Preventive) Jodhpur. However, the said authority has not been arrayed as a party.

10. According to us, the said authority would be a necessary party for adjudicating the instant writ petition.

10.1. Accordingly, based on the prayer made orally by Ms Manish, Commissioner of Customs (Preventive), Jodhpur is arrayed as respondent no.4.

10.2. Amended memo of parties will be filed by Ms Manish within one week.

11. Issue notice to the newly arrayed respondent no.4. 11.1. Mr Harpreet Singh accepts notice on behalf of respondent no.4 as well.

12. As indicated above, we had heard counsel for the parties and recorded our observations in some detail in the order dated 24.08.2022. For the sake of convenience, the said order is set forth hereafter:

"1. In the writ petition, the following substantive prayers have been made:

"(a) Issue a writ, order or direction in the nature of certiorari to quash and set-aside the investigations initiated by the DRI, Headquarters, in investigation No. DRI / HQ-CI / B-Cell /50D/Enq-2022/2018/627; and/or

(b) Issue a writ, order or direction in the nature of declaration or any other appropriate writ, order or direction holding and declaring that the investigation / search conducted by the office of Respondents as is illegal, arbitrary being without jurisdiction;

(c) Grant cost of the petition."

2. Counsel for the parties are ad idem that the dispute between the parties concerns classification.

2.1. The petitioner appears to have imported actuators and aerosol valves meant for perfumes and toilets sprays 2.2. The imported goods have been classified by the petitioner under various sub-heads of chapter 84. The classification head according to the petitioner is Customs Tariff Heading (CTH) 84248990.

2.3. Moreover, as per the respondents/revenue, the subject goods should have been classified under CTH 9616. Concededly, if the subject goods are classified under this heading, they would attract a higher rate of customs duty.

3. According to the respondents/revenue, the period in issue spans between 12.07.2017 and 28.06.2022.

4. Ms Anjali J. Manish, who appears on behalf of petitioner, says that the premises of the petitioner were searched on 15.01.2019.

4.1. It is also Ms Manish's submission that various summons were issued to the petitioner between January and May 2019. These summons, according to Manish were issued by Directorate of Revenue Intelligence (DRI). Ms Manish goes on to state that the last time around a summon was issued in 2019 was 16.05.2019.

4.2. Furthermore, Ms Manish says that, after a gap of nearly three years, a summon was issued to the petitioner on 02.03.2022, followed by a summon dated 09.03.2022. It is in these circumstances that the petitioner approached this Court via the instant writ petition.

5. Besides this, Ms Manish has drawn our attention to the following facts:

5.1. Firstly, another entity going by the name of Stella Industries Ltd. had approached this Court by way of a writ petition i.e. W.P. (C) No.860/2019. The grievance articulated by the Stella Industries Ltd. was that while search operations were being carried out, its representative was forced to make a deposit of Rs.70,00,000/- with the respondents/revenue. 5.2. Evidently, the aforementioned amount was returned to the petitioner. Accordingly, on 25.01.2019, when the said writ petition was taken up for hearing by the Court, the petition was disposed of after recording the stand of the respondents/revenue that the money has been returned to the petitioner.

5.3. It was also indicated in the very same order that the petitioner would join the investigation and cooperate with the respondents/revenue.

5.4. The respondents/revenue were directed to complete the investigation at the earliest, preferably within three months, as per law.

5.5. Secondly, the petitioner had also filed a writ petition in this Court i.e., W.P. (C) No.916/2019, wherein the grievance articulated was that the goods imported by it against the bill of entry dated 14.01.2019 had not been released. 5.6. Mr Harpreet Singh, who appeared on behalf of respondents/revenue in the said writ petition, informed the Court at the hearing held on 06.02.2019, that the aforementioned bill of entry would be assessed and a provisional assessment order would be passed shortly. The writ petition was disposed by the Court by directing the respondent/revenue to issue a provisional assessment order at the earliest, preferably within two weeks, even while keeping the rights and contentions of the parties open. 5.7. It is not disputed before us that the respondents/revenue, in fact, carried out a final assessment albeit, on 08.02.2019.

The imported goods against the bill of entry dated 14.01.2019, were assessed under CPH 84248990.

5.8. Third, in interregnum, the Customs Authority for Advance Ruling [in short, "CAAR"] had been approached by the petitioner qua the issue concerning classification of the goods.

5.9. The application before CAAR, we are told, was filed on 16.03.2020. We are told by Ms Manish that a communication dated 14.08.2020 was addressed by CAAR to the Commissionerate Customs (Preventive), Jodhpur, whereby its comments in the matter were sought.

5.10. It is not in dispute that on 05.10.2021, CAAR ruled in favour of the petitioner insofar as the issue concerning the classification was concerned. To put it pithily, CAAR ruled that the goods imported by the petitioner fell under CTH 84248990.

6. Given the aforesaid, the petitioner was aggrieved by the fact that fresh summons had been served upon it in March 2022 i.e., summons dated 02.03.2022 and 09.03.2022

7. Notice in the instant writ petition was issued on 23.03.2022. Since then, counter-affidavit has been filed on behalf of the respondents/revenue.

8. We are informed by Mr Harpreet Singh, who appears on behalf of the respondents/revenue, that during the pendency of the above-captioned writ petition, a show cause notice dated 08.07.2022 has been issued to the petitioner. 8.1. A hard copy of the said show cause notice has been placed before us in the course of the hearing. A perusal of the show cause notice shows that it is predicated upon the classification dispute obtaining between the parties.

9. Counsel for the parties have also informed us that a review application filed on behalf of the respondents/revenue before the CAAR was disposed of on 08.08.2022. The fact that a review application was filed is noticed in our order dated 13.07.2022 (the order, as uploaded, wrongly notes the date as 13.07.2022).

10. Be that as it may, it is not disputed by Mr Singh that the CAAR has rejected the respondents'/revenue's review application. A perusal of paragraphs 9.4 to 9.7 would show that the

position taken by the respondents/revenue that the petitioner had indulged in fraudulent conduct was rejected by the CAAR. The relevant paragraphs are extracted hereinafter:

"9.4 It is not in dispute that no Show Cause Notice had been issued to the applicant by DRI, New Delhi regarding the past clearances at the time of the applicant filing application before the erstwhile AAR, even if it is acknowledged that DRI, New Delhi was investigating the issue of appropriate classification of aerosol valves allowed final clearance by the jurisdictional customs officers. Therefore, the question before me narrows down to whether the brief declaration regarding the investigation by DRI, New Delhi by the applicant (in para 6 of Annexure -1 of the application) and subsequent non-elaboration thereof tantamount to fraud or misrepresentation of facts by the applicant.

9.5 I note that section 28-K mentions two circumstances for declaring the advance ruling void, namely fraud or misrepresentation of facts, as distinct from three circumstances for invocation of extended period under section 28 (4) of collusion; or any wilful mis-statement; or suppression of facts. Merriam Webster dictionary defines fraud to mean deceit or trickery, more specifically intentional perversion of truth in order to induce another to part with something of value or to surrender a legal right. Clearly, the alleged act of omission of not elaborating on the details of DRI, New Delhi investigation by the applicant even if it were to be accepted would not be covered under the meaning of fraud. In the same vein, I do not find any misrepresentation of fact by the applicant, noting further that this authority had also ascertained from DRI Jaipur whether any SCN had been issued and they had replied in the negative.

9.6 Let us for argument sake consider the course of events that would have been followed by this Authority had the applicant made a fuller disclosure regarding the on-going investigation by DRI, New Delhi (noting that the applicant states that they were not aware of the continuation of such investigation). Noting the indisputable facts that the previous clearances had been allowed finally, i.e. without recourse to provisional assessment by the jurisdictional customs officers and no pre-consultation notice or show cause notice had been issued by any of the competent authority, this Authority would not have invoked the proviso (a) to section 28-1 (2) of the Customs Act, 1962. In a recent ruling in the application of M/s HQ Lamps Manufacturing Co. Pvt Ltd., this Authority has opined that an application may be considered "pending"

before any officer only if it is pending before an officer in formal manner before an officer who is competent to answer the said question in terms of specific powers vested with the officer under the Customs Act. An illustrative list of such situations would include cases wherein a Show Cause Notice has been issued; bill of entry has been provisionally assessed under section 18 of the Customs Act, 1962; the matter is pending before the Special Valuation Branch of the Customs Commissionerate for the purpose of valuation of the goods in question; or the proper officer has held the pre-notice

consultation with the applicant in terms of the proviso of subsection (a) of Section 28(1) of the Customs Act, 1962. Therefore, in cases, such as the extant case, wherein an officer of customs is engaged in an investigation that may result in formulation of a question that would be posed before another competent officer would not qualify as "pending before an officer".

9.7 Before concluding, I wish to emphasise that the ruling pronounced by this Authority in the case of the applicant. M/s Spraytech India Limited was based on the submissions made by the applicant and considering the views of the jurisdictional Commissioner of Customs, noting that the applicant had approached this Authority to obtain certainty on the issue of classification based on their experience of dispute relating to past clearances. Having carefully considered the representation of DRI, I do not find that they have proffered any evidence of fraud or misrepresentation of facts by the applicant, which may have colored my ruling even remotely. The said Ruling No. CAAR/Del/Spraytec/20/2021 dated 05.10.2021 has therefore not been obtained by fraud or misrepresentation of facts by the applicant and does not merit to be declared void."

11. Given this position, what clearly emerges is the following:

- (i) The respondents/revenue having issued a show cause notice, the investigations have come to an end.
- (ii) As of now, the classification dispute stands settled in favour the petitioner.
- (iii) Since the show cause notice was issued during the pendency of the writ petition, there is no prayer concerning the same.

12. Thus, having regard to the aforesaid, leave is granted to Ms Manish to amend the writ petition to assail the show cause notice.

13. We may also note that Mr Singh has, on instructions, stated before us that the respondents/revenue intend to prefer an appeal against the order passed by CAAR.

14. List the matter on 14.09.2022."

[Emphasis is ours]

13. As would be evident from the above extract, the hearing on 24.08.2022 was held when the unamended writ petition was on record.

14. Furthermore, a perusal of the extract of the order dated 24.08.2022 would show that the petitioner has been able to demonstrate, at least before the Customs Authority for Advance Rulings (CAAR), that the subject goods have been correctly classified under the Customs Tariff Heading (CTH) 84248990.

15. It is not disputed by the counsel for the respondents, as noticed in the hearing held on 24.08.2022, that a review application was filed before the CAAR, which was dismissed on 08.08.2022. Furthermore, the allegation that the petitioner had employed fraud or misrepresentation was rejected by CAAR.

16. In these circumstances, prima facie, we are of the view that the steps taken by the concerned authority towards adjudication are fraught with legal flaws and/or impediments.

17. Therefore, till the next date of hearing, the operation of the show- cause notice dated 08.07.2022 shall remain stayed.

18. The respondents will file counter-affidavit within three weeks from today. 18.1. Rejoinder thereto, if any, will be filed before the next date of hearing.

19. List the matter on 28.10.2022.

RAJIV SHAKDHER, J TARA VITASTA GANJU, J SEPTEMBER 14, 2022/pmc Click here to check corrigendum, if any