CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

Customs Appeal No: 833 of 2012

[Arising out of Order-in-Appeal No: 281/MCH/ADC/Gr.IV/2012 dated 28th May 2012 passed by the Commissioner of Customs (Appeals), Mumbai Zone– I.]

Reliance Industries Ltd … ***Appellant***
Maker Chamber IV, 3rd Floor, Nariman Point,
Mumbai 400021

versus

Commissioner of Customs (Import) ***…Respondent***
New Customs House, Ballard Estate, Mumbai – 400 001

APPEARANCE:

Shri JC Patel, Advocate for the appellant

Ms Trupti Chavan, Assistant Commissioner (AR) for the respondent

CORAM:

HON’BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON’BLE DR SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO: A/86251 / 2019

DATE OF HEARING: 07/02/2019
DATE OF DECISION: 17/07/2019

PER: C J MATHEW

On the direction of Commissioner of Customs (Import), New Custom House, Mumbai, the adjudicating authority filed appeal before the Commissioner of Customs (Appeals), Mumbai Customs Zone – I and, *vide* order-in-appeal no. 281/MCH/ADC/Gr.IV/2012 dated 28th May 2012, the order of the original authority was set aside. It is seen from a perusal of the order of the original authority that the demand is for ₹ 6,26,485/-, against bill of entry no. 851991/27.07.2008 and 850930/15.07.2008 for the import of 33.2448 metric tonnes and 40.63 metric tonnes of 'new and unused prime quality of universal beam', that, though the show cause notice dated 4th November 2009 did not invoke *proviso* to section 28(1) of Customs Act, 1962 it was not relevant to demand duty for the normal period of limitation. As neither the original authority nor the appellate authority have considered the issue on merit, it would appear that the impugned order has restricted itself only to the extent of finding that the demand was not barred by limitation. It is also important to note that Revenue is not in appeal against the impugned order and, therefore, in the absence of any finding on merit, it cannot be held that the assessment of 'proper officer' was incorrect.

2. Briefly, the importer order had cleared the goods under 'risk management system' and without examination on the claim of classification under heading no. 7216 3200 of the First Schedule to the Customs Tariff Act, 1975 with benefit of notification no. 21/2002-Cus dated 1st March 2002 (sr. no.190). 'Post clearance audit' was of the

opinion that the goods were correctly classifiable under heading no. 7308 of First Schedule to the Customs Tariff Act, 1975 and chargeable to basic customs duty of 10% instead of ‘nil’ rate in the bill of entry as assessed.

3. It is the finding of the first appellate authority that though the show cause notice had been issued only on 4th November 2009 which, admittedly, is well beyond the normal period of limitation, reference was made to letter dated 9th September 2008 of the ‘post clearance audit section’ and, therefore, the notice dated 4th November 2009 is redundant.

4. We have heard both Learned Counsel for the appellant and Learned Authorised Representative. The stand taken by the first appellate authority that the formal issue of the show cause notice in September 2009 is irrelevant and redundant is based on the letter dated 9th September 2008 requiring them to pay the difference of duty, with interest, under section 28 of Customs Act, 1962 in response to which the appellant herein had sought additional time to reply. The reply made on 19th November 2008 was followed by consultative letter dated 16th September 2009. In this letter, the request to be heard personally was rejected with a clear advice that unless the show cause notice is issued, the stage of personal hearing would not be reached following which the show cause notice appeared to have been issued.

5. Learned Counsel for the appellant draws our attention to the decision of the Hon'ble Supreme Court in *Metal Forgings v. Union of India [2002 (146) ELT 241 (SC)]* and *Union of India v. Charak Pharmaceuticals (India) Ltd [2003 (254) ELT 354 (SC)]* which has followed the earlier decision that.

> *'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.

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17. For the reasons stated above, we are of the opinion that in the absence of a show cause notice it is not open to the Revenue to make a demand on the appellants even assuming that the contention of the Revenue in regard to classification as held by the Tribunal is correct.'

6. The law laid down by the Hon'ble Supreme Court is that no proceedings under section 28 of Customs Act, 1962 for recovery of short-paid or unpaid can be initiated without issuing a show cause notice; implicit in such a proceeding is also the right to respond in writing and to opt to be heard in person. It would appear from the records that the appellant herein had responded as though in reply to show cause notice and had sought personal hearing. It is also seen from the records that the request was rejected as being premature indicating that, as on 16th September 2009, no show cause notice has been issued which was followed by issue of a communication titled as show cause notice. It is surprising that the customs authorities have taken inconsistent stands and that the first appellate authority has

chosen to ignore the fundamental premises in adjudication proceedings, *viz.* the right to notice, the right to respond and the right to be heard. In a matter in which the assessing officer has taken that stand that no show cause notice had been issued and which is established by subsequent issue of a show cause notice, the ground on which the appeal was filed before the first appellate authority appears to be without basis.

7. On a perusal of the ‘notice’ that the first appellate authority found to be sufficient, we observe that this is a summons for document to complete the process of ‘post clearance’ audit and, that instead of enumerating the documents, an order for recovery was included. This clearly, therefore, is not a notice to show cause as to why the duty allegedly short-paid should not be recovered but is a demand itself. Demand without a notice is legal unsustainable.

8. The show cause notice dated 4th November 2009 does not place on record any of the ingredients warranting invoking of the extended period. Consequently, that show cause notice is barred by limitation.

9. Learned Authorised Representative made a fervent plea for remand of the matter. We are unable to consider this demand as Revenue is not in appeal against the impugned order. The principle of classification is that a declared heading can be unsettled only if the

alternative heading proposed by the assessing officer in a show cause notice is found to be appropriate. In the absence of such a finding, the declared heading would have to be the only available substitute which, notwithstanding any doubt of its appropriateness, will remain until unsettled in proper proceedings in accordance with law.

10. For the above reasons, we set aside the impugned order and allow the appeal.

(Order pronounced in the open court on 17/072019)

(C J Mathew)
Member (Technical)

(Dr Suvendu Kumar Pati)
Member (Judicial)

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