

Commissioner of Central Excise Vs. Shree Ganesh Dyeing and Printing

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jun-29-2006

Reported in : (2006)(111)ECC622

Judge : K Kumar, S T Chittaranjan, T Anjaneyulu

Appellant : Commissioner of Central Excise

Respondent : Shree Ganesh Dyeing and Printing

Judgement :

1. Heard both sides. The order was reserved on the preliminary objection raised by the learned advocate to the effect that nowhere in the appeal filed by the applicant Commissioner it has been mentioned that the Commissioner has formed an opinion that the order passed by the lower appellate authority is not legal or proper. In this regard, he relies on the Apex Court decision in the case of Collector of Central Excise, Vadodara v. Rohit Pulp Paper Mills .

We have not heard as yet either side on the merits of the case pending decision on the aforesaid preliminary objection.

2. We find that the impugned appeal has been filed under Section 35B of the Central Excise Act, 1944 against the order passed by the lower appellate authority. The relevant Sub-section (2) of the said Section 35B of the Central Excise Act, 1944, before its amendment in the year 2005, read as under: The Commissioner of Central Excise may, if he is of opinion that an order passed by

the Appellate Commissioner of Central Excise under Section 35, as it stood immediately before the appointed day, or the Commissioner (Appeals) under Section 35A, is not legal or proper, direct any Central Excise Officer authorized by him in this behalf (hereafter in this Chapter referred to as the authorized officer) to appeal on his behalf to the Appellate Tribunal against such order.

The aforesaid provision makes it clear that the Commissioner has to form an opinion that an order passed by the Commissioner (Appeals) is not legal or proper before directing a Central Excise Officer authorized by him to appeal on his behalf to the appellate Tribunal against such order. In the instant case, we find that the Commissioner himself has filed the appeal. The respondents have not taken any objection to the Commissioner himself filing the appeal instead of authorizing another official to file the appeal on his behalf and rightly so. Since the Commissioner has the powers to authorize someone else to file the appeal, he himself can also file the appeal.

3. We now deal with the other ingredient of Section 35B(2) that the Commissioner should have formed an opinion that the order of the Commissioner (Appeals) is not legal or proper. In *Rohit Pulp* (cited supra), the facts were slightly different. In the said case, the Collector simply authorized the Superintendent to file an appeal without applying her mind as was evident from the relevant authorization and note sheet order. In the instant case, we find that the Commissioner has himself filed the appeal running to 23 pages. He has dealt with each and every issue relating to the case at hand. The entire thrust of his appeal is that the order passed by the Commissioner (Appeals) is not correct and legal and his prayer is to set aside the said order and to restore the order of the original authority. The detailed appeal filed by the Commissioner clearly reveals application of his mind to each and every issue and it is not difficult to conclude that he has filed the said appeal because he has come to the conclusion that the impugned order in appeal is not legal and proper. For example, he has stated in Grounds of Appeal No. (3), "The Commissioner (Appeals) has erred in holding...". In Grounds of Appeal No. (6) he has noted, "The observations of the Commissioner (A) are not correct...". In Grounds of Appeal No. (7), he has noted, "further the Commissioner (Appeals) has not taken cognizance of any of the case laws cited by the original adjudicating

authority...." On the whole, a detailed reading of the appeal filed by the Commissioner leaves one in no doubt that he has formed a clear opinion that the order passed by the Commissioner (Appeals) is neither legal nor proper and he has given detailed reasons for the same supported by case laws praying for setting aside the said order. We have, therefore, no doubt in our mind that the appeal filed before us under Sub-section (2) of Section 35B of the Central Excise Act, 1944 is maintainable. Hence, we reject the preliminary objection raised by the learned advocate for the respondents and fix the case on 2.1.2006 for hearing the appeal on merit. recorded Sd/-19-1-06 Sd/-(Krishna Kumar) (Chittaranjan Satapathy) Member (J) Member (T) 4. I have perused the order recorded by the Hon'ble Member (Technical).

I am not convinced with the order recorded by him. Provisions of Sub-section (2) of Section 35B of the Central Excise Act, 1944 as is relevant for the purpose of the case is already reproduced in the order of the Id. M(T). A bare perusal of the provisions shows that the Commissioner has to record his opinion that the order passed by the appellate Commissioner is not legal or proper and on such opinion having been formed, he may direct any Central Excise Officer authorized by him on his behalf to appeal in the appellate Tribunal against such order. The section in no way authorizes the Commissioner himself to file an appeal. Thus, to hold that the Commissioner is competent to file the appeal himself will tantamount to re-write the provisions which are not found in the said section and will also be extraneous to the provisions of law. The Apex Court has clearly laid down that if the law prescribes a thing to be done in a particular manner, it has to be done in that manner alone and it cannot be done in any other manner.

Therefore, the view of Id. Member (Technical) that the Commissioner can file the appeal himself is based on consideration which is extraneous to the provisions of law.

5. The Id. Counsel for the respondent has relied on the decision of the Apex Court in the case of CCE, Vadodara v. Rohit Pulp Paper Mills , wherein the Hon'ble Apex Court has inter alia held that the provisions of Section 35B(2) clearly required as a pre-requisite to the direction to any Central Excise Officer to file an appeal. The

formation of the opinion by the Collector that the order against which the appeal is to be filed is "not legal or proper." Since no such pre-requisite condition was fulfilled, the Hon'ble Apex Court has dismissed the appeal filed by the Revenue. In the present case also the Commissioner instead of forming an opinion that the order appealed against is "not legal and proper" has preferred to file appeal himself.

6. Therefore, I am of the opinion that the appeal filed by the Revenue is not maintainable. Since the appeal does not sustain on the preliminary objection, I do not consider it necessary to go into merits of the case. The appeal needs to be dismissed as not maintainable.

(Kris 7. Since difference of opinion has arisen between the Member (Judicial) and Member (Technical), the question has been formulated for reference to the 3rd Member: Whether in view of the facts and the legal position as explained in the order of Member (Technical) and Member (Judicial), the appeal of the Revenue is to be rejected on the preliminary objection raised by the Counsel for the respondent. Sd/-14-3-06 Sd/-(Krishna Kumar) (Chittaranjan Satapathy) Member (J) Member (T) 9. I have perused the two separate orders passed by the Ld. Member (Technical) as well as the Ld. Member (Judicial) in respect of preliminary objection raised by the respondents as to the maintainability of the appeal. After due consideration of the submissions made by both sides and in the light of the ratio laid down in the case of Collector of Central Excise, Vadodara v. Rohit Pulp Paper Mills Collector of Central Excise, Mumbai v. Bombay Switchgear, which followed the decision of the Supreme Court as cited Supra, I am in full agreement with the order passed by the Ld. Member (Judicial).

10. The Ld. Member (Technical) basing on grounds of appeal appears to have formed an opinion that the order impugned is 'not legal and proper' and as such the opinion formed by the learned Commissioner, Central Excise need not specify in specific terms about illegality and impropriety in the impugned order. As a matter of fact, the Memorandum of Appeal deals with statements of facts involved in the case and grounds of appeal would show errors on fact findings and issue of law, on which appeal is to be decided. In whatever manner or fashion one may

express on the grounds of appeal to point out infirmities in the impugned order, it does not tantamount to formation of an opinion within the meaning of Section 35B(2) of Central Excise Act, 1944. The Sub section makes it clear that formation of an opinion about the impugned order passed by the Commissioner (Appeals), Central Excise, is one act and filing of the appeal at the subsequent stage after formation of such an opinion is a different act. The subsequent act can not rectify the infirmity of the first act as both the acts are being performed by two different authorities at different stages. Therefore one can not venture to cull out the meaning of the words not legal and proper from the grounds of appeal as it is completely outside of the scope of Section 35B(2) Central Excise Act, 1944. Therefore, in my considered opinion the Ld. Member (Technical) has erred on this aspect.

11. The learned Member (Technical) while dealing with another objection about the maintainability of the appeal by the Commissioner himself has noted that this objection is not taken by the respondents whereas the Ld. Member (Judicial) in the very same order had also dealt with this objection. This goes to show that the appellants have taken the objection with regard to the formation of defective opinion about the impugned order passed by the lower appellate authority and as well as the propriety of the Commissioner himself in filing the appeal instead by another officer on due authorisation. As a matter of fact Section 35B (Sub-section 2) comprises both these elements. In this context it is to be said that the appellants obviously raised both these grounds otherwise the Ld. Member (Judicial) could not have deal with the same.

12. The Id. DR. Mr. N.V.B. Nair points out as per Section 12E of the Central Excise Act, the Commissioner of Central Excise can perform the duties of any other Central Excise Officer sub-ordinate to himself and filing the appeal by the same Commissioner is no way defective. Thus the Id. DR justifies an act of Commissioner of Central Excise in filing this appeal by virtue Section 12E of the Central Excise Act. At this juncture, it is to be observed that Section 12E and Section 35B are provided in the Act to achieve different objectives and incorporated separately in different context in the Act. In case the Commissioner of Central Excise, intends to file the appeal himself by exercising the powers under

the proviso of Section 12E of the Act nothing prevented him to do so subject to mentioning the same in the opinion / authorization and later filing appeal himself exercising the powers of a subordinate to whom he had authorized to file Appeal. Under any circumstances, this kind of action on the part of the Commissioner can not be in compliance to Sub-section 2 of Section 35B of Central Excise Act, 1944.

13. Thus in the light of aforesaid discussions and in my considered opinion the present appeal is not maintainable on the ground of these objections raised and as recorded by the Ld. Member (Judicial).

Therefore, I am in full agreement with the said order.

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