

(2014) 06 AP CK 0145

In the Andhra Pradesh High Court

Case No : Writ Petition No. 4438 of 2014

Aurobindo Pharma Limited

APPELLANT

Vs

The Assistant Commissioner

RESPONDENT

Date of Decision : 06-06-2014

Acts Referred:

Customs Act, 1962 — Section 11A, 28, 28(1)(a)

Citation : (2014) 4 ALT 730 : (2014) 308 ELT 450 : (2014) 28 GSTR 55

Hon'ble Judges : Kalyan Jyoti Sengupta, C.J.; Sanjay Kumar, J

Bench : Division Bench

Advocate : T.V.L. Narasimha Rao, Advocate for the Appellant; V. Gopala Krishna Ghokle, Advocate for the Respondent

Judgement

Kalyan Jyoti Sengupta, C.J.—This writ petition has been filed challenging the demand notice dated 07.02.2014 by which the respondent asked the petitioner to pay a sum of Rs. 7,03,92,505/- towards central excise (Rs. 1,28,26,974/-) and customs duties (Rs. 5,75,65,331/-) along with interest u/s 28AB of the Customs Act, 1962 and Section 11AB of the Central Excise Act, 1944 in terms of the bond executed by them before the Assistant Commissioner of Customs and Central Excise, Hyderabad-A Division, in fulfillment of the conditions laid down for duty free import under the said notification within seven days of receipt of the demand notice.

2. Learned counsel for the petitioner stated that the impugned notice has been issued quantifying the amount of demand in violation of the principles of natural justice, as no show cause notice intending to afford, opportunity of being heard was issued before adjudication of the aforesaid amount allegedly due and payable.

3. In the counter affidavit it has been stated that in fact hearing was given after taking a decision and this fact is also admitted even in the notice. It is also contended that in a case of this nature issuance of show cause notice was not required under law.

4. Learned counsel for the petitioner highlighting the aforesaid fact drew our attention to Section 28 of the Customs Act, 1962 and submits that before adjudication as to leviability of any duty or any amount payable by the petitioner issuance of show cause notice is mandatory requirement of law. According to him, the post decisional hearing is not adherence to the requirement of the said Section.

5. Learned counsel for the respondent countering above contention says that if Section 28 of the Customs Act is read, it would appear that the dispute in this matter is not covered thereunder. Thus, it is legally permissible for the respondent to issue demand notice straight way. In any event, post decisional hearing has been given to the petitioner. Hence, there cannot be any grievance with regard to the alleged violation of principles of natural justice. He relied on the decision of the Supreme Court in the case of Commissioner of Customs, New Delhi Vs. C.T. Scan Research center (P) Ltd., on the point that issuance of show cause notice is not a mandatory requirement for raising demand.

6. We have considered the rival contentions and we have examined the issue involved in this matter, which is reproduced hereunder:

"Whether issuance of show cause notice in a case of this nature is mandatory or not?"

7. Before we address to the issue, we examine Section 28(1)(a) of the Customs Act that requires issuance of show cause notice. Accordingly, the said section is set out hereunder:

28. Recovery of duties not levied or short-levied or erroneously-(1) Where any duty has not been levied or has been short-levied or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any willful mis-statement or suppression of facts,-

the proper officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.

8. From the facts of this case it appears that the petitioner was otherwise liable to pay the duty, but for the exemption notification. It follows logically that duty is leviable in absence of exemption. To our mind overruling the contention of the learned counsel for the respondent the aforesaid section covers the dispute involved herein as ultimately liability to pay duty may rest on petitioner if its contention is rejected. Naturally, show cause notice is a must before adjudication of the quantity of the duty sought to be levied followed by demand. Clause (a) of sub-section (1) of Section 28 is a mandatory in character and it is well settled that in the regime of interpretation of statute the mandate of fiscal law has to be

strictly construed. Accordingly, this has to be complied with. The Supreme Court in the case of Metal Forgings and Another Vs. Union of India (UOI) and Others, , which was cited by the learned counsel for the petitioner, in paragraph 10 has stated what we say to interpret above as follows:

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 appellant authority are inadequate to be treated as show cause notices contemplated under Rule 10 of the Rules of 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.

9. The decision cited by the learned counsel for the respondent in our view has no manner of application, as this judgment nowhere laid down the law that in a case of this nature no show cause notice is required. The Supreme Court in that case has noted on fact that show cause notice was issued before making any demand. Therefore, the aforesaid judgment is quite distinguishable.

10. Learned counsel for the respondent has said that in fact post decisional hearing was given. In our view when the intention of the Legislature is to give a notice before adjudication of the dispute, post decisional hearing does not fulfill the object of issuance of show cause notice and there must be reasons underlying for making such provision. If we have been able to understand the mind of the Legislature, issuance of notice before taking a decision is required. It is general perception that the authority decides the issue in a post decisional hearing without having open mind with inclination to uphold his own decision and not to reverse it. Unlike judicial authority the executive authority's mind is not

so flexible. In these circumstances, we think that the very purpose of hearing as mentioned in clause (a) is not fulfilled in this case. If we accept the argument of the learned counsel for the respondent that in a case of this nature issuance of show cause notice is not required, meaning thereby, no hearing is to be given when a post decisional hearing was given, we are inclined to think that no post decisional hearing is required as there is no provision under law. Accordingly, we reject the said argument.

11. We therefore hold that this entire adjudication and consequent demand notice are absurd and in breach of principles of natural justice. More so, they are noncompliant with the mandatory provision of the aforesaid Section. We therefore set aside the impugned demand and direct the adjudicating authority to decide the issue with an independent mind, without being influenced by the earlier decision. The entire exercise shall be completed within a period of one month from the date of communication of this order. The adjudicating authority shall proceed afresh by issuing proper show cause notice as required under the aforesaid Section. Such show cause notice has to be issued within a period of fortnight from the date of receipt of a copy of this order.

12. The writ petition is accordingly allowed.

13. Miscellaneous petitions, if any, pending in this writ petition shall stand closed. No order as to costs.