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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 20.9.2022*

+ **W.P.(C) 12425/2022 & CM Appl.37362/2022**

M/S VICTORY ELECTRIC VEHICLES INTERNATIONAL
PVT LTD (PRESENTLY KNOWN AS) VICTORY ELECTRIC
VEHICLES INTERNATIONAL LTD
(THROUGH ITS DIRECTOR)Petitioner

Through: Mr S. Sunil, Adv.

versus

UNION OF INDIA & ANR.Respondents

Through: Ms Nidhi Raman, CGSC with Mr
Chetanya Puri and Mr Zubin Singh,
Advs. for R-1.

Mr Satish Kumar, Sr. Standing
Counsel with Mr Anis Raj and Mr
Dhruv, Advs. for R-2.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MS. JUSTICE TARA VITASTA GANJU

[Physical Court hearing/ Hybrid hearing (as per request)]

RAJIV SHAKDHER, J. (Oral):

1. This writ petition was listed before the Court, in the first instance, on 29.08.2022, when after hearing the counsel for the petitioner as well as the counsel for the respondents i.e., Ms Nidhi Raman, who appeared on behalf of respondent no.1/Union of India and Mr Satish Kumar, who appeared on behalf of the contesting respondent i.e., respondent no.2/revenue, the following had been recorded:

“1. The principal grievance of the petitioner is, that the impugned Order-in-Original dated 25.05.2022 is based on a

show cause notice [“SCN”], which is untenable in law.

2. Mr S. Sunil, who appears on behalf of the petitioner, says that the SCN could only have been issued after pre-show cause notice consultation had occurred, as contemplated in the proviso appended to Section 28(1) (a) of the Customs Act, 1962 [in short, “1962 Act”].

3. It is Mr Sunil’s contention, that the respondents/revenue has taken a position, that a pre-consultation notice dated 14.12.2021 was served on the petitioner.

3.1 Mr Sunil says that it is the position of the petitioner, that although it did not receive the aforesaid notice dated 14.12.2021, assuming that it did receive the said notice, that by itself will not lend legal viability to the SCN dated 22.12.2021.

4. The reason Mr Sunil makes this argument is based on the provisions of Regulations 3(2) and 3(4) of the Pre-Notice Consultation Regulations, 2018 [in short “2018 Regulations”].

4.1 For this purpose, our attention has been drawn to page 152 of the case file. For the sake of convenience, the proviso to Section 28(1)(a) of the 1962 Act and the relevant regulations are extracted hereafter:

"SECTION 28. Recovery of [duties not levied or not paid or short-levied or short-paid] or erroneously refunded.—

xxx xxx xxx

Provided that before issuing notice, the proper officer shall hold pre-notice consultation with the person chargeable with duty or interest in such manner as may be prescribed."

"REGULATION 3. Manner of conducting pre-notice consultation. –

Pre-notice consultation shall be made in the following manner :-

xxx xxx xxx

(2) The person chargeable with duty or interest may, within fifteen days from the date of communication referred to in sub-regulation (1), make his submissions in writing on the grounds so communicated:

Provided that if no response is received, from the person

to whom the grounds on which notice is proposed to be issued, is received within the specified time, the proper officer shall proceed to issue the notice to the said person without any further communication :

Provided further that while making the submissions, the person chargeable with duty or interest shall clearly indicate whether he desires to be heard in person by the proper officer.

xxx

xxx

xxx

(4) Where the proper officer, after consultation, decides not to proceed with the notice with reference to the grounds communicated under sub-regulation (1), he shall, by a simple letter, intimate the same to the person concerned.”

5. *A perusal of the proviso does indicate that it was obligatory on the part of the respondents/revenue to serve a notice on the petitioner, with regard to the pre-consultation.*

6. *Although there is some dispute, as to whether pre-consultation notice letter dated 14.12.2021 (hereinafter referred to as “the notice”) was served on the petitioner, Regulation 3(2) does mandate that 15 days, from the date of communication, had to be accorded for enabling the recipient of the notice to make submissions in writing.*

6.1 *Furthermore, the recipient of the notice, under the very same regulation, also had a right to indicate to the concerned proper officer, whether he was desirous of being heard in person.*

7. *The reason why such a procedure has been engrafted in the Act, as well as in the Regulations, is, evidently, to cut-out the unnecessary litigation.*

8. *Regulation 3(4) of the 2018 Regulations confers power on the proper officer to drop the next steps in the matter, i.e., issuance of the SCN, in case consultation with the noticee leads to the conclusion that the SCN need not be issued.*

9. *On the facts which obtain in the present case, 15 days when factored in from the date of the notice (i.e., 14.12.2021)*

would have expired on 29.12.2021, whereas the SCN is dated 22.12.2021.

10. *Prima facie, we are of the view that the impugned order, which is predicated on the SCN, is impregnated with a legal lacunae.*

11. *Mr Satish Kumar, who appears on behalf of the contesting respondent, i.e., respondent no.2, says that he would require time to return with instructions.*

12. *In case instructions are received to resist the writ petition, counter-affidavit will be filed before the next date of hearing.*

13. *List the matter on 19.09.2022.”*

2. As would be evident from the extract of the order dated 29.08.2022, we had given an opportunity to Mr Kumar to return with instructions, and in the event, instructions received were to resist the petition, he was required to file a counter-affidavit before the returnable date i.e., 19.09.2022.

3. Concededly, the counter-affidavit was not filed, as directed by this Court *via* order dated 29.08.2022.

4. Resultantly, when the matter was listed on 19.09.2022, we had put to Mr Kumar, as to what were his instructions in the matter.

4.1 Mr Kumar had informed us that he had no instructions in the matter, and that the matter should be stood over till today, for him to return with instructions.

5. Today, Mr Kumar says that the counter-affidavit is ready, which will be filed in the course of day.

6. Admittedly, the counter-affidavit has not been filed, although e-filing system is available to all litigants, which includes the respondents as well.

6.1 However, a hard copy of the counter-affidavit, which Mr Kumar intends to lodge, has been furnished to us.

7. A perusal of the counter-affidavit shows, that although it has been signed by the concerned affiant, it is not notarized.

8. Be that as it may, the stand taken on behalf of respondent no.2/revenue is that there has been no breach of principles of natural justice, as a consultative letter dated 28.06.2021 was served on the petitioner, whereby he was called upon to deposit the disputed tax, amounting to Rs.7,00,37,534/-.

9. It is also asserted in the said counter-affidavit, that the petitioner had responded to the same *via* the letter dated 08.09.2021.

9.1 In sum, the stand taken by respondent no.2/revenue is that this exchange of communication between respondent no.2/revenue and the petitioner would suffice, and that broadly, it would, substantially take care of the safeguards incorporated in the proviso appended to Section 28(1)(a) of the Customs Act, 1962 [in short “1962 Act”] and Regulation 3(2) of the Pre-Notice Consultation Regulations, 2018 [in short “2018 Regulations”].

10. Mr S. Sunil, who appears on behalf of the petitioner, contends otherwise.

10.1 According to Mr Sunil, a perusal of the letter dated 28.06.2021 would show, that it was issued when Post Clearance Audit was conducted.

11. Furthermore, according to Mr Sunil, the said communication was not issued in terms of the aforementioned provisions of the 1962 Act and the 2018 Regulations.

12. Mr Kumar, on the other hand, relies upon the stand taken by respondent no.2/revenue in the aforementioned counter-affidavit.

13. Having heard the counsel for the parties, we are of the view that the order-in-original dated 25.05.2022 cannot be sustained.

14. We had briefly indicated in the order dated 29.08.2022 as to what was the legal flaw in the order-in-original passed in the matter.

14.1 The first flaw, as indicated in our order dated 29.08.2022, was the non-adherence to the statutory provision extracted in the said order i.e., Section 28(1)(a) read with the proviso appended to the said provision of the 1962 Act.

14.2 A careful perusal of the said provision would show, that it is obligatory on the part of the concerned officer, to ensure that prior to issuance of the show-cause notice [“SCN”], a pre-notice consultation is held with the person chargeable with duty or interest in such manner as may be prescribed. Such consultation is mandatory; an aspect which is driven home by use of the expression “*the proper officer shall hold pre-notice consultation with the person chargeable with duty or interest ...*”

15. The second flaw, according to us, is that the manner prescribed for holding pre-notice consultation, as provided in sub-regulation (2) and (4) of Regulation 3 was not adhered to.

15.1 According to the aforementioned Regulation, the person chargeable with duty or interest was required to be given fifteen [15] days to make his submission, in writing, concerning the ground(s) communicated to him in the pre-consultation notice; which, as indicated above, is required to be served prior to issuance of the SCN.

16. In the facts of this case, it is not in dispute, that the pre-consultation notice is dated 14.12.2021, and therefore, 15 days would have expired only on 29.12.2021.

17. Admittedly, the SCN was issued prior to the expiry of the statutory timeframe.

17.1 The SCN, as noticed in our order dated 29.08.2022, is dated 22.12.2021.

18. Therefore, clearly, there has been a violation of not only the safeguard provided in the proviso appended to Section 28(1)(a) of the 1962 Act requiring holding pre-notice consultation with the person chargeable with tax and interest but also infraction of the right of such person, to be accorded, in the very least, 15 days under sub-regulation (2) of Regulation 3 of the 2018 Regulations to respond to any such initiative of holding such consultation

18.1 The importance of pre-show cause notice consultation is exemplified in the provisions of sub-regulation (4) of Regulation 3. As noticed in the order dated 29.08.2022, a plain perusal of the said provision would show, that it is quite possible, that after consultation, the concerned authority may decide to drop the proceedings if it is satisfied with explanation it receives during such process.

19. A perusal of the record shows, that *inter alia*, the dispute centers around classification i.e., the heading, under which the subject goods are to be classified.

20. The differential duty demanded, as noticed above, is founded on this dispute obtaining between the parties. This is evident upon a perusal of paragraph 5 of the communication dated 28.06.2021. For the sake of convenience, the observations made in the said paragraph are extracted hereafter:

“5. The importer has thus mis-classified the imported items under CTH 87141090 and paid BCD @ 15%, SWS @ 10% and IGST @ 18/28%. Whereas the items are correctly classifiable under CTH 87116020 and consequently duty payable as BCD

@ 100%, SWS @ 10% and IGST @ 12%. Thus, it appears that the importer has short paid duty amounting to Rs.7,00,37,534/-, which is recoverable from the importer under section 28(1) of the Customs Act, 1962 along with interest at appropriate rate under Section 28AA of the Customs Act, 1962.”

21. We are of the opinion, that the pre-show cause notice consultation, as provided, both in the 1962 Act as well as the 2018 Regulations, is necessary, as the object of having such provisions is to stem the tide of litigation between the revenue and assessee.

21.1 With the docket explosion that Courts are experiencing, this is a wholesome provision, which the revenue needs to scrupulously adhere to.

22. The fact that respondent no.2/revenue has failed to adhere to this provision, is quite evident in the instant case.

23. Accordingly, for the foregoing reasons, we are of the view, as noticed at the very outset, that the impugned order-in-original cannot be sustained.

24. Accordingly, the order-in-original dated 25.05.2022 is set aside.

25. That being said, the respondent no.2/revenue would be free to initiate proceedings *de novo*, albeit, as per law.

26. The writ petition is disposed of in the aforesaid terms.

27. The hard copy of the counter-affidavit placed before us by Mr Kumar on behalf of respondent no.2/revenue shall be scanned and uploaded by the Registry, so that it remains part of the record.

28. Mr Kumar will, however, place on record, formally, a duly notarized counter-affidavit.

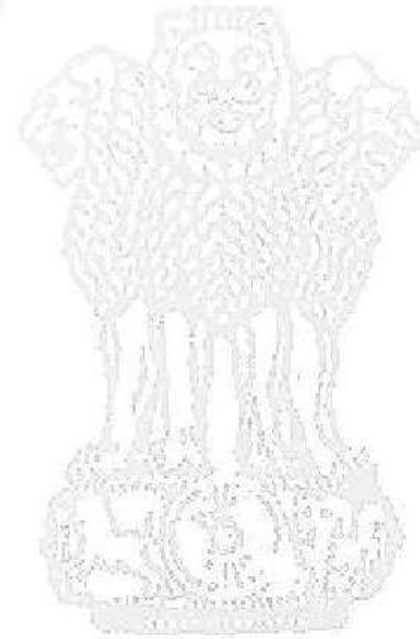
28.1 Necessary steps will be taken in that behalf, by Mr Kumar within the next two days.

29. The petitioner will be entitled to costs, as per the extant regime.
30. Pending application shall stand closed.

(RAJIV SHAKDHER)
JUDGE

(TARA VITASTA GANJU)
JUDGE

SEPTEMBER 20, 2022
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