IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NO: E/823/2008

[Arising out of Order-in-Appeal No: SRK/221/M-III/2008 dated 24th April 2008 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone – II.]

S Narendrakumar & Co …***Appellant***

versus

Commissioner of Central Excise
Mumbai – III …***Respondent***

Appearance:

Shri Prasad Paranjape, Advocate for appellant

Shri H N Dixit, Assistant Commissioner (AR) for respondent

CORAM:

Hon'ble Justice Dr. Satish Chandra, President
Hon'ble Shri C J Mathew, Member (Technical)

Date of hearing: **13/12/2017**
Date of decision: **03/04/2018**

ORDER NO: A/85882 / 2018

Per: C J Mathew

After hearing the detailed submissions made by Learned Counsel for appellant and Learned Authorized Representative, and having perused the records, we are of the opinion that the matter can be disposed off on the short points of classification traveling beyond the show cause notice and of the disregard of case law relied upon in the orders of the lower authorities.

2. Appellant, M/s S Narendrakumar & Co, is a manufacturer of henna powder cleared in unit packs of 25/50/100 grams. Claiming to have taken recourse to the decision of the Tribunal in *Henna Export Corporation v. Collector of Central Excise [1993 67 ELT 907 Tribunal]* which laid down the distinction for classification under heading no. 14041019, for clearance in bluk and heading no. 33059040, pertaining to clearance in unit packs as hair dye, the appellant had been discharging duty liability under the former.

3. The original authority confirmed demand of ₹4,26,350 on the clearances effected between June 2006 and March 2007 under section 11A of Central Excise Act, 1944 with appropriate interest, while imposing penalty of like amount under section 11AC of Central Excise Act, 1944. In appeal before Commissioner of Central Excise (Appeals), Mumbai, the appellant made the same pleas as now submitted before us. The first appellate authority vide order-in-appeal no. SRK/221/M-III/2008 dated 24th April 2008 rejected the appeal leading to the present proceedings.

4. Learned Counsel claims that their product is not marketed as hair dye and should, therefore, not be classified under the alternative

heading as decided upon by the Tribunal *in re Henna Export Corporation*. Two subsequent decisions of the Tribunal, *Commissioner of Central Excise, Kanpur v. Shubham Goldiee Masala Pvt Ltd [2017 (5) TMI 1286 – CESTAT ALLAHABAD]* and *Baboolal Brijbhushan & Others v. Commissioner of Central Excise, Jodhpur [final order no. 57176-57177/2017],* according to Learned Counsel, also reinforce this contention.

5. It would appear that the end use has not been considered by the original authority despite relying upon the earlier decision of the Tribunal in relation to presentation in unit packs. Moreover, it is seen from the records that the two lower authorities have classified the goods under a heading that was not contemplated in the show cause notice. In *Commissioner of Customs, Ahmedabad v. Krishna Petrochemicals [2014 (304) ELT 744 (Tri-Ahmd)],* the Tribunal held thus

> *'6. Heard both sides and perused the case records. The issue involved in the present appeal filed by the Revenue is whether classification of the imported goods Palm Kernal Acid Oil can now be made under CTH 1515 when the original contest was for classification of the imported goods under either CTH 3823 19 00 or CTH 1513 29 10 before the adjudicating authority and the first appellate authority. The dispute taken before the first appellate authority by the importer (present respondent) was decided under CTH 3823 19 00 after getting further testing of the sample of imported*

goods. Even after receipt of the subsequent test report, as per the directions of first appellate authority it was not agitated by the Revenue that classification of the imported goods could be other than CTH 3823 19 00 or CTH 1513 29 10. When an issue is not the subject matter of the show cause notice first issued and was not agitated before the lower authorities, it has to be held that Revenue has no justification in agitating an issue before this Bench which was not agitated before the lower authorities. Accordingly, the lower authorities cannot be directed to go beyond the scope of the show cause notice.

6.1 The above view is further fortified by the case law of NTB International Pvt. Limited v. CCE, Mumbai-III (supra). Paras 2 and 6 of this judgment are relevant and are reproduced below :-

> *"2. The brief facts of the case are that the show cause notice was issued to the appellant to classify their product under Heading 5910.00 on 16-2-2000. The goods were sent for chemical examination and as per chemical test report dated 23-3-2000, the authorities did not issue any corrigendum to the show cause notice to classify the product under Chapter Sub-heading 4010.90. Thereafter, the adjudicating authorities classify the product under Heading 5603.00, as claimed by the appellants. Against that order Revenue filed an appeal before the Commissioner (Appeals) to classify the product under Sub-heading 4010.90. The contention of department was opposed by the appellants on the ground that the Commissioner (Appeals) cannot travel beyond the show cause notice, as in the show cause notice proposed to classify the product under Chapter Sub-heading 5910.00. Therefore, the appellant relied on the decision of this Tribunal in the case of J.D. Jones & Co. Pvt. Ltd. v. Commissioner of C. Ex., Calcutta-II reported in 2003 (154) E.L.T. 106 (Tri.-Kolkata), Airport Authority of India v. Commissioner of Customs, New Delhi reported in 2003 (152).E.L.T. 97 (Tri.-Del.) and Mawana Steels (P) Ltd. v. Commissioner of Central Excise, Kanpur reported in 2002 (148) E.L.T. 375 (Tri.-Del.) wherein it was held that the adjudicating authority cannot travel beyond*

the show cause notice. The Commissioner (Appeals) considering the decision cited by the appellant held that these decisions are not relevant to the facts of the case. Therefore, he classified the impugned goods under Chapter Sub-heading 4010.90. Aggrieved from the said order the appellants are in appeal before this Tribunal on the ground that Commissioner (Appeals) has no power to travel beyond the show cause notice.

3. ………….

4. ………….

5. ………….

6. It is also an admitted fact that in the show cause notice it was not the issue before adjudicating authority below to classify the product under Chapter Sub-heading 4010.90 of the Central Excise Tariff Act. As the issue before the adjudicating authority was whether the impugned product is classifiable under Chapter sub-heading 5603.00 (as claimed by the appellant) or CH. 5910.00 (as alleged by the revenue). Therefore, we do not find any infirmity in the adjudication order. There is catena of judgments available wherein it is held that no one can travel beyond the issue involved in show cause notice. Therefore, following the said ratio, we hold that in this case the Commissioner (Appeals) has no power to travel beyond the show cause notice. In view of the above observation, the impugned order is set aside."

7. In view of the above observations there is no merit in the appeal filed by the Revenue and the same is accordingly, rejected.'

6. In *Commissioner of Central Excise, Nagpur v. Ballarpur Industries Ltd [2007 (215) ELT 489 (SC)],* the Hon'ble Supreme Court held that

'7. At this stage, it may be clarified that, in this case, three show cause notices were issued; the first was dated 21-5-1999, which related to the period September, 1996 to March, 1999, second show cause notice was dated 30-9-1999, which related to the period April, 1999 to June, 1999, and the third

> *show cause notice was dated 18-11-1999, which related to the period July, 1999 to September, 1999. This difference is required to be kept in mind because under the first show cause notice dated 21-5-1999, the Department has invoked the extended period of limitation, whereas the second and the third show cause notices dated 30-9-1999 and 18-11-1999 were for the periods April, 1999 to June, 1999 and July, 1999 to September, 1999 respectively, which were within limitation.'*

7. Considering the above, the impugned order does not have the sanctity of law. Admittedly, the show cause notice itself has been disregarded by the lower authorities and the issue raised by the appellant on the scope of classification requires reconsideration. Accordingly, the matter requires to be considered afresh for which purpose we set aside the impugned order and remand the matter back to the original authority to consider the above two aspects.

(Pronounced in the Open Court on 03/04/2018)

(C J Mathew)	**(Justice Dr. Satish Chandra)**
Member (Technical)	***President***

**/as*