Demand of Customs Duty

Ravi Holani

< EXECUTIVE SUMMARY >

◆ Where there is an excess payment of duty, there is a provision for refund. Similarly, in case of short payment or non-payment of the levy, there is a set of provisions for such recovery along with interest and penalty. Though there is a provision of refund, a refund claim could not be a substitution of an appeal- CCE Vs Flock (India) Pvt. Ltd 2000 (120) ELT 285 (SC). In other words, in case where there is a wrong order under which there is an excess payment of duty, the procedure is to file an appeal against the order instead of filing of a refund application. Similarly, where there is an order in favour of the assessee to pay duty, which in the opinion of the Department is a short payment of duty, the legal remedy is filing of an appeal by the Department against such order instead of issuing a show cause notice to re-adjudicate the same. Sec.28 and 28A of the Customs Act, 1962 have contained the provisions about the demand of short levy or non-levy or erroneous refund, which are corresponding to Sec. 11A and Sec.11AA of the Central Excise Act, 1944.

1. Incase where customs duty or interest payable has not been levied or short levied or erroneously refunded, a show cause notice for the same may be issued by the proper officer within six months to the assessee. However, in the case of any import made by any individual for his personal use or by the Government or by any educational, research or charitable institution or hospital, the time limit shall be one year from the relevant date. However, in case of fraud, collusion, any willful mis-statement or suppression of facts, such time limit would be five years from the relevant date and the show cause notice shall be issued by the Commissioner of Customs or any officer subordinate to him after getting the approval of the Commissioner. And in case where the amount involved is more than Rs. One Crore, then the prior approval of the Chief Commissioner is a required condition.
2. If it is possible, in normal cases, the disposal of the show cause notice should be within six months. However, in case of extended period, the time limit is one year from the date of service of the S.C.N.
3. If before issue of the S.C.N., such alleged duty or interest has been paid by the assessee him self and he inform about the same, to the Department, there is no need to serve any S.C.N. for such recovery. However, the assessment of such payment shall be made within one year or six months as the case may be, from the date of receipt of such information. However, the facility is not available where there is a fraud, collusion, any willful misstatement or suppression of facts – [see sec.11A (2B) of the Central Excise Act, 1944 and sec.28(2B) of the Customs Act, 1962 w.e.f. 11-5-2001 by sec.123 of the Finance Act, 2001].
4. The relevant date means:-
   a) in a case where duty is not levied, or interest is not charged the date on which the proper officer makes an order for the clearance of goods;
   b) in case of provisional assessment under section 18, the date of adjustment of duty after the final assessment there of;
   c) in case of erroneous refund, the date of refund;
   d) in any other case, the date of payment of duty or interest.
5. An intent to evade payment of duty while invoking extended period must be proved by the Department –Cosmic Dye Chemical Vs. CCE 1995 (75) ELT 721 (SC) merely on the ground of non-declaration of few information, inference of intention to evade payment of duty shall not be drawable automatically- CCE Vs. HMM Ltd 1995 (76) ELT 497 (SC), conscious or deliberate with-holding of information by manufacturer must be required. Where the Department had full knowledge or the assessee had reasonable belief that he is not required to give a particular information, larger limitations of five years could not be invoked –CCE

The author is a member of the Institute. The views expressed herein are the personal views of the author and do not necessarily represent the views of the Institute.

Vs.Chemphar Drugs & Liniments 1989 (40) ELT 276 (SC). Where there was a scope of doubt about liability to pay duty, mere failure or negligence does not attract the extended limitation- Padmini Products Vs. CCE 1989 (43) ELT 195 (SC) unless there is evidence that the manufacturer know that goods were liable to duty. Similarly, in case of question of interpretation or conflicting decision, extended period is inapplicable- Pushpam Pharmaceuticals Co.Ltd. Vs. CCE (78) ELT 401 (SC).

6. For invoking extended period of five years limitation, duty should not had been paid, short levied or short paid or erroneously refund because of either any fraud, collusion or willful mis-statement or suppression of facts or contravention of any provision of the Act or Rules made thereunder. These ingredients postulate a positive act, therefore, failure to pay duty is not necessary due to fraud or collusion or willful misstatement or suppression of facts or contravention of any provision of the Act. Likewise, suppression of facts is not failure to disclose the legal consequences of a certain provision- Padmini Products Vs. CCE 1989 (43) ELT 195 (SC). When the law requires an intention to evade payment of duty, then it is not mere failure to pay duty. It must be something more. That is, the assessee must be aware that the duty was leviable and he must deliberately avoid paying it. The word "evade" in this context means defeating the provision of law of paying duty. It is made stringent by use of the word "intent". In other words, the assessee must deliberately avoid payment of duty which is payable in accordance with law- Tamil Nadu Housing Board Vs. CCE 1994 (74) ELT 9 (SC). Where facts are known to both the parties, the omission by one to do what he might have done, and not that he must have done, does not render it suppression of facts – Pushpam Pharmaceuticals Co. Vs. CCE 1995 (78) ELT 401 (SC). In case of CCE Vs. Malleable Iron & Steel Castings Co. (P) Ltd 1998 (100) ELT 8 (SC), it was held that suppression of fact is not allegable when the Department was all along aware of the nature of products manufactured in as much as the assessee had written to Superintendent of Central Excise for clarification about classification of the goods and there was further correspondences between them.

7. There must be mentioned in the show cause notice the fact of any collusion, willful mis-statement or suppression of fact by the appellants for the purposes of five years. This is a requirement of natural justice. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the authorities. The defaults enumerated in the provision are more than one and if the authorities placed reliance on the proviso, it had to be specifically stated in the show cause notice which was the allegation against the assessee falling within the four corners of the said proviso- Raj Bahadur Marain Singh Sugar Mills Ltd Vs. UOI 1996 (88) ELT 24 (SC). Show cause notice must contain an averment to that effect pointing out specifically as to which of the various commissions or omissions stated in the proviso had been committed by the assessee and the adjudicating authority must specifically deal with assessee's contention in rebuttal there-of- CCE Vs. H.M.M. Ltd 1995 (76) ELT 497 (SC). Once the Department is able to bring on records material to show that the appellant was guilty of any of those situations which are visualized by the section, the burden shifts and then applicability of the proviso has to be construed liberally- Tamil Nadu Housing Board Vs. CCE 1994 (74) ELT 9 (SC). Whichever ground is alleged against the assessee must be made known to him and there is no scope for assuming that the ground is implicit in the issuance of the show cause notice – Kaur & Singh Vs. CCE 1997 (94) ELT 289 (SC).

8. If a demand show cause notice is not issued within the prescribed time limit, recovery would become time barred not with standing the review order passed in this behalf – CCE Vs. Rerolling Mills 1997 (94) ELT 8 (SC); UOI Vs Jain Shudh Vanaspati Ltd 1886 (86) ELT 460 (SC)

9. The assessee is not required to pay the demand just on the issue of the show cause notice. The notice has to be abjdicated upon after hearing the assessee and the demand has to be confirmed by the adjudicating authority before the assessee can be asked to pay it.

10. The condition of issuing a show cause notice before raising a demand is a mandatory requirement – CCE Vs. Tin Plate Co. Of India Ltd 1996 (87) ELT 589 (SC). But since its operation is one which deals with the individual rights of a person concerned and is for his benefit, the said person can always waive such right – C.C. V/s Virgo Steels 2002 (141) ELT 598 (SC). Thus, right of show cause notice under section 28 of the Customs Act, 1962 being personal to the person concerned, the same can be waived by that person even if it is a mandatory requirement.

11. Any demand can not be confirmed a ground which the revenue never canvassed in the show cause notice and which the assessee was never required to meet – Reckitt & Colman of India Ltd Vs. CCE 1996 (88) ELT 641 (SC); Prince Khadi Wollen Handloom Prod. Coop. Indl. Society Vs. CCE 1996 (88) ELT 637 (SC); GTC Industries Ltd Vs. CCE 1997 (94) ELT 9 (SC); Warner Hindustan Ltd. Vs. CCE 1999 (113) ELT 24 (SC). The authority is not competent to look into the second show cause notice for adjudicating the allegations contained in the first show cause notice. Each show cause notice must be limited

to the case that is made out therein. [GTC Industries Ltd. v. Collector – 1997 (94) E.L.T. 9(SC)].

12. Though the circulars are not binding on the courts and such circulars have to be "for giving effect to the provisions of the Act," and not in derogation thereof- Bengal Iron Corporation Vs. CTO 1993 (66) ELT 13 (SC); but the Department can not overlook the circulars which are in favour of the assessee. In other words, the Department has no right to plead against the circulars or trade notices issued in favour of the assessee – British Machinery Supplies Co. Vs. UOI 1996 (86) ELT 449 (SC); Ranadey Micronutrients Vs. CCE 1996 (87) ELT 19 (SC); and the Department can not repudiate a circular against the assessee on the ground that it is inconsistent with a statutory provision. The Department can not be allowed to plead that such circular is not valid- CCE Vs. Jayant Dalal Private Ltd 1996 (88) ELT 638 (SC). Though such circulars can not be ignored – Purewal Associates Ltd Vs. CCE 1996 (87) ELT 321 (SC); because they are of binding on the Revenue authorities – CCE Vs. Dhiren Chemical Industries 2001 (47) ELT 881 (SC). The assessing authority cannot draw its own conclusion against the assessee by ignoring such circulars – Kirloskar Oil Engines Ltd Vs. UOI 1995 (77) ELT 479 (SC). Trade Notice based on CEBC's Tariff Advice is bindings on the Department – Poulose And Mathen Vs. CCE 1997 (90) ELT 264 (SC); Revenue can not be permitted to take a stand contrary to instructions issued by the Board but it is different matter that an assessee can contest the validity or legality of a departmental instruction – CCE Vs. Usha Martin Industries 1997 (94) ELT 460 (SC).

13. The Supreme Court in the case of UOI Vs. Kamlakshi Finance Corporation Ltd. 1991 (55) ELT 433 (SC) has laid down that, " ———— in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities". The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collector who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is "not acceptable" to the department – is in itself an objectionable phrase – and is the subject of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent court. If this healthy rule is not followed, the result will only be undue harassment to assessee and chaos in administration of tax laws.

And, in the case of Veena Commercial Corp. Vs. UOI 1993 (68) ELT 569 (Bom), it was held that a show cause notice issued by the Assistant Commissioner contrary to appellate order is invalid. Consistency and discipline are of greater importance than winning or losing a court case – Ranadey Micronutrients Vs. CCE 1996 (87) ELT 19 (SC).

14. And, at last, in the case of D.C.M Shriram Consolidated Ltd Vs. UOI 1992 (59) ELT 260 (Raj), the Rajasthan High Court has expressed that a tendency is growing in the Government Department, may be of State Government or of the Union of India, that show cause notices are either mechanically issued or that they are issued for some prospective realization in expectation of some future judgments of the courts which can never be justified. Besides this, such notices unnecessary drag the parties to litigation adding to the burden on the courts and certainly at the cost of taxpayers and the shareholders of the companies. Time, money and energy spent in such cases can better be utilized for the developmental works of the Government or of the labour or for increasing the efficiency of the Department or the industry.

15. Thus, in sum-up, any demand notice could not be an alternative resort for the revenue instead of filing an appeal against any order similar to filing a refund claim by an assessee instead of filing an appeal before the appropriate authority. Any demand notice could be issued by any appropriate authority within specified time limit, other wise the same would be time barred irrespective of the merit. Issue of the show cause notice is a mandatory requirement, but because of a personal right, the same could be waived by the assessee. And to confirm any demand, the abjudicating authority could not go behind the show cause notice and is not competent to confirm the same on those ground which has never been raised by the Revenue in the show cause notice. While confirming any demand, the adjudicating authority cannot overlook the circulars issued by the Central Board of Excise & Customs which are in favour of the assessee. However, in case where an assessee contests the validity or legality of a departmental instruction, the authority must draw its own conclusion by ignoring such circular or direction. Similarly, the decision of the appellate authority must be followed unreservedly by the subordinate authorities unless the operation of the order has been stayed/suspended by the higher appellate authority. And at last, for proper operation of the law as well as for healthy environment, a tendency of the Government Department to issue show cause notice mechanically or on the basis of same probability must be stopped to employ time, money and energy for development work or increasing the efficiency instead of creating the litigation to end the industry or an assessee. ■