

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH**

REGIONAL BENCH - COURT NO. I

Excise Appeal No. 60574 of 2018

[Arising out of Order-in-Appeal No. LUD-EXCUS-001-APP-322-323 dated 21.02.2018 passed by the Commissioner, Ludhiana]

M/s Panacea Biotec Ltd

B-1, Extn G-3, Mohan Cooperative Indl. Estate,
Mathura Road, New Delhi-110044

.....Appellant

VERSUS

**Commissioner of Central Goods and
Service Tax, Ludhiana**

GST Bhawan, F-Block, Rishi Nagar, Ludhiana, Punjab
141001

.....Respondent

APPEARANCE:

Present for the Appellant: Shri T.R. Rustagi , Advocate

Present for the Respondent: Shri Aneesh Dewan, Authorized
Representative

CORAM: HON'BLE MR. S. S. GARG, MEMBER (JUDICIAL)

FINAL ORDER NO. 60676/2023

DATE OF HEARING: 26.09.2023

DATE OF DECISION: 06.12.2023

PER S. S. GARG

The present appeal is directed against the impugned order dated 21.02.2018 passed by the Commissioner (Appeals) deciding two appeals of the appellant whereby the Commissioner (Appeals) has allowed the appeal against the demand of interest and imposition of penalty upon the appellant but upheld the Assistant Commissioner order rejecting the refund claim of Rs. 19,55,010/-.

2. Briefly the facts of the present case are that the appellant is engaged in the manufacture of P or P Medicines classifiable under Chapter/heading No. 30.03 of the First Schedule to the Central Excise Tariff Act, 1985. One of the products manufactured by the appellant is Euphorbia Prostrata dry extract. In another proceeding a dispute arose regarding the classification of this product namely, whether it should be classified under chapter 30 as claimed by the appellant or under heading 13.02 as per the department's view. After adjudication of the show cause notice, the Assistant Commissioner confirmed demand of short payment of the differential duty of Rs. 2,71,108/- for the period October 2010 to February 2012. Aggrieved by the said order, the appellant filed the appeal before the Commissioner who upheld the order and thereafter the appellant filed the appeal before the Tribunal and the said appeal remain pending till 2022.

3. When appellant filed application for withdrawal of the appeal under Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 and the same was allowed to be withdrawn, thereafter, Superintendent, Derabassi vide his letter dated 07.01.2014 wrote to the appellant to deposit an amount of differential duty of Rs. 19,55,010/- for the period April, 2012 to May, 2013 when no proceedings were initiated by way of a demand show cause notice for this particular period. Although, no show cause notice was issued demanding differential duty by Assistant Commissioner but still the Range officer insisted upon the appellant to pay the differential duty of Rs. 19,55,010/- for the period April, 2010 to May, 2013 on their own. The appellant refused to pay the amount on the ground that no show cause notice

was issued and no procedure laid down under Section 11A has been followed. However, when the department pressurized the appellant, thereafter, the appellant informed the department vide their letter dated 16.01.2014 that though they have filed the appeal in the Tribunal on the classification dispute the amount of differential duty of Rs. 19,55,010/- for the period March, 2012 to May, 2013 was paid under protest. Thereafter, vide letter dated 02.12.2014, Superintendent, Derabassi informed the appellant that though the amount of differential duty of Rs. 19,55,010/- has been paid, interest has not been paid and asked the appellant to pay the amount of interest as calculated by him amounting to Rs. 4,08,844/-. Thereafter, Assistant Commissioner, Derabassi issued a show cause notice dated 27.02.2015 to show cause as to why interest be not recovered on the amount of differential duty of Rs. 19,55,010/- thereafter, the appellant vide his letter dated 30.03.2015 replied to the Assistant Commissioner submitting that the show cause notice was hit by time bar in as much as the show cause notice related to the period March, 2012 to May, 2013 and also submitted various other reasons contesting the demand. In the meantime, the appellant made an application to the Assistant Commissioner dated 02.11.2015 requesting for refund of amount of Rs. 19,55,010/- paid under protest on the ground that no show cause notice was issued demanding the duty and no order was issued to vacate the protest.

4. After following the due process, the Assistant Commissioner vide his order dated 28.12.2015 confirmed the demand of interest on the amount of differential duty of Rs. 19,55,010/- and also imposed

penalty under Rule 25 of the Central Excise Rules, 2002. Aggrieved by the said order, appellant filed the appeal before the Commissioner (Appeals) and also wrote letter dated 23.02.2016 to the Assistant Commissioner requesting for sanctioning the refund with interest. The Assistant Commissioner vide his letter dated 29.04.2016 replied *"you have not produced any order from any authority establishing that the above said amount of duty of Rs. 19,55,010/- was not payable". In view of the above, refund claim cannot be considered at pre-mature stage."*

5. Thereafter, the appellant wrote letters dated 05.05.2016 and 08.06.2016 requesting the sanctioning authority to either sanction the refund or pass an appealable order, thereafter, the appellant filed appeal on 28.06.2016 to the Commissioner (Appeals) against Assistant Commissioner Orders dated 29.04.2016. Commissioner (Appeals) decided both the appeals of the appellant by a common order dated 21.02.2018. He allowed the appeal against demand of interest and imposition of penalty upon the appellant. However, he affirmed the order of Assistant Commissioner rejecting the refund claim of Rs. 19,55,010/-. Aggrieved by the said order, the appellant has filed the present appeal.

6. Heard both the parties and perused the record.

7. Ld. Consultant, T.R. Rustagi, appearing for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without appreciating the facts of the case and the law and the binding judicial precedents. He further submitted that

the order passed by the Commissioner (Appeals) upholding the denial of refund of Rs. 19,55,010/- by the Assistant Commissioner is illegal. He further submitted that while in the case of demand of interest, the Ld. Commissioner considered the timely issue of demand notice as a legal necessity but failed to apply the same principal of law in the case of refund of duty paid (under Protest) by the appellant. He further submitted that the Ld. Commissioner (Appeals) erred in not recognizing that the refund asked for had not arisen from any order passed by the department, but from the amount insisted to be paid in the absence of any show cause notice.

8. Ld. Consultant further submitted that it is a settled law that no demand of duty amount can be confirmed without issuing show cause notice and following the procedure prescribed under Section 11A of the Central Excise Act, 1942. Ld. Consultant in support of this submission referred to the law laid down by the Hon'ble Apex Court in the case of ***Union of India Vs. ITC Limited – 1993 (67) ELT 3 (SC)*** wherein the Apex Court observed "just as an assessee cannot be permitted to evade payment of rightful tax, the authority which recovers tax without any authority of law cannot be permitted to retain the amount merely because the tax payer was not aware at that time."

9. Further, the Ld. Consultant on this issue relied upon the following case laws which are reproduced here in below:-

- Gokak Patel Volkart Ltd. Vs. Collector of Central Excise – 1987 (28) E.L.T. 53 (S.C.)

- CCE Vs. Akay Cosmetics-2005 (182) ELT 294 (SC).
- Collector of Customs Calcutta- Vs. Tin Plate Co. of India Ltd.
1988 (35) E.L.T. 349 (S.C.)
- Metal Forgings Vs. Union of India – 2002 (146) ELT 241 (S.C)
- Balaji Vegetables Products Pvt. Ltd Vs. Collector of C.Ex.
Kanpur-1999 (108) E.L.T. 802 (Tribunal)
- Century Metal Forgings Pvt. Ltd. Vs. Union of India- 2009
(234) ELT 234 (P & H).

10. On the other hand, Ld. AR reiterated the findings of the impugned order and submitted that the letter dated 29.04.2016 issued by the Assistant Commissioner is itself an order rejecting the refund against which the appellant has right to file the appeal and in fact the appellant has filed the appeal before the Commissioner against this letter.

11. After considering the submission of both the parties and perusal of the material on record, I find that initially there was a dispute of classification of product called euphorbia prostrate dry extract and the original authority demanded the differential duty of Rs. 2,71,108/- which was contested by the appellant by filing the appeal and the same was confirmed in the appeal, thereafter the appellant filed the appeal before the Tribunal and during the pendency of that appeal, the appellant availed the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 and their appeal was allowed. When the appeal was pending, the Superintendent, Derabassi vide his letter

dated 07.01.2014 asked the appellant to deposit the differential duty of Rs. 19,55,010/- without issuing the show cause notice which was paid by the appellant under protest and thereafter, the department also demanded interest on the said amount of Rs. 4,08,844/- which was also challenged by the appellant before the Commissioner (Appeals) who dropped the demand of interest on time bar. Since, no show cause notice was issued with regard to demand of differential duty of Rs. 19,55,010/- the appellant requested the Assistant Commissioner to pass the appealable order when the said order was not passed; the appellant filed refund claim which was rejected vide letter dated 29.04.2016 by the Assistant Commissioner, further I find that the main issue involved in this case is demand of differential duty of Rs. 19,55,010/- for the period March, 2012 to May, 2013 without issuing show cause notice and without affording an opportunity of hearing to the appellant which is in violation of the statutory provision and the principles of natural justice. The Hon'ble Supreme Court has consistently held in various decisions relied upon by the appellant cited (Supra) that show cause notice is a condition to demand any tax in this regard. I may refer to the decision of the Hon'ble Apex Court in the case of **Gokak Patel Volkart Ltd. Vs. Collector of Central Excise – 1987 (28) E.L.T. 53 (S.C.)** wherein in para 9 and 10 the Hon'ble Apex Court has observed as under:

9. No notice seems to have been issued in this case in regard to the period in question. Instead thereof an outright demand had been served. The provisions of Section 11A(1) and (2) make it clear that the statutory scheme is that in the situations covered by the sub-section (1), a notice of

show cause has to be issued and sub-section (2) requires that the cause shown by way of representation has to be considered by the prescribed authority and then only the amount has to be determined. The Scheme is in consonance with the rules of natural justice. An opportunity to be heard is intended to be afforded to the person who is likely to be prejudiced when the order is made before making the order thereof. Notice is thus a condition precedent to a demand under sub-section (2). In the instant case, compliance with this statutory requirement has not been made, and, therefore, the demand is in contravention of the statutory provision. Certain other authorities have been cited at the hearing by Counsel for both sides, Reference to them, we consider, is not necessary.

10. The appeal has to be allowed and the demand raised for the period 19-8-1975 to 23-2-1981 has to be set aside. There shall be no order for costs. The tax paid, if any, shall be refunded to the appellant.

12. Further, in the case of CCE Vs. Akay Cosmetics-2005 (182) ELT 294 (SC) wherein in para 47 & 48 the Hon'ble Apex Court has observed as under :

47. In the case of Union of India & Others v. Madhumilan Syntex Pvt. Ltd. reported in ELT. 349, this Court held that the demand raised without notice was invalid. That, Section 11A clearly proceeded to say that prior show cause notice must be issued to the person against whom any demand on grounds of short-levy or non-levy was proposed and, therefore, post-facto show cause notice cannot be regarded as adequate in law.

48. Applying the said judgment to the facts of the present case, we hold that the demand for differential duty for the period 1/88 to 8/88 without issue of show cause notice under Section 11A was unsustainable. Absence

of show cause notice was not disputed. In the circumstances, the Tribunal was right in setting aside the demand for differential duty amounting to Rs. 1,59,606.22 for the said period.

13. Further, I find that in the case of ***Metal Forgings Vs. Union of India – 2002 (146) ELT 241 (S.C)*** wherein para 10 the Hon'ble Apex Court has observed as under:

10. It is an admitted fact that a show cause notice as required in law has not been issued by the Revenue. The first contention of the Revenue in this regard is that since the necessary information required to be given in the show cause notice was made available to the appellants in the form of various letters and orders, issuance of such demand notice in a specified manner is not required in law. We do think that we cannot accede to this argument of the learned Counsel for the Revenue. Herein we may also notice that the learned Technical Member of the Tribunal has rightly come to the conclusion that the various documents and orders which were sought to be treated as show cause notices by the Appellate authority are inadequate to be treated as show cause notices contemplated under Rule 10 of the Rules or Section 11A of the Act. Even the Judicial Member in his order has taken almost a similar view by holding that letters either in the form of suggestion or advice or deemed notice issued prior to the finalisation of the classification cannot be taken note of as show cause notices for the recovery of demand, and we are in agreement with the said findings of the two Members of the Tribunal. This is because of the fact that issuance of a show cause notice in a particular format is a mandatory requirement of law. The law requires the said notice to be issued under a specific provision of law and not as a correspondence or part of an order. The said notice must also indicate the amount demanded and call upon the assessee to show

cause if he has any objection for such demand. The said notice also will have to be served on the assessee within the said period which is either 6 months or 5 years as the facts demand. Therefore, it will be futile to contend that each and every communication or order could be construed as a show cause notice. For this reason the above argument of the Revenue must fail.

14. The ratio of the decision cited (Supra) are squarely applicable in the present case because in the present case also, no show cause notice as required in law was issued to the appellant and no opportunity of hearing as required under law was accorded. Hence, by following the ratio of the Hon'ble Apex Court decision cited (Supra) I am of the considered opinion that the rejection of refund claim of Rs. 19,55,010/- deposited by the appellant under protest is liable to be refunded to the appellant as prescribed by the law, accordingly, I allow the appeal of the appellant and direct the Revenue to refund the said amount along with interest as prescribed by law. Appeal is accordingly, allowed.

(Order pronounced in the open court on 06.12.2023)

(S. S. GARG)
MEMBER (JUDICIAL)