

Commissioner of Central Excise Vs. Metro Steel Rolling Mills, Konark

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jun-07-2004

Judge : S T S.S., T Anjaneyulu

Appellant : Commissioner of Central Excise

Respondent : Metro Steel Rolling Mills, Konark

Judgement :

1. All these appeals filed by the Revenue cover the same issue and are being disposed of by this common order.
2. After hearing both sides, we find that the issue on merits in this case i.e. the applicability of Notification No. 206/63 and subsequent Notification No. 208/83 as regards ship breaking scrap used as raw material for rerolling is covered in favour of the assesseees by the decision in L.G. Industries 2000 (148) ELT 43 as approved by the Supreme Court reported in 2003 (157) ELT A 209.
3. As regards the finding of the Commissioner (Appeals) and his dismissal of the Revenue's appeal filed before him, on the grounds that the original order was passed by the Additional Commissioner and the order of Revenue was a direction given to the Deputy Commissioner to file these appeals before the Commissioner (Appeals) which were not permissible was as held by the Tribunal in the case of Dhampur Sugar Mill Co. Ltd. v. CCE 1999 (108) ELT 498. Therefore it was held and appeals filed by the Assistant Commissioner/Deputy Commissioner when the subject Orders-in-Original were passed by the Additional Commissioner were

dismissed. Hence these appeals.

4. It is found that the question has been well settled in the case of Dhampur Sugar Mill Co. Ltd. v. CCE 1999 (108) ELT 498, wherein in para 7 the Tribunal has observed as under: 7. We have considered the submissions made by both the sides. Two questions arise for decision in this appeal. One is whether the direction given by the Collector to Assistant Collector, Moradabad to file an application before the Collector (Appeals) under Section 35E(2) was a legal valid direction and (2) whether the Superintendent while awarding interest by his order, dated 23-4-1991 was acting on authority of the order given by the Hon'ble High Court under Article 226 or whether he was acting within the powers given to him under the Central Excise Act. Section 35E(2) reads as under : "The Collector 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 Collector (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Collector of Central Excise in his order".

On a careful reading of the provisions of Section 35E(2), it is quite clear that the power given to the Collector is to call for and examine the record of any proceeding in which an adjudicating authority subordinate to him had 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 direct "such authority" to apply to the Collector (Appeals) for determination of such points arising out of the decision or order. It is quite clear that Section 35E(2) contemplates only one authority whose orders or decision 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 sub-section for giving the direction to any other authority to make an application to the Collector (Appeals). In the instant case, we find that though the order was passed by the Superintendent, the direction that was given by the Collector to file an application against their order was to the Assistant Collector and not to the Superintendent. On a plain reading of the provisions of Section 35E(2), therefore, the direction given to the Assistant Collector as in the present case is clearly not permissible under Section 35E(2). We derive support for this view from the Apex Court decision in *C.C.E. v. M. Rubber Co.* (supra) relied on by id. Counsel.

From the last sentence of the para extracted hereinabove, it is very clear that the Bench have derived support from the Appex Court's decision in the case of *CCE v. M.M. Rubber Co* after having considered the decision of the Tribunal in the case of *Collector of Central Excise, Bangalore v. Falcon Tyres Ltd.* 649. Therefore, we find no merits in the plea being made now by the Id D.R. calling for to rely on the case of *Sun Exports 1989 (42) ELT 308*, and *Mirah Exports Pvt Ltd 1987 (29) ELT 401*, & *Falcon Tyres*, since those orders were passed before the Supreme Court's decision in the case of *CCE v. M.M. Rubber Co* was pronounced on 4.9.1999. Para 6 of the Supreme Court's decision in *M.M. Rubber Co* reads as under: "6. It may be seen that the direction to file an appeal under these two sub-sections by the Board and the Collector, as the case may be, is to the very adjudicating authority who would otherwise be bound by his own order and not expected to be aggrieved by the same. When an appeal is filed on such direction, the appellant will be the adjudicating authority himself and not the authority who gave the direction." This may not amount to ratio discendi pleaded by the Ld D.R., but this para in the Supreme Court's decision cannot be ignored. Even obiters of Supreme court would be binding. We find therefore no reasons to uphold the plea being made of referring the matter to the Larger Bench in view of the decisions relied by DR, since they were arrived at without the benefit of the decision in *M.M. Rubber Co*.

5. In this view of the matter, when we find that there is no material to sustain the revenue's case on merits, and there is no reason for us to refer the matter to the Larger Bench, as pleaded, we would uphold the order as arrived at by the learned

Commissioner (Appeals). The appeals being bereft of any merits are therefore dismissed.

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