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CUSTOMS. EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
SINGLE MEMBER APPEAL BRANCH

Appeal No. C/528 /2008 - SM Date 20/03/2009

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
C.C. (EXPORT) NEW DELHI
AIR CARGO EXPORT, NEW CUSTOM HOUSE, NEW DELHI 110037
C.C. (EXPORT) NEW DELHI Appellant

Vs

M/S R.K.INTERNATIONAL, Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 232 / 2009 –SM[BR] dated 17.3.2009 passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
   M/S R.K.INTERNATIONAL,
   108, EROS APARTMENTS,NEHRU PLACE,NEW DELHI-110090
2. Adv. / Consult SHRI A. JAJU ADV.
   R-163, SECOND FLOOR G. K. –I
   NEW DELHI -110048.

3 S.D.R
4 ~~J.C.D.R.~~
5 Bar association, CESTAT, New Delhi
6 M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017
7 M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New - 3
8 Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9 Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10 Nidheshak publications, I.P.Estate, new Delhi
11 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12 Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai
13 Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-1
15 Office Copy
16 Guard file

Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
R.K. PURAM, W.B. NO.2, PRINCIPAL BENCH
NEW DELHI.

Customs Appeal No. 528 of 2008
[Arising out of review order No. 03/2008-09 dated 23.6.2008 passed by the Committee consisting of Chief Commissioner of Customs (Delhi Zone) and Chief Commissioner of Customs (Prev.) New Delhi].

Date of Hearing/ Decision : 27.02.2009

CC, New Delhi — Appellant

Versus

M/s R.K. International — Respondent

Appeared for Appellant - Mr. Sansar Chand, DR
Appeared for Respondent - Mr. A. Jaju, Advocate

CORAM: Hon'ble Mr. D.N. Panda, Judicial Member

Final Order No. 232/09-SM(BR)

Per D.N. Panda

Revenue has come in appeal being aggrieved by the order passed by the learned Commissioner who didn't demand customs duty although confiscation was held to be proper.

2. Learned Counsel appearing for the Respondent submits that the learned Commissioner was not required to demand customs duty because show cause notice did not propose demand of such duty. He relies on the judgement of the Apex Court in the case of Metal Forgings vs. Union of India reported in 2002 (146) ELT 241 (SC). He relies on para 10 of the judgement and submits that the show cause notice should indicate the amount demanded and call upon the assessee to show cause if he has any objection for such demand. In absence of the show cause notice on such aspect showing the demand, that amounts to no realiation of the demand from the respondent.

3. To the above submission, learned DR vehemently objects relying on the decision of the Apex Court in the case of Commr of Cus. (Import), Mumbai Versus Jagdish Cancer & Research Centre reported in 2001 (132) E.L.T. 257 (S.C.). He submits that realization of the duty in respect of confiscable goods is mandate of Section 125 of the Customs Act, 1962. Even if the show cause notice did not indicate the duty amount the respondent is required to pay duty in terms of the provision contained in Section 125(2) of the said Act.

4. Heard both sides and perused the record. In view of rival submission above, it was necessary to go through the provision of Section 124 and 125 of Customs Act, 1962. These two sections read as under:-

"**Section 124. Issue of show cause notice before confiscation of goods, etc.**- No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person-

(a) is given a notice in writing informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty.

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein, and

(c) is given a reasonable opportunity of being heard in the matter:

Provided that the notice referred to in clause (a) and the representation referred to in clause (b) may, at the request of the person concerned be oral.

Section 125. Option to pay fine in lieu of confiscation.- (1) Whenever confiscation of any goods is authorized by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods, or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit:

Provided that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

"(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1), the owner of such goods or the person referred to in sub-section (1), shall, in addition, be liable to any duty and charges payable in respect of such goods".

5. Sub-section (2) of Section 125 of Customs Act, 1962 requires that where any fine is imposed in lieu of confiscation the owner of the goods or the person referred to in sub-section (1) of section 125 of that Act shall in addition, be liable to any duty and charges payable in respect of the impugned goods. This sub-section calls for reading of section 124 of the Customs Act, 1962. Section 124 requires issuance of show cause notice before confiscation of goods. A show cause notice was issued to the respondent in this case under section 124 of Customs Act, 1962 on 28.11.2007.

6. Combined reading of section 124 and 125 of Customs Act, 1962 throws light that Principles of natural justice is embedded into the law by section 124 of the Customs Act, 1962 in order to invoke the provision of Section 125 of that Act. Section 124 deals with a proposal for confiscation or levy of penalty. Realization of duty is subject matter of Section 125(2) of the Customs Act, 1962. But that section does not exclude issuance of show cause notice for realization of customs duty following the decision of the Apex Court in the case of Metal Forgings cited by the learned Counsel (supra). That decision was rendered in the context of Central Excise Act, 1944 and Section 125 of Customs Act, 1962 was not subject matter of decision in that case.

7. Learned DR's reliance on the decision of Jagdish Cancer & Research Centre is a case decided under Section 125 of the Customs Act, 1962. But even in that case the Assistant Commissioner of Customs had issued a show cause notice to show the reason why customs duty amounting to Rs. 64,93,598/- shall not be realized. This is patent from para-3 of reported judgement in 2001 (132) ELT 257 (SC). Apex Court in para 11 of the judgement held that sub-sections (1) and (2) of Section 125 together makes it clear that liability to pay duty arises under sub-section (2) in addition to the fine under sub-section (1). Therefore, where an order is passed for payment of customs duty along with an order of imposition of fine in lieu of confiscation of goods, it shall only be referable to sub-section (2) of Section 125 of the Customs Act. It would not attract Section 28(1) of the Customs Act which covers the cases of duty not levied, short levied or erroneously refunded etc. The Court further held that the order for payment of duty under Section 125 (2) would be an integral part of proceedings relating to confiscation and consequential orders thereon, on the ground as in that case that the importer had violated the conditions of notification subject to which exemption of goods was granted, without attracting the provisions of Section 28(1) of the Customs Act. The Hon'ble Court while deciding the case of Jagdish Cancer & Research Centre case relied in the judgement in the case of *Mohan Meakins Ltd.* v. *Commissioner of Central Excise, Kochi*, 2000 (115) E.L.T. 3 (S.C.) = (2000) 1 SCC 462 wherein it has been observed in Para 6 as under:

> "..... Therefore, there is a mandatory requirement on the adjudicating officer before permitting the redemption of goods, firstly, to assess the market value of the goods and then to levy any duty or charge payable on such goods apart from the redemption fine that he intends to levy under sub-section (1) of that section."

8. It may be significant to note that that the notice issued in the present case under appeal under Section 124 merely deals with proposed action relating to confiscation and penalty in order to invoke an action under Section 125 of the Customs Act, 1962. The facts involved in the decision made in Jagdish Cancer & Research Centre' case and the facts involved in the decision in Metal Forgings are different and decisions were under two different statutes. While Metal Forgings case is under the Central Excise Act, 1944 the case Jagdish Cancer & Research Centre case is under Customs Act, 1962. Learned Counsel submits that in the present case under appeal the show cause notice was not issued under Section 124 read with Section 125 of the Customs Act, 1962 but that was issued under Section 111 of the Customs Act, 1962. Therefore, a misconceived proceeding for realization of Customs duty was unsustainable. Contention of the learned Counsel has force when the show cause notice was issued for a limited purpose mentioned therein without proposing to realize customs duty, if any, patent from page 5 of the show cause notice itself.

9. On an analysis of the provision contained in Sections 124 and 125 of the Customs Act, 1962 read with the decisions in Metal Forgings case and Jagdish Cancer & Research Centre case it may be stated that a show cause notice should necessarily state a proposal for levy of duty which is necessity of law. This would be a requirement to grant opportunity of defence when the case of Jagdish Cancer & Research Centre case shows that the Assistant Commissioner who issued the show cause notice had proposed realization of customs duty of Rs. 64,93,598/-. With the proposal in show cause notice for levy of duty, the decision in para 11 of the judgement appears to have been arrived at. It appears that judgement in Jagdish Cancer & Research Centre has not laid down the ratio that a show cause notice can ignore proposal for

levy of customs duty. Therefore, ratio laid down in Metal Forgings case warrants to state that para 11 of Jagdish Cancer & Research Centre's case is to be read with the governing fact that proposal to levy customs duty was made through a show cause notice.

10. In view of the aforesaid analysis, it may be stated that the levy of customs duty in Jagdish Cancer & Research Centre case having been proposed by a show cause notice issued, action for levy of duty, was held to be proper without attracting section 28 of Customs Act, 1962 in that case. The admitted fact in Jagdish Cancer's & Research Centre's case is that assessee was asked by show cause notice to pay customs duty of Rs. 64,93,598/-. But in the present case, no such notice was issued to the Respondent. Therefore, Revenue's grievance that duty shall be payable cannot be answered affirmatively.

11. It may be stated that if the appeal of Revenue is canvassed to be a case of realization of duty as well as confiscation with option given for payment of redemption fine in lieu of fine, the learned Commissioner who had issued show cause notice on 28.11.2007 should have taken benefit of decision of Apex Court in the case of Jagdish Cancer and Research Centre decided on 02.08.2001 decision in the case of Metal Forgings decided on 22.11.2002. But he has not taken at all any care as to the recovery of the duty in the present case. Therefore, learned Chairman of Central Board of Excise & Customs is expected to deal the matter appropriately as to loss of Revenue, if any, that has resulted in the present case that remained un-recovered.

12. In the result appeal of the Revenue is dismissed.

[Dictated and pronounced in the open Court]

[D.N. Panda]
Judicial Member

[Pant]