

Commissioner of Customs and Central Vs. Dcl Polyester Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : May-30-2003

Reported in : (2003)(90)ECC567

Judge : J Balasundaram

Appellant : Commissioner of Customs and Central

Respondent : Dcl Polyester Ltd.

Judgement :

1. In this case the adjudication order was passed by the Assistant Commissioner of Central Excise, Bhandara Division, extending the benefit of modvat credit of duty paid on polyester filament yarn (non-textured) used in the manufacture of polyester yarn (textured).

The Commissioner of Central Excise, Nagpur reviewed order in terms of Section 35E(2) of the Central Excise Act, 1944 in order to satisfy himself as to the legality, propriety and correctness of the stay order and found that the order-in-original was not legal, proper and correct and therefore directed the Assistant Commissioner to file a fresh application in proper form with the Commissioner of Central Excise (Appeals) in terms of Sub-section (4) of Section 35E of the Act. The appeal was rejected by the Commissioner (Appeals) on the ground of maintainability as the direction of the Commissioner of Central Excise was to the Assistant Commissioner Headquarters (R&T), Nagpur while the adjudication order was passed by the Assistant commissioner, Bhandara Division. In other words he held

that direction for filing the appeal could be given only to the very same officer, who passed the adjudication order. Hence this apply by the Revenue.

"The Commissioner of Central Excise may, of his own motion, call for and examine the record of any proceeding in which an adjudicating authority subordinate to him has passed any decision or order under this Act for the purpose of satisfying himself as to the legality or propriety of any such decision or order and may, by order, direct such authority to apply to the Commissioner (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Commissioner of Central Excise in his order." 4. According to the Revenue the expression "such authority" used above is also to be qualified by the clause "as may be specified by the Commissioner of Central Excise in his order" refers as also made to Section 35E(4) which provides that an application to the appellate Tribunal or the Commissioner (Appeals) can be made by the adjudicating authority or the authorised officer and the submission of the Revenue is that the mention of authorised officer in addition to adjudicating authority was necessitated because of the possibility of the Commissioner authorising another officer subordinate to him, other than the adjudicating officer, to file an appeal under Section 35E(2).

Reliance is also placed by the learned SDR on the decisions of the Tribunal in the case of CCE v. Falcon Tyres Limited 1997 (91) ELT 649 wherein the Tribunal held that Section 35E(2) requires a broad interpretation, reading it in harmony with Section 35E(4) of the Act and that the Collector can issue direction to the adjudicating officer or any other officer and the officer directed by the Collector or an officer authorised by the latter can file the application; and Sun Export Corporation v. CC 1989 (42) ELT 308 wherein it was held that a harmonious construction of the provisions of two Sub-sections 129D(2) and 12D(4) of the Customs Act, 1962 would indicate that in cases where the adjudicating authority is unavailable for being directed, it is reasonable to conclude that the direction can be fulfilled by another Customs Officer authorised by the Collector, although he may not be the officer who adjudicated the case. It is therefore prayed by the learned SDR that the impugned order may be set aside and the matter be remanded for denovo consideration on merits.

5. The prayer is opposed by the respondents who relied upon the decision of the Tribunal in the case of Dhampur Sugar Mills v. CCE, Meerut 1999 (108) ELT 498 (which has been followed by the lower appellate authority) in support of their contention that appeal should have been filed by the Assistant Commissioner of Central Excise, Bhandara Division under authorisation from the Commissioner, and not by the Assistant Commissioner Headquarters (R&T), Nagpur.

6. I note that in the case of Dhampur Sugar Mills the Tribunal held that: "Section 35E(2) contemplates only one authority whose orders or decisions can be called for and examined by the Collector and that authority can be only an adjudicating authority subordinate to him.

After examination of the record, the Collector has to satisfy himself as to the legality or propriety of any such decision or order. Thereafter he has to direct 'such authority' to apply to the Collector for determination of such points arising out of the decision or the order as may be satisfied. There is no provision under that subsection for giving the direction to any other authority to make an application to the Collector (Appeals)."Baron International Ltd. v. CCE, Vadodara 2002 (143) ELT 112 the bench has noted the decision of Dhampur Sugar Mills v. CCE and held that the expression 'such authority' means an officer of the same level as the one who had passed the adjudication order and overruled the objection of the assesseees that the very Commissioner who passed the adjudication order must file the application under Section 35E(4). In the present case both the Assistant Commissioner who passed the adjudication order and the Assistant Commissioner to whom the direction for filing the appeal was given are officers of the same level. Therefore the appeal filed before the Commissioner (Appeals) is maintainable. Since there is no finding on the merits of the admissibility of the credit I set aside the impugned order and remand the case to the Commissioner of Central Excise (Appeals) for denovo adjudication on the merits of the matter after extending a reasonable opportunity of hearing to the assesseees.