Commissioner of Central Excise Vs. Atul Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Apr-20-2000

Reported in : (2000)(120)ELT743Tri(Mum.)bai

Appellant : Commissioner of Central Excise

Respondent : Atul Ltd.

Judgement :
1. Today an application for stay has been taken up for consideration.

In this case an order had been passed by the Commissioner (Appeals) made in Order-in-Appeal No. SSS/SRT/1406/99, dated 19-8-1999 allowing the appeal of the assessee, thereby the assessee was declared entitled to Modvat credit of Rs. 4,18,998.22 and the penalty imposed on them was also set aside. In such types of orders where the department is aggrieved, the Commissioner may authorise under Section 35B(2) any Central Excise officer, if the order passed by the Commissioner (Appeals) is not legal and proper, to appeal on his behalf to the appellate Tribunal. In the authorisation dated 19-11-1999 it has been mentioned as follows : "Whereas in exercise of the powers vested in me under Section 35E(2) of the Central Excise Act, 1944,1 have called for the records of the proceedings in respect of M/s. Atul Ltd., P.O. Atul, Dist. Valsad, in which the Commissioner (Appeals), Customs & Central Excise, Surat, has passed the Order-in-Appeal No. SSS/SRT/1406/99 dated 19-8-1999.

And whereas upon examination of the said records, I find that the said order passed by the Commissioner (Appeals), Customs & Central Excise, Surat is not correct, proper and legal and merits filing of Appeal.

I, therefore, direct the Superintendent (Appeals), Customs & Central Excise, Hdqrs., Surat-II, to make an application to the CEGAT, Mumbai, under the provision of Sub-section (2) of Section 35E of the Central Excise Act, 1944 for examining and determining the points arising out of the order as specified in the grounds of appeal against the Order-in-Appeal No. SSS/SRT/1406/99 dated 19-8-1999, passed by the Commissioner (Appeals), Customs & Central Excise, Surat."
2. When the application for stay came up, preliminary objection has been raised by the assessee that the authorisation is not proper and it has been made under section 35E and not under section 35B of the Act.

The learned DR would argue that word CEGAT, Mumbai has been stated in the third para of the authorisation therefore the entire matter has to be viewed in a proper perspective inasmuch as the typographical error of 35E mentioned in the authorisation should be treated as 35B. The company representative pleaded that it cannot be said in that line when the Supreme Court in the case of CCE, Vadodara v. Rohit Pulp Paper Mills 1998 (101) E.L.T. 5 held the provisions of section 35B(2) is pre-requisite which, I feel, should be read in a mandatory way. The representative of the assessee says that the judgment of the Supreme Court in Rohit Pulp Paper Mills should be seen.

3. I have considered the rival submissions. Normally, whenever an authority passed an order wrong mentioning of rule should not deny the authority to exercise the power enshrined under the Act. Here the judgment of the Supreme Court in Rohit Pulp Paper Mills may proceed on the basis that the provisions of section 35B should be treated as a mandatory way. The authorisation extracted above shows that section 35E(2) deals with an appeal before the Commissioner (Appeals). The power of the Commissioner is to authorise officers subordinate to him to file appeal before the Commissioner (Appeals) against an order passed by the adjudicating authority. The provisions of section 35B(2) enables the Commissioner to file appeal against an order passed by the Commissioner

(Appeals) to the Tribunal. The word CEGAT, Mumbai is mentioned in the authorisation. It is true that a possible view could be taken that the Commissioner, Surat may have thought of filing appeal to CEGAT, Mumbai but the existence of the words "provisions of subsection (2) of section 35F" enable me not to accept the contention raised by the department because the judgment of the Supreme Court in Rohit Pulp Paper Mills may hold that it is a mandatory provision. Where there is a mandatory provision the Commissioner has to be careful in exercising the power enshrined under section 35B. It may be noted that the Commissioner (Appeals) and the Commissioner (Adjudication) are equivalent in rank. The functions of the Commissioner in exercising the power under sections 35B(2) and 35E(2) are different. The Executive Commissioner has to view the order passed by the Commissioner (Appeals) who is equivalent in rank, in a proper way. He has to give some weight to the order passed by the authority equivalent to him. Whenever any action is taken against the equivalent authority's order the Executive authority has to be care-ful in looking into the words contained in the authorisation. He cannot authorise a subordinate officer to plead on his behalf in a lackadaisical and casual manner. This may show some sort of non-application of mind inasmuch as the appeal provisions contained in sections 35B and 35E are different, namely one is filing of appeal before the Commissioner (Appeals) and the other is filing of appeal before the Tribunal. I am therefore constrained to hold, in view of the circumstances of this case as well as the decision of the Supreme Court in Rohit & Pulp Paper Mills that the provision of section 35B(2) is a mandatory one. Hence I dismiss the stay petition as well as the appeal. The appeal is not disposed of on merits.

4. One more point needs to be commented. The appeal before the Tribunal against the order pleaded on behalf of the department by the Commissioner is that an appeal is filed by the Commissioner before an superior authority. He cannot allow his Commissionerate to send attested copy of the authorisation. It is salutary if the Commissioner sends the original of the authorisation and instruct his Commissionerate accordingly. As I feel that it is an important matter, I am directing the Registry to send a copy of this order to the Chairman, CBEC to issue suitable instructions in this regard.