Commissioner of Central Excise Vs. Hari Vishnu Packaging

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jun-07-2004

Reported in : (2004)(173)ELT280Tri(Mum.)bai

Judge : S T C.

Appellant : Commissioner of Central Excise

Respondent : Hari Vishnu Packaging

Judgement :

1. Heard both sides. The impugned order in original was passed by the Joint Commissioner dropping a demand of Rs. 3,91,275/- but imposing a penalty of Rs. 3,000/-. The said order was reviewed by the Commissioner and an appeal was filed before the Commissioner (Appeals) by the Deputy Commissioner as authorized by the Commissioner who reviewed the order.

The Commissioner (Appeals) has rejected the Department's appeal without going into the merits of the case on the sole ground that the authorization given to the Deputy Commissioner to file appeal is not a valid authorization. While passing the said order he has relied on the decision of the Tribunal in the case of Dhampur Sugar Mills Co. Ltd. v.Collector of C.Ex., Meerut - 1999 (108) E.L.T. 498 (Tribunal). This appeal has been filed, against the impugned order passed by the Commissioner (Appeals), by the Deputy Commissioner as authorized by the Commissioner. The short question that arises for consideration in this appeal filed by the Department is whether the authorization given to the Deputy Commissioner to file an appeal before Commissioner (Appeals) against an adjudication order passed by the Joint Commissioner was a valid authorization. Incidentally, there is no challenge to filing of this appeal to the Tribunal against the order of Commissioner (Appeals) though the same has been filed by a Deputy Commissioner authorized by the Commissioner.

2. Shri A.K. Saxena, learned J.D.R. appearing for the Department and Shri N.S. Thacker, learned Advocate appearing for the respondents have very ably assisted the Bench in pointing out the relevant provisions of law and also by providing different decisions by various Benches of the Tribunal on the subject. Both sides also pointed out that a reference application has been filed in the Mumbai High Court in another case on this issue but neither side was able to produce the decision of the High Court, if any, passed on the reference application despite sufficient time allowed.

3. In the scheme of things as contained under the Customs and Central Excise Law, an adjudication order passed by the Commissioner can be reviewed by the Board and Departmental appeals can be filed to the Tribunal. Similarly, the Commissioner can review adjudication orders passed by any official subordinate to him and thereafter departmental appeals can be filed to the Commissioner (Appeals). There is no dispute regarding the substantive power of the Board/Commissioner to review an adjudication order and to direct filing appeal against the same if it is found to be not legal or proper. The dispute is as to the procedure relating to who should file the departmental appeal before the Tribunal/Commissioner (Appeals). The legal provisions in this regard are contained in Section 129D(1) and (2) of the Customs Act, 1962 and Section 35E (1) & (2) of the Central Excise Act, 1944, which read as follows:- "Sectionl29D (1) The Board may, of its own motion, call for and examine the record of any proceeding in which a Commissioner of Customs as an adjudicating authority has passed any decision or order under this Act for the purpose of satisfying itself as to the legality or propriety of any such decision or order and may, by order, direct such Commissioner or any other Commissioner to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by the Board in its order.

(2) The Commissioner of Customs 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 Customs in his order."* * * * * * * * * "Section 35E (1) The Board may, of its own motion, call for and examine the record of any proceeding in which a Commissioner of Central Excise as an adjudicating authority has passed any decision or order under this Act for the purpose of satisfying itself as to the legality or propriety of any such decision or order and may, by order, direct such Commissioner or any other Commissioner to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by the Board in its order.

(2) 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." Section 129D(1) of the Customs Act, 1962 and Section 35E(1) of Central Excise Act, 1944 initially provided that Board may direct 'such Commissioner' to file appeal to the Appellate Tribunal, but these provisions have been amended by the Finance Act, 2001, to provide that Board may direct 'such Commissioner or any other Commissioner' to appeal to the Tribunal. Admittedly similar amendments have not been made to Section 129D(2) and Section 35E(2) which require the Commissioner to direct 'such authority' (i.e. the Adjudicating Authority) to file appeal before Commissioner (Appeals). Appropriate amendments to Section 129D(2) and Section 35E(2) providing for the Commissioner to direct 'such or any other authority' to file appeal before the Commissioner (Appeals) will set the matter at rest and it is for the Board to initiate proper steps for necessary legislative amendment in this regard so that such dispute as has arisen in the present case

can be eliminated in the future.

4. However, in the absence of such amendments as have been made in the case of Section 129D(1) and Section 35E(1), the dispute in the present case has to be resolved with reference to the existing law. It is seen that a series of decisions of the Tribunal cited by the Applicant Commissioner as well as the learned D.R. permit filing of appeals before the Commissioner (Appeals) by an authorized officer other than the Adjudicating Commissioner himself. In the case of Collector of Customs, Bombay v. Mirah Exports (P) Ltd. - 1987 (29) E.L.T. 401 (Tribunal), the majority decision of the three member Bench has ruled that an appeal filed by a Collector authorized by the Board was valid even though the adjudication order was passed by an Additional Commissioner. In the case of Sun Export Corporation v. Collector of Customs - 1989 (42) E.L.T. 308 (Tribunal), a two member Bench has held that an appeal filed by the Collector is valid although he may not be the officer who adjudicated the case. In the case of Collector of C.E.Bangalore v. Falcon Tyres Ltd. - 1997 (91) E.L.T. 649 (Tribunal) also, another two member Bench comprising of the then President has also held that the Collector can direct the Adjudicating Authority or any other officer to file an appeal by a harmonious construction of Sub-sections (2) and (4) of Section 35E of the Central Excise Act, 1944.

5. However, as pointed out by the learned Advocate for the respondents following three decisions of the Tribunal passed subsequently by two member Benches have essentially held that on review the Collector/Commissioner must authorize the Adjudicating Authority himself for filing appeal and that authorization to another officer to file appeal is not valid:-Dhampur Sugar Mills Co. Ltd. v. C.C.E. Meerut - 1999 (108) E.L.T. 498 (Tribunal,Supreme Industries Ltd. v. C.C.E. Indore - 1999 (114) E.L.T. 1003 (Tribunal), 3) C.C.E., Aurangabad - Flexoplast Abrasives (I) Ltd. - 2003 (55) R.L.T. 233 (CEGAT-Mum).

It is seen that these decisions starting with Dhampur Sugar Mills Co.

Ltd. (supra) which are contrary to the earlier decisions of the Tribunal, are based on a reference in Dhampur Sugar Mills Co. Ltd. (supra) to the Apex Court decision in the case of Collector of C.E. v.M.M. Rubber Co. - 1991 (55) E.L.T. 289 (S.C.). It is, however, seen that the Apex Court dealt with a totally different issue in the case of M.M. Rubber Co. (supra) as is evident from the opening paragraph of the Apex Court order which reads as follows:- "The short question of law that arises for consideration in this appeal is as to what is the relevant date for the purpose of calculation of the period of one year provided under Section 35E(3) of the Central Excises & Salt Act, 1944 (hereinafter called the Act)." In paragraphs 5, 6 and 7 of the said order, the Apex Court 'has set out some of the relevant provisions in the Act' before proceeding to decide upon the aforesaid issue set out in paragraph 1.

6. As such, the Apex Court had no occasion in the said case to deal with the dispute as to whether an authorization to file an appeal given to an official other than the adjudicating official is valid or not. As such, it is clear that Dhampur Sugar Mills Co. Ltd. (supra) and the subsequent decisions by the two member Benches of the Tribunal are based on an incorrect reference to the said Apex Court decision apart from being contrary to the earlier decisions of the Tribunal cited above.

7. Moreover, the right of Revenue to file an appeal against an illegal and improper order on review is a substantive right. Authorizing a particular officer to file the appeal against an illegal and improper order is a matter of procedure. The act of authorizing an officer different from the Adjudicating officer to file the appeal, when filing such appeal is warranted in the interest of public revenue cannot be questioned so long as the Commissioner, in whom the power of Review is vested, has applied his mind and has come to a conclusion that the order of the Adjudicating Authority is illegal or improper. Besides, the other party is put to no disadvantage by filing of an appeal by an officer other than the adjudicating officer who is authorized by the Commissioner after due review and proper application of mind to the adjudication order. It is immaterial who carries the appeal to the appellate authority from the reviewing authority and no legal injury can be said to have been caused to the other party by another authorized officer filing such appeal. After all, the act of filing appeal pursuant to the direction of the reviewing authority is a mechanical act and requires no application of any discretion on the part of the adjudicating/authorized official.

8. For the reasons stated above, I am unable to follow the decisions of the Tribunal in the case of Dhampur Sugar Mills Co. Ltd. (supra), Supreme Industries Ltd. (supra), and Flexoplast Abrasives (I) Ltd. (supra) which are contrary to the earlier decisions in the case of Mirah Exports (P) Ltd. (supra), Sun Export Corporation (supra), and Falcon Tyres Ltd. (supra). Following these earlier decisions of the Tribunal and for the additional reasons recorded above, I am of the view that the authorization issued by the Commissioner to the Deputy Commissioner to file an appeal against the order passed by the Commissioner is valid. Hence, I set aside the impugned order in appeal and remand the matter to the Commissioner (Appeals) for decision on merits. He shall grant an adequate opportunity of hearing to the respondents before passing a fresh order.