

M/S.Aabis International vs The Commissioner Of Customs on 17 June, 2021

Author: Anita Sumanth

Bench: Anita Sumanth

W.P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.06.2021

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.P. No.10913 of 2021

and

WMP. Nos.11550 & 11547 of 2021

M/s.Aabis International
Door. No. 10/1285
Bhima Tower, III Floor
Wadakkancherry, Thrissur
Kerala - 580 582.
Rep. by its Managing Partner
Mr.Riyas N.I

Vs

...Petiti

1.The Commissioner of Customs
Chennai Customs II Commissionerate Customs
House Chennai - 600 001.
2.The Deputy Commissioner of
Customs Group I, Chennai Customs II
Commissionerate,
Custom House Chennai - 600001.

...Respon

Prayer: Writ Petition filed under Article 226 of the Constitution of India
Writ of Certiorarified Mandamus to calling for the records pertaining to

assessment dated 21.4.2021 passed by the 2nd respondent herein pertaining to import of 17700 kgs of Areca Nuts of Sri Lankan Origin covered by Bill of Lading No. 2924137 dated 26.2.2021 without extending the benefit of the zero customs duty as prescribed under Customs Notification no. 26/2000 Cus dated 1.3.2000. The petitioner fully complying with the condition imposed under the said notification and to quash the same for having revised the assessment already passed by the proper officer of customs in terms of Sec. 17 of the Customs Act by exercising the authority conferred on the said respondent and without jurisdiction and without complying with the procedures set out by the Central Board of Excise & Customs, New Delhi and grossly violating the principles of natural justice.

For Petitioner	: Mr.J.Srinivasa Mohan for Mr.N.Viswanathan
For Respondents	: Mr.R.Gunalan Junior Standing Counsel

ORDER

The petitioner is an importer of Areca Nuts through various Indian ports. The present writ petition is filed in relation to a consignment comprising 17,700 kgs of Areca nuts through Chennai port. On the basis of bill of lading dated 15.02.2021 and bill of entry (B/E) dated 26.02.2021 accompanied by a certificate of origin (COO) dated 15.02.2021 issued by the Department of Commerce, Colombo, Sri Lanka, the petitioner sought the benefit of import with an exemption from customs duty under Notification No.26 of 2000.

2. Queries were raised by the Assessing Authority and an assessment made under the Faceless Assessment procedure exercising powers under Section 17 of the Customs Act, 1962 (Act) on 01.03.2021. Prior thereto, the respondent had raised a dispute in regard to the declared value of the consignment that the petitioner had accepted. The petitioner also undertook to procure a no objection certificate (NOC) from the Food Safety and Standards Authority of India (FSSAI). Accordingly, an agency appointed under the provisions of the Food Safety and Standards Act, 2006 (FSSA Act), examined the consignment and opined that the same conformed to the standards laid down under the applicable regulations. No objection was given for the release of the consignment from the port.

3. The petitioner remitted the duty as assessed under Section 17 and sought the issuance of an order for release of the consignment, referred to as an 'out-of-charge' order. The COO produced was defaced by the appropriate authority as a precursor to release of the goods and physical examination of the goods waived. While the petitioner was thus awaiting release of the goods, an objection came to be raised by R2 in regard to the authenticity of the COO issued.

4. The first point raised by the authority was whether the date stamped upon the COO was '07' or '17'. A clarification dated 19.03.2021 was obtained from the Department of Commerce, Colombo, Sri Lanka, the certificate issuing authority, though overseas suppliers M/s.New Ceylon Spice Exports (Pvt) Ltd. Sri Lanka, to the effect that the certificate had been issued on '17'.02.2021 only. The clarification also confirmed that the COO had been signed by one Ms.Vireshika, Assistant Director of Commerce, who was an authorized officer of the Department of Commerce, Colombo. The above clarification was itself signed by one Mr.Somasena Mahadiulwewa, the Director of Commerce.

5. This having been cleared, the second objection raised by R2 was in regard to a stamp affixed on the COO which read 'issued retrospectively'. According to the counter filed and the oral submission made by the learned Junior Standing Counsel, the trade agreement between India and Sri Lanka does not provide for the issuance of a COO retrospectively.

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6. According to the respondent, there are trade agreements that specifically permit the issuance of a COO retrospectively/retroactively in cases where the COO was not issued at the time of exportation or proximate thereto, but on a later date. He cites the (i) Customs Tariff (Determination of Origin of Products under the Duty Free Tariff Preference Scheme for Least Developed Countries) Rules 2015 (Notification No.29 of 2015-Section 15(8) (ii) South Asian Free Trade Area Agreement (SAFTA) (Article 10) (iii) Association of Southeast Asian Nations (ASEAN) (Annexure 3 to part 10), in this regard.

7. The Indian Sri Lankan Free Trade Agreement (ISFTA), which governs the import of the consignment in question is silent on this aspect and for this reason, the respondents would state that the COO needs further verification. As regards clarification issued by the Department of Commerce, they would eschew the same stating that it has not been received through proper channel. These explanations do not emanate in the course of correspondence between the parties or, most importantly, in the impugned order itself and are raised only in the counter.

8.The impugned order merely raises a demand of a sum of duty rejecting the exemption claimed and no reasons are set out therein for the rejection of the <https://www.mhc.tn.gov.in/judis/> exemption. On this very ground, I could well set aside the impugned order as being bereft of reasons and non-speaking. For this purpose, I need only to refer to the celebrated judgment of the Supreme Court in the case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner and Others (1978 AIR 851) to the effect that an order, to be valid, has to speak for itself, containing reasons to sustain the same. It has to stand or fall on its own merit. It cannot be bolstered or supported by reasoning supplied as an afterthought, either by way of oral argument or by way of counter, as in the present case. To quote the Bench, 'Orders are not like old wine becoming better as they grow older'.

9. According to the petitioner, if R2 entertained doubts about the veracity of the COO, he should have initiated an enquiry with the competent Verification officer of the contracting State through the Board. For this purpose, reliance is placed upon the procedure set out under the Customs

(Administration on Rules of Origin under Trade Agreements), Rules 2020 (CAROTAR). This has admittedly not been done till date though the import in question was in early February 2021.

10. Revenue, for its part, states that a reference will be made to the competent authority for determination of state of origin only after the petitioner provides 100% <https://www.mhc.tn.gov.in/judis/> security for the differential duty. For this purpose, learned Standing Counsel refers to Circular No.42 of 2020 F.No.465/01/2016-Cus V dated 29.09.2020 under which officers have been directed to take recourse to the procedure for reference under the CATODAR only if the importer furnishes 100% of the differential duty as a security.

11. In order to test the correctness or otherwise of the rival submissions advanced I must advert to the provisions of Section 28-DA of the Act. Section 28-DA is contained in Chapter V-A, inserted by Act 12 of 2020, and sets out the administration of rules of origin under trade agreements. Section 28-DA, to the extent to which it is relevant to this matter, is extracted below:

Chapter V-AA Administration of Rules of Origin under Trade Agreement 28-DA.
Procedure regarding claim of preferential rate of duty. - (1) An importer making claim for preferential rate of duty, in terms of any trade agreement, shall –

(i) make a declaration that goods qualify as originating goods for preferential rate of duty under such agreement;

(ii) possess sufficient information as regards the manner in which country of origin criteria, including the regional value content and product specific criteria, specified in the rules of origin in the trade agreement, are satisfied;

(iii) furnish such information in such manner as may be provided by rules;

(iv) exercise reasonable care as to the accuracy and truthfulness of the information furnished.

(2) The fact that the importer has submitted a certificate of origin issued <https://www.mhc.tn.gov.in/judis/> by an Issuing Authority shall not absolve the importer of the responsibility to exercise reasonable care.

(3) Where the proper officer has reasons to believe that country of origin criteria has not been met, he may require the importer to furnish further information, consistent with the trade agreement, in such manner as may be provided by rules.

(4) Where importer fails to provide the requisite information for any reason, the proper officer may, –

(i) cause further verification consistent with the trade agreement in such manner as may be provided by rules;

(ii) pending verification, temporarily suspend the preferential tariff treatment to such goods:

Provided that on the basis of the information furnished by the importer or the information available with him or on the relinquishment of the claim for preferential rate of duty by the importer, the Principal Commissioner of Customs or the Commissioner of Customs may, for reasons to be recorded in writing, disallow the claim for preferential rate of duty, without further verification.

(5) Where the preferential rate of duty is suspended under sub-section (4), the proper officer may, on the request of the importer, release the goods subject to furnishing by the importer a security amount equal to the difference between the duty provisionally assessed under section 18 and the preferential duty claimed:

Provided that the Principal Commissioner of Customs or the Commissioner of Customs may, instead of security, require the importer to deposit the differential duty amount in the ledger maintained under section 51A.

....

12. Section 28-DA is a self-contained code setting out the scheme in regard to claim of preferential rate of duty and the procedure to be followed in this regard. Sub-Section (1) provides for a claim in regard to preferential rate of duty supported by such information as is necessary to support the claim. Sub-Section (2) reiterates the responsibility cast upon the importer to ensure that the goods have indeed been imported only from the stated destination, notwithstanding any claim/confirmation <https://www.mhc.tn.gov.in/judis/> in that regard by the importer. Sub-Section (3) vests the proper officer with an authority to call for information consistent with the trade agreement in support of the claims by the importer.

13. Sub-Section (4) states that where the importer fails to provide the requisite information, the proper officer may cause verification consistent with the relevant trade agreement and the applicable rules in that regard and may, pending verification temporarily suspend the preferential tariff treatment claimed by the importer. The proviso to sub-Section (4) states that the Principal Commissioner or Commissioner may, where they are of the view that the information furnished by the importer is erroneous, or on the basis of information available with them, for reasons to be recorded, disallow the claim for preferential claim of duty without further verification.

14. In the present case, the claim for preferential duty has been rejected unilaterally and without assigning any reasons whatsoever by the Deputy Commissioner of Customs, an authority not competent to have rejected the claim as per the proviso to Section 28-DA(4). Though the consignment has been imported in February 2021, there has been no initiation of enquiry by the proper officer under <https://www.mhc.tn.gov.in/judis/> sub-Section (3) for further enquiry into the COO or any other aspect of the matter that he deems relevant. The impugned order rejecting the claim for exemption has come to be passed by the 2nd respondent, the Deputy Commissioner of

Customs, who is not the competent authority to have rejected the claim of exemption, since such rejection could only have been by the Principal Commissioner or Commissioner and that too, for reasons to be recorded. This is a flaw that goes to the root of the matter, the procedure adopted in the impugned proceedings.

15. Sub-Section (5) states that where the preferential rate of duty is suspended under sub-section (4), the proper officer may, on the request of the importer, release the goods subject to furnishing by the importer of security, of an amount equal to the difference between the duty provisionally assessed under section 18 and the preferential duty claimed. The proviso states that the Principal Commissioner of Customs or the Commissioner of Customs may, instead of security, require the importer to deposit the differential duty amount in the ledger maintained under section 51A.

16. This puts paid to the argument of Mr. Gunalan that a reference will be made under CAROTAR to the Verification Authority only if the petitioner remits <https://www.mhc.tn.gov.in/judis/> 100% of the duty quantified. This submission is liable to be rejected straightaway in light of Section 28-DA (5) which requires the importer to furnish security for 100% differential duty only as a pre-condition to release of the goods.

17. The scheme of Section 28-DA does not permit raising of a demand for security for initiation of verification but only for release of the consignment. Circular No. 42 of 2020 to the extent to which it is transgresses the statutory scheme under Section 28-DA, particularly sub-Sections (4) and (5) thereof, is an excess of authority and is bad in law.

18. CAROTAR has been notified specifically to set out the procedure and facilitate exchange of information in case of issues arising from the application of the Articles of a Trade Agreement including conflicts in rate of duty, one by an importer and the other by the revenue. Regulation (6) provides for a request for verification to be made by the proper officer and is extracted below:

6. Verification request. – (1) The proper officer may, during the course of customs clearance or thereafter, request for verification of certificate of origin from Verification Authority where:

(a) there is a doubt regarding genuineness or authenticity of the certificate of origin for reasons such as mismatch of signatures or seal when compared with specimens of seals and signatures received from the exporting country in terms of the trade agreement;

<https://www.mhc.tn.gov.in/judis/>

(b) there is reason to believe that the country of origin criterion stated in the certificate of origin has not been met or the claim of preferential rate of duty made by importer is invalid; or

(c) verification is being undertaken on random basis, as a measure of due diligence to verify whether the goods meet the origin criteria as claimed:

Provided that a verification request in terms of clause (b) may be made only where the importer fails to provide the requisite information sought under rule 5 by the prescribed due date or the information provided by importer is found to be insufficient. Such a request shall seek specific information from the Verification Authority as may be necessary to determine the origin of goods. (2) Where information received in terms of sub-rule (1) is incomplete or nonspecific, request for additional information or verification visit may be made to the Verification Authority, in such manner as provided in the Rules of Origin of the specific trade agreement, under which the importer has sought preferential tariff treatment.

(3) When a verification request is made in terms of this rule, the following timeline for furnishing the response shall be brought to the notice of the Verification Authority while sending the request:

(a) timeline as prescribed in the respective trade agreement; or

(b) in absence of such timeline in the agreement, sixty days from the request having been communicated.

(4) Where verification in terms of clause (a) or (b) of sub-rule (1) is initiated during the course of customs clearance of imported goods,

(a) the preferential tariff treatment of such goods may be suspended till conclusion of the verification;

(b) the Verification Authority shall be informed of reasons for suspension of preferential tariff treatment while making request of verification; and

(c) the proper officer may, on the request of the importer, provisionally assess and clear the goods, subject to importer furnishing a security amount equal to the difference between the duty provisionally assessed under section 18 of the Act and the preferential duty claimed. (5) All requests for verification under this rule shall be made through a nodal office as designated by the Board.

(6) Where the information requested in this rule is received within the prescribed timeline, the proper officer shall conclude the verification within forty five days of receipt of the information, or within such extended period as the Principal Commissioner of Customs or the Commissioner of Customs may allow:

<https://www.mhc.tn.gov.in/judis/> Provided that where a timeline to finalize verification is prescribed in the respective Rules of Origin, the proper officer shall finalize the verification within such timeline.

(7) The proper officer may deny claim of preferential rate of duty without further verification where:

(a) the Verification Authority fails to respond to verification request within prescribed timelines;

(b) the Verification Authority does not provide the requested information in the manner as provided in this rule read with the Rules of Origin; or

(c) the information and documents furnished by the Verification Authority and available on record provide sufficient evidence to prove that goods do not meet the origin criteria prescribed in the respective Rules of Origin.

19. The timeline for response by the Verification Authority is set out in regulation 63b, which is sixty days from date of request. In the present case, this request has not been initiated and the Department has been sitting pretty on the consignment despite requests for release, the petitioner repeatedly drawing attention to the fact that the consignment comprises perishable goods.

20. That apart and very relevantly, 'Verification Authority' is defined under Regulation 2(g) to mean the authority in the export country designated to respond to a verification request under a trade agreement. The certificate of origin in this case as well as the clarification obtained by the petitioner have been obtained from the Assistant Director acting for the Director General of Commerce in the Department of Commerce, Colombo. The designated Authority under the IFSTA is the Director <https://www.mhc.tn.gov.in/judis/> General of Commerce, Department of Commerce, also the authority which has issued the COO and subsequent clarification. The objection of the respondents in regard to the COO as well as their contention that the clarification dated 19.03.2021 ought to have been received 'through proper channel' is thus, in my view, hyper- technical, to say the least.

21. In the light of the discussion as above, I am of the view that the petitioner has satisfied the requirement of production of a valid COO in this case. I would hasten to add that the Department is not foreclosed from making further enquiry in regard to any apprehensions that they may still continue to harbour concerning the COO.

22. As far as the present litigation is concerned, the petitioner has made a strong enough case to persuade me to quash the impugned order and issue mandamus for release of the goods forthwith, in any event within one week from the date of issuance of this order. I also draw support from the fact that the petitioner has been relying on the very same documentation as in the case of the consignment in question, including the COO, in other ports not just in India, but in Tamil Nadu itself that is, the Thoothukudi port, and consignments are being released without <https://www.mhc.tn.gov.in/judis/> demur. The response of the revenue to this submission is that such actions will not 'bind' the Chennai authorities. This position is not appreciated as authorities under a Central enactment are expected to adopt consistent views in regard to similar/identical transactions, especially when they relate similar/identical fact and legal patterns. Diametrically opposite conclusions are not expected to be drawn on identical questions of fact and law by statutory

authorities.

23. This writ petition is allowed in the above terms. Connected miscellaneous petitions are closed. No costs.

17.06.2021 ska Index: Yes Speaking order To

1.The Commissioner of Customs Chennai Customs II Commissionerate Customs House Chennai - 600 001.

2.The Deputy Commissioner of Customs Group I, Chennai Customs II Commissionerate, Custom House Chennai - 600001.

<https://www.mhc.tn.gov.in/judis/> DR. ANITA SUMANTH, J.

ska and WMP. Nos.11550 & 11547 of 2021 17.06.2021 <https://www.mhc.tn.gov.in/judis/> and WMP. Nos.11547 & 11550 of 2021 DR. ANITA SUMANTH, J.

After pronouncement of this order, Mr.N.Viswanathan, learned counsel for the peti-

tioner requests for a direction that the authori-

ties issue a detention certificate. This request may well be made to the authorities who will consider the same in accordance with law.

17.06.2021 rkp <https://www.mhc.tn.gov.in/judis/>