Supreme Court of India
Collector Of Customs, Calcutta vs Tin Plate Co. Of India Ltd. on 3 October, 1996
Equivalent citations: 1996 (87) ELT 589 SC, (1997) 10 SCC 538
Bench: A Ahmadi, K Paripoornan
ORDER A.M. Ahmadi, CJI and K.S. Paripoornam, J.

1. Civil Appeal No. M 88/87. The respondents imported three consignments consisting of 532 coils of Tin Imported Black Plate in regard to which the bills of entries were presented on 19th, 28th and 29th of December, 1983 on a prior entry basis and the goods were assessed free of duty in terms of the Notification No. 243-Customs, dated 13-11-1981 as amended by Notification No. 215-Customs and 126-Customs dated 29-9-1982 and 13-5-1983 respectively. The benefit of the exemption was available until 31-12-1983. All the three vessels travelled through Bombay and Madras to Calcutta. The goods carried in the three vessels were cleared on 10th, 11th, 12th and 24th January, 1984. Under Section 15 read with Section 46 of the Customs Act, 1962 the relevant date for determination of rate of duty in the case of goods entered for home consumption, is the date on which the bill of entry in respect of such goods is presented, provided that if it has been presented before the date of actual entry it shall be deemed to have presented on the date of such actual entry. The bills were presented on prior entry basis on three different dates in December, 1983 as mentioned above but since the three vessels entered the Port of Calcutta on the respective dates in January, 1984 the bills of entry are deemed to have been presented on the dates of actual entry of the vessels. Now as the validity of the Notification No. 243/81, dated 13-11-1981 as amended by the subsequent two Notifications had come to an end on 31st December, 1983, the period not having been extended, the importers were not entitled to exemption from duty under Section 15(1) of the Customs Act. It appears that when this fact came to the notice of the Customs Department the Assistant Collector of Customs, Calcutta, issued two demand notices dated 27th and 28th December, 1984 calling upon the respondent to pay the short levy amounting to Rs. 50,38,766.50 and Rs. 1,17,69,455.70 respectively. The body of these demand notices are in the following terms :

Please refer to the above subject consignment. The goods should have been assessed under Heading No. 73.13(1) @ 30% - 25% C.V. Rs. 650 + 10% Spl. on C. V. instead of Free. As such Rs. (the figure varies in the two notices) has been short levied which you are requested to pay immediately.

It is clear on a plain reading of these two notices that the Assistant Collector of Customs straight away issued the two demand notices calling upon the assessee to pay short levied duty forthwith.

2. On receipt of these notices, the assessee protested and contended that it was not open to the Assistant Collector of Customs to straight away issue these demand notices dated 27th - 28th December, 1984. It was realised by the Department that this action on the part of the Assistant Collector of Customs was not in conformity with the provisions of Section 28 of the Customs Act. The Deputy Collector of Customs wrote a letter dated 22-7-1985 wherein after stating the facts which we have set out hereinbefore he proceeded to add as under :

Above facts, as it appears were within your knowledge but you did not submit the bills of entry to Customs House for re-assessment at appropriate rates of duty effective on the date of entry inwards

of the subject vessels. Thus, it appears you have suppressed the fact regarding entry of the vessels and clearance of the goods after expiry of the notification and as a result the short levy has occurred. Accordingly, under the proviso to Section 28(1) of the Customs Act, 1962 the notices have been issued in time and are not ultra vires as stated by you.

You are accordingly again requested to make payment of the short levied amount. However, you may approach the Assistant Collector of Customs for a hearing in this matter if you so desire.

It will be seen from the above statement made in the notice of 22-7-1985 that what was reiterated was that the assessee should make payment as per the demand notices, as those demand notices were within the period of limitation and were not ultra vires as contended by the assessee. In a somewhat cavalier fashion it was then stated in the concluding paragraph of the notice, that if the assessee so desired he may approach the Assistant Collector of Customs for a hearing. It was, therefore, contended that so-called notices were clearly not in conformity with Section 28 of the Customs Act.

3. Sub-section (1) of Section 28 provides that when any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer may (a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year; (b) in any other case, within six months, from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been so short-levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice. When the two demand notices were issued on 27th and 28th December, 1984 on the ground that there was a short levy both of them were time barred under Section 28(1)(b) of the Customs Act. On that there can be no dispute.

4. The proviso to Section 28(1) extends the period of limitation to five years in certain cases of collusion, wilful mis-statement or suppression of facts by the assessee. In the case of suppression of facts the proviso would be attracted and the period of limitation would stand extended to five years. Therefore, when it was realised that so far as the two demand notices were concerned they were beyond the period of limitation prescribed by Section 28(1)(b) of the Customs Act, the Deputy Collector of Customs issued a notice dated 22-7-1985 in which for the first time the allegation in regard to suppression of facts came to be made. On the basis of that notice, it was stated that the two demand notices dated 27th and 28th December, 1984 were within time. It is interesting to note that even by this Notice dated 22-7-1985 what was sought to be done was to relate back the matter to the two demand notices and overcome the difficulty of limitation by saying that since there was suppression those two demand notices were within time. Now, as pointed out earlier if action is contemplated under Section 28(1)(b) it is incumbent (or mandatory) on the part of the Department to serve the assessee a notice requiring him to show cause why he should not pay the amount specified therein. This requirement is in keeping with the Principle of Natural justice. Indisputably, no show cause notice was issued to the assessee before the two demand notices were issued. Even the notice of 22-7-1985 is not "a show cause notice" within the meaning of Section 28(1) of the

Customs Act. It is only an answer to the assessee's letter dated 1-2-1985 addressed to the Collector of Customs wherein he contended that the two demand notices were ultra vires and the Deputy Collector refers to the factum of suppression with a view to bringing those two notices within the period of limitation by the invocation of the proviso to Section 28(1) of the Customs Act. There was nothing to stop the Department from issuing a proper show cause notice, if suppression of fact was a valid ground for invoking Section 28(1) of the Customs Act. But instead of doing so, what the Deputy Collector does is to justify the two demand notices as being within time by pointing out that this has a case of suppression of facts and then stating in a cavalier fashion that if the assessee, so desires he may approach the Assistant Collector for a hearing. It is incumbent on the part of the Department to issue a show cause notice and thereby give the assessee an opportunity to make his representation as is envisaged by Section 28(2) of the Customs Act. It is a condition precedent. Instead of following that procedure the Department followed the circuitous method and left it to the assessee to approach the Assistant Collector of Customs, if he so desired. We are, therefore, of the opinion that the communication of 22-7-1985 could hardly be described as a show cause notice under Section 28(1) of the Customs Act.

5. The Tribunal has by the impugned order come to the conclusion and rightly in our opinion, that the communication of 22-7-1985 does not purport to be "a show cause notice" and the two demand notices cannot be construed as show cause notices as envisaged by the Act. It has further taken note of the fact that the two demand notices do not refer to any suppression of facts. On the question of suppression the Tribunal notices that there is no material tendered by the Department to indicate that there was any attempt on the part of the assessee to deceive the Government or induce the authorities to release the goods notwithstanding the expiry of the period of the exemption notification. The Tribunal notices that there is no active concealment: it rightly states that suppression envisages a deliberate and conscious omission to state a fact with the intention of deriving wrongful gain. It further points out that when the Department was aware that the outer date of the exemption notification had expired. In Bharat Surfactants (Private) Ltd. v. Union of India and Anr. (1989) 3 SCC 21, a Constitution Bench of this Court had an occasion to set out the procedure in detail to be followed in such cases. According to the procedure indicated in Paragraph 12 of the judgment, it is clear that the presentation of the Manifest to the Customs Authority could be effected before or after the arrival of the vessel and in the instant case the Manifest had been effected after the arrival of the vessels. Therefore, the authorities were also aware that the vessel had arrived after 31st December, 1983, the last date for availing of the benefit of the exemption notification. The Tribunal, therefore, also came to the conclusion and in our opinion rightly, that the element of deliberate or conscious omission had not been established and, therefore, even on that count it did not uphold the Department's contention. We see no reason to take a different view.

6. The appeal, therefore, fails and is dismissed with no order as to costs.

7. Civil Appeal No. 2320/88. - In view of the dismissal of Civil Appeal No. 1488/87, this appeal does not survive and is dismissed with no order as to costs.