

Commissioner of C. Ex. and Cus. Vs. Pradeep Kumar Shyam Sukha

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Nov-29-2005

Judge : J Balasundaram, Vice-, T Anjaneyulu, S T S.S.

Appellant : Commissioner of C. Ex. and Cus.

Respondent : Pradeep Kumar Shyam Sukha

Judgement :

2. The relevant provision of Section 35E at the material time read as under: 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 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 as to the legality or propriety of any such decision or order any 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.

3. The case before us is one falling under the provisions of Sub-section (1) of Section 35E. Under this provision, the Board is empowered to direct that a Commissioner should apply to the Appellate Tribunal for determination of points specified by the Board arising out of his decision or order. The Commissioner has not been empowered to authorize any Central Excise Officer to apply to the Tribunal on his behalf. A similar provision namely, Section 35G as it then stood, relating to Reference Application, was interpreted by the Tribunal in the case of Collector of Central Excise, Cochin v. Indian Oil Corporation wherever the legislature thought it fit, the Collector was empowered, to delegate his power to subordinate Excise officer to do or perform and act on his behalf, but under Section 35G, the Collector has not been so empowered and therefore, Reference Application filed by the Assistant Collector against Tribunal's order was dismissed as not maintainable, as it was only the Collector who was competent to file the Reference Application under this Section.

4. Sub-section (1) of Section 35E has been interpreted by the Tribunal in this case of Baron International Limited v. Commissioner of Customs & Central Excise, Vadodara so as to mean that the Board is empowered to assign the function of a particular level of the officer to another officer of the same level. The contention of the Company that the direction under Section 35E(1) to the adjudicating authority for filing against his own order should be to the same person who passed the order, was rejected and it was held that the expression "such Commissioner" occurring therein is to be interpreted liberally to include successor Commissioner also, even for a period prior to the amendment to the Section by which the expression "any other Commissioner" was included. The Tribunal held that Sub-section (1) of Section 35E speaks of only one level of Officer of Central Excise i.e.

Commissioner, in contrast to Section 35E(2), which speaks of an adjudicating authority subordinate to the Commissioner, which would cover different levels of Officers such as, Assistant Commissioner, Joint Commissioner, Additional Commissioner etc. The Bench followed its earlier decision in Dhampur Sugar Mills Co. Ltd. v. Collector of Central Excise holding that the expression "such authority" in Section 35E(2) of the Central Excise Act means Officer of the same level as the one who had passed adjudication order. In GTC Industries Limited v. CCE, New

Delhi , the Tribunal has held that the direction to file appeal to the Tribunal is to be given by the CBEC to the Commissioner, who passed decision or order as an adjudicating authority. Commissioner of Central Excise v. Hari Vishnu Packing interpretation of provision of Section 35E(2). The impugned order therein was passed by a Joint Commissioner; the Commissioner reviewed the order and authorized the Deputy Commissioner of file in appeal against Joint Commissioner's order before the Commissioner (Appeals).

The Bench held that the decision in Dhampur Sugar Mills Ltd. , which so related to interpretation of Section 35E(2) was contrary to earlier decisions of the Tribunal in Collector of Central Excise, Mumbai v. Mirah Exports (P) Ltd , Sun Export Corporation v. Collector of Customs and Collector of Central Excise, Bangalore v. Falcon Tyres Limited on the interpretation of Section 35E(2). However, in none of these three cases it was held that an appeal filed by an Officer of lower level than the Commissioner was maintainable. In the case of Mirah Exports (P) Ltd, the Tribunal held that an appeal filed by the Collector, who was authorized by the Board was valid even though the adjudication order against which an appeal was filed, was passed by the Additional Commissioner. The Ld. Collector included an Additional Collector and they had concurrent jurisdiction. In Sun Export Corporation, the Tribunal held that an appeal filed by the Collector was valid even though he may not be the Officer who adjudicated the case. It was held in cases, where adjudicating authority is not available for being directed to file an application, it is reasonable to Conclude that the direction can be fulfilled by any Customs Officer authorized by the Collector although he may not be the Officer, who adjudicated the case. In Falcon Tyres' case, the adjudication order was passed by the Assistant Collector, while the appeal before the Tribunal was filed by other Assistant Collector (Assistant Collector - Legal).

The Tribunal held that while Sub-section 35E states that the Collector can direct "such authority" to apply to the Collector (Appeals), the Sub-section (4) contemplates an application being filed before the Tribunal or before the Collector (Appeals), as the case may be, by "the adjudicating authority or by authorized Officer". If the words "such authority" in Sub-section 2 are to be understood in a restricted sense as indicating only the Officer who actually passed the adjudication

order, the question of an "authorized officer" other than adjudicating authority filing an application under Sub-section (4) would not arise.

The Bench held that there is an apparent conflict between the language used in Sub-section (2) and Sub-section (4) and that harmony between the two provisions requires that Sub-section (2) is to be understood as enabling the Collector of Central Excise to issue direction either to any other proper officer. In those cases as recorded by the Bench in CCE v. Hari Vishnu Packing (supra) there was no case of a different level of authority than the Adjudicator being directed. The authority was of a Collector or of a same level, as held in Dhampur Sugar Mills Ltd. . In the context of the present case, there is no conflict between Sub-section (2) and Sub-section (4) of Section 35E for the reason that sub-section uses expression "Commissioner of Central Excise as adjudicating authority" and "such Commissioner" and Sub-section(4) also uses expression "adjudicating Officer". The level of the Officer remains the same. Further, as already indicated herein above, the language of Sub-section (1) is clear and un-ambiguous and provides for the Board to direct only the Commissioner to apply to the Appellate Tribunal and not any other level officer.

6. In this case, it is not a question of mere presentation of an appeal. The appeals have been filed by a Superintendent (Appeals) and filing of an appeal is certainly cannot be a ministerial function, but a substantive function. Which cannot be further delegated to any other officer by the Commissioner, who is the officer to whom a direction was given by the Board under Section 35E(1).

7. In the light of the above, we answer the reference by holding that the Commissioner who is directed by the Central Board of Excise & Customs to file appeal under Section 35E(1) read with Section 35E(4) of the Central Excise Act, 1944, cannot validly authorize the Superintendent (Appeals) Central Excise and Customs to present such application (appeal) to the Appellate Tribunal, and the appeal as filed will not be maintainable.

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