

R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

WRIT PETITION NO. 385 OF 2009

Union of India through the
Commissioner of Customs (Import)
New Customs House, Ballard Estate,
Mumbai – 400 001.

.. Petitioner

Versus

1. Customs & Central Excise

Settlement Commission,
Additional Bench Mumai
Utpad Shulk Bhavan
Bandra Kurla Complex, Bandra (E),
Mumbai – 400 051.

2. Kamal Jagat Malkani

504, Luv Kush Tower,
Sindh Society, Chembur,
Mumbai – 400 071.

.. Respondents

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- Mr. Pradeep Jetly, Senior Advocate a/w Mr. Jitendra B. Mishra and Mr. Dhananjay B. Deshmukh for Petitioner
 - Mr. Prakash Shah a/w Mr. Jas Sanghavi i/b PDS Legal for Respondent No. 2
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**CORAM : K. R. SHRIRAM &
MILIND N. JADHAV, JJ.**

DATE : JULY 08, 2022

ORAL JUDGMENT [PER K.R. SHRIRAM, J.] :

1. Petitioner – Union of India is impugning an order dated 28.07.2008 passed by the Office of the Settlement Commission, Additional Bench, Customs and Central Excise, Mumbai under section 127C (5) of the Customs Act, 1962 (“**the Act**”).

2. Mr. Jetly stated that petitioner is challenging the impugned order on two grounds:-

- (a) that no show-cause-notice had been issued and therefore respondents could not have filed application before the Settlement Commission under section 138 of the Customs Act, 1962; and
- (b) Settlement Commission could not have interpreted classification of the goods under the Customs Tariff Act, 1975.

3. Before we go into the details, as regards the first point, in paragraph 2 of the petition, it is stated the challenge is to the extent that it classifies Motor-home imported by respondent No. 1 under Custom Tariff Heading (CTH) 87.02 as against 87.03 held by the revenue department. The challenge on jurisdiction because no show-cause-notice was issued is not a grievance raised in the petition. In any event, when we consider the documents annexed to the petition, the admitted position was oral show-cause-notice had been issued which was permissible under section 124 of the Act - a notice at the request of person concerned could be oral. After respondent No. 2 approached the Settlement Commission, on the directions of the Settlement Commission, a written show-cause-notice was also issued.

4. The facts in brief are, Respondent No. 2 filed a Bill of Entry

bearing No. 848213 dated 27.06.2008 describing importation of one New Burstner, 1821 FIAT DUCATO Chassis No. ZFA25000001354482 12 seater sitting. This vehicle had been imported from one RDH Motor Homes & Caravans Ltd., Nottinghamshire, U.K. According to petitioner, the goods on examination was found to be a Motor-home well equipped with sleeping bed, bathroom, toilet, kitchen, micro-oven, television, refrigerator etc. SIIB(I) Mumbai had taken up the matter for investigation because it found discrepancies in the documents submitted. Though the expression used is 'discrepancies', actually the documents submitted did not contain certain mandatory documents. The SIIB(I) also found that the vehicle was not classified properly in as much as respondent No. 1 had declared the vehicle as 12 seater seeking classification under CTH 87.02 whereas SIIB(I) asserted that the vehicle was a motor-home (a special purpose vehicle) to be classified under CTH 87.03. In the midst of the ongoing investigation, respondent No. 2 filed an application on 08.07.2003 before the Settlement Commission, viz., respondent No. 1, claiming that the department had given oral show-cause-notice and written show-cause-notice was waived vide letter dated 04.07.2008. Respondent No. 2 had requested respondent No. 1 for settlement of the following issues:-

- (a) Confiscation of the vehicle under section 111 of the Act;

- (b) Immunity from fine order under section 125 of the Act;
- (c) Duty liable under section 125(2) of the Act;
- (d) Immunity from penalty under the Act and ;
- (e) Immunity from prosecution under the Act.

Respondent No. 2 also prayed to settle the dispute pertaining to claim for 15% trade discount on the invoice value and non-availability of the Type Approval Certificate.

5. In reply to the application filed by respondent No. 2 with respondent No. 1, petitioner contested the claim of respondent No. 2 and denied that any oral show-cause-notice was issued and also submitted that apart from the claim for 15% trade discount on the invoice value and non-availability of Type Approval Certificate, there was a major issue pertaining to classification which needed to be investigated. The Settlement Commission gave the department seven days time to issue a show-cause-notice.

6. Summons were issued to respondent No. 2 and in the statement recorded, respondent No. 2 maintained that the vehicle was classifiable under CTH 8702 and not 87.03.

7. Respondent No. 1 in its final order dated 28.07.2008, which is impugned in this petition, settled the case for declared duty amount of Rs. 26,38,713/- and imposed fine of Rs. One Lakh on respondent No. 2 for non-submission of Type Approval Certificate. As regards the

dispute relating to classification, respondent No.1 found no mis-declaration on the part of respondent No. 2 and held that the vehicle in question was a ten seater and thus classifiable under CTH 87.02. Respondent No. 2 paid the duty and fine as per order of respondent No. 1 and vehicle was released by Authorities. Petitioner is impugning this order dated 28.07.2008 on two grounds which we are recorded in para 2 above. As noted by us, the issue of show-cause-notice is a non-issue and we are going to restrict ourselves only on the issue of classification.

8. Sub-section (1) of section 127(b) of the Act reads as under:-

“127B. Application for settlement of cases - (1) Any importer, exporter or any other person (hereinafter referred to as the applicant in this Chapter) may, in respect of a case, relating to him make an application, before adjudication to the Settlement Commission to have the case settled, in such form and in such manner as may be specified by rules, and containing a full and true disclosure of his duty liability which has not been disclosed before the proper officer, the manner in which such liability has been incurred, the additional amount of customs duty accepted to be payable by him and such other particulars as may be specified by rules including the particulars of such dutiable goods in respect of which he admits short levy on account of mis-classification, under-valuation or inapplicability of exemption notification [or otherwise] and such application shall be disposed of in the manner hereinafter provided:

Provided that no such application shall be made unless,—

- (a) the applicant has filed a bill of entry, or a shipping bill, or a bill of export, or made a baggage declaration, or a label or declaration accompanying the goods imported or exported through post or courier, as the case may be, and in relation to such document or documents, a show cause notice has been issued to him by the proper officer;*
- (b) the additional amount of duty accepted by the applicant in his application exceeds three lakh rupees; and*
- (c) the applicant has paid the additional amount of customs duty accepted by him along with interest due under*

section 28AA

Provided further that no application shall be entertained by the Settlement Commission under this sub-section in cases which are pending in the Appellate Tribunal or any court:

Provided also that no application under this sub-section shall be made in relation to goods to which section 123 applies or to goods in relation to which any offence under the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) has been committed:

Provided also that no application under this sub-section shall be made for the interpretation of the classification of the goods under the Customs Tariff Act, 1975 (51 of 1975)

(3) Every application made under sub-section (1) shall be accompanied by such fees as may be specified by rules.

(4) An application made under sub-section (1) shall not be allowed to be withdrawn by the applicant.

(5) Any person, other than an applicant referred to in sub-section (1), may also make an application to the Settlement Commission in respect of a show cause notice issued to him in a case relating to the applicant which has been settled or is pending before the Settlement Commission and such notice is pending before an adjudicating authority, in such manner and subject to such conditions, as may be specified by rules.”tariff Act, 1975 (51 of 1975).

[Sub-section (2) omitted by Act 25 of 2014, sec. 84(iii). Sub-section (2), before omission, stood as under:-

(2) Where any dutiable goods, books of account, other documents or any sale proceeds of the goods have been seized under section 110, the applicant shall not be entitled to make an application under sub-section (1) before the expiry of one hundred and eighty days from the date of seizure.]’

9. Mr. Jetly submitted that as per fourth proviso of sub-section (1), the Settlement Commission could not have interpreted the classification of the goods under the Customs Tariff Act, 1975. For the purpose of this matter, we do not wish to enter into that issue or deal with this interpretation issue because the Settlement Commission has arrived at its conclusion purely based on the admission made by petitioner in the show-cause-notice. Therefore, even for a moment we go on the basis that Settlement Commission has no jurisdiction to

interpret on the classification of the goods, still the Settlement Commission has not made any such interpretation for petitioner to be unhappy.

10. In paragraph 4 of the show-cause-notice dated 18.07.2008, it is stated that “the goods were examined by A.O./Shed under D.C./SIIB(I) supervision. On examination it is *inter alia* found that:-

(a)

(b)

(c) Seating arrangement found to be for 10 persons
(including Driver) as against declared 12-seater.

This finding on examination by a Customs Officer turned the matter on its head against petitioner.

11. It was department's case that the appropriate classification of the goods is under CTH 87.03 and not 87.02 as claimed by the importer and there was a huge difference of duty between classification under CTH 87.03 and CTH 87.02.

12. Petitioner has relied on certain brochure regarding the vehicle. In the petition, it is not stated that this brochure was submitted by respondent No. 2 or the manufacturer of the vehicle has stated that this brochure actually pertains to the vehicle that was in question. Even in the show-cause-notice, there is no reference to this

brochure.

13. It is the case of respondent No. 2 that petitioner has, by admitting that the seating arrangement in the vehicle is for 10 persons including driver, the classification of the vehicle should be under CTH 87.02 and not 87.03. The classification under CTH 87.02 and 87.03 is reproduced hereunder:-

***“Section XVII
87.02/03,***

87.02 – MOTOR VEHICLES FOR THE TRANSPORT OF TEN OR MORE PERSONS, INCLUDING THE DRIVER.

- 8702.10 - With compression-ignition internal combustion piston engine (diesel or semi -diesel)*
- 8702.90 - Other*

This heading covers all motor vehicles designed for the transport of ten person or more (including the driver),

The heading included motor buses and coaches; trolleybuses (obtaining current from overhead wires); and “gyrobuses” which operate on the principle that kinetic energy can be stored in a high – speed flywheel and used to drive an electric generator which supplied current to a motor.

This heading also includes motor coaches; convertible into rail-cars by changing the wheels and locking the steering, the motor remaining unchanged. (emphasis supplied)

87.03- MOTOR CARS AND OTHER MOTOR VEHICLES PRINCIPALLY DESIGNED FOR THE TRANSPORT OF PERSONS (OTHER THAN THOSE OF HEADING No. 87.02), INCLUDING STATION WAGONS AND RACING CARS.

8703.10 - Vehicles specially designed for travelling on snow; golf cars and similar vehicles

- Other vehicles, with spark-ignition internal combustion reciprocating piston engine:*

8703.21 -- Of a cylinder capacity not exceeding 1,000 cc

8703.22 -- Of a cylinder capacity exceeding 1,000 cc but not exceeding 1,500 cc

8703.23 -- Of a cylinder capacity exceeding 1,500 cc but not exceeding 3,000 cc

- 8703.24 -- Of a cylinder capacity exceeding 3,000 cc
- Other Vehicles, with compression-ignition internal combustion piston engine (diesel or semi-diesel):
- 8703.31 -- Of a cylinder capacity not exceeding 1,500 cc
- 8703.32 -- Of a cylinder capacity exceeding 1,500 cc but not exceeding 2,500 cc
- 8703.33 -- Of a cylinder capacity exceeding 2,500 cc
- 8703.90 -- Other

This heading covers motor vehicles of various types (Including amphibious motor vehicle) designed for the transport of person; it **does not**, however, **cover** the motor vehicles of **heading 87.02**. The vehicles of this heading may have any type of motor (internal combustion piston engine, electric motor, gas turbine, etc.).

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The vehicles of this heading may be of the wheeled or track-laying type.

The heading also includes:

- (1) **Motor cars** (e.g. saloon cars, hackney carriages, sports cars and racing cars).
- (2) **Specialised transport vehicles** such as ambulances, prison vans and hearses.
- (3) **Motor-homes** (campers, etc.) vehicles for the transport of persons, specially equipped for habitation (with sleeping, cooking, toilet facilities, etc.).

XXXXXXXXXX

For the purposes of this heading, the expression "station wagons" means vehicles with a maximum seating capacity of nine persons (including the driver), the interior of which may be used, without structural alteration, for the transport of both persons and goods.

14. Reading of 87.03 clearly states that all vehicles classifiable under heading 87.02 are excluded. The heading Motor-homes under 87.03 refers to Motor-homes having less than 10 seater capacity such as station wagons. 87.02 clearly provides "*This heading covers all motor vehicles designed for the transport of ten persons or more*

(including the driver)”. If in the show-cause-notice, petitioner admits that seating arrangement was for ten persons including the driver, it would place the subject vehicle clearly within the meaning of 87.02 and 87.02 is expressly excluded in 87.03.

15. This is what respondent No. 1 has stated in the impugned order. Therefore, we find no reason to interfere with the impugned order. Petition dismissed with no order as to costs.

16. On 22.04.2009, when the court was pleased to issue rule, the Court also directed respondent No. 2 to furnish bank guarantee for a sum of Rs. 37,16,701/- and keep it alive till final hearing of the petition. Mr. Shah states that the bank guarantee has been kept alive and is alive even today. In view of the above, petitioner is directed to cancel the bank guarantee and return the same to petitioner within two weeks of receiving a request from petitioner.

[MILIND N. JADHAV, J.]

[K. R. SHRIRAM, J.]