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Commissioner Central Excise Vs. Lloyds Metals and Engg. Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jul-12-2006

Judge : A Wadhwa, A T K.K.

Appellant : Commissioner Central Excise

Respondent : Lloyds Metals and Engg. Ltd.

Judgement :

1. The respondent in this case were issued show cause notice seeking to deny them modvat credit on certain items of capital goods which do not appear to satisfy the definition of capital goods under Rule 57Q of the Central Excise Rules, 1944. The. show cause notice was adjudicated by the Addl. Commissioner who held these items as eligible items of capital goods entitled to modvat credit and accordingly allowed the modvat credit.

2. In pursuance of the powers conferred under Section 35E(2) of the Central Excise Act, the Commissioner of Central Excise, called for and examined the said order in original and authorised and directed the Asstt. Commissioner, Central Excise, Nagpur to file an appeal before the Commissioner (Appeal) with the prayer for setting aside the said order in original.

3. The Commissioner Central Excise however, held that the appeal filed by the department is not maintainable on the ground that the Commissioner, Central Excise had directed the Asstt. Commissioner who was not adjudicating authority and therefore the appeal was not legal and valid under Section 35E(2) of the

Central Excise, Act, 1944 and that such authorisation could have been given only to the Addl.

Commissioner and not to any other authority subordinate to Commissioner. The Commissioner (Appeal) has placed his reliance on the decision of the tribunal in case of Dhampur Sugar Mills Ltd. v. CCE.Meerut 4. The revenue has come up in appeal against the above order of the Commissioner (Appeal). It has been contended by the revenue that under Section 35E(2) the Commissioner of Central Excise is empowered to call for and examine any order passed by an adjudicating authority subordinate to him and if necessary the Commissioner is also empowered to direct such authority to apply to the Commissioner (Appeal) for determination of such points as may be specified by him in his order.

From the above it follows that the expression "such authority" and "such points" should be qualified by the clause 'as may be specified by the Commissioner of Central Excise in his order". It was submitted that the Commissioner (Appeal) has failed to notice that the expression "such authority" used in the said sub-section is also to be qualified by the clause "as may be specified by the Commissioner of Central Excise in his order ". The word " such authority" is also to be ' qualified by the clause "as may be specified by the Commissioner in his order" is also established from the contents of Sub-section 4 of the Section 35E(2) which reads as under: Where in pursuance of an order under Sub-section (1) or Sub-section (2) the adjudicating authority or the authorised officer makes an application to the appellate Tribunal or the Commissioner (Appeals)---- to such application.

The mention of the authorised officer in addition to the adjudicating authority in the said sub-section was necessitated because of the possibility of the Commissioner authorising an officer subordinate to him other than the adjudicating officer for filing an appeal under Section 35(E)(2) of the Central Excise Act. It was submitted that the tribunal in its recent decision in the case of Commissioner C.E. v.Blue Star Spinning Mills Ltd. has held that "such authority" under Section 35E(2) has to be read harmoniously with "adjudicating authority" or authorised officer in Section 35E(4) to avoid inconsistency between the two provisions and prevent; defeat of purpose of Section 35E. " Such authority" cannot be said to be only the

adjudicating authority and Commissioner can issue directions either to adjudicating authority or any other officer to file appeal. It was held that on review of the order of Additional. Commissioner, Commissioner can direct Assistant Commissioner to file appeal before the Commissioner (Appeals). It was further submitted that similar decision was given by the tribunal in the case of Collector of Central Excise v.Falcon Tyres Ltd. , (ii) Collector v. Mirah Exports (P) Ltd. , (iii) Sun Export Corporation v. Collector . The decision in Blue Star Spinning Mills Ltd cited supra was followed by the tribunal in the case of Commissioner, Hyderabad v. Usha Conductors (P) Ltd. Further the decision in Blue Star Spinning Mills Ltd has considered the Supreme Court's decision in Collector v. M.M. Rubber Co. which was duty distinguished. In view of above it was submitted that order of the Commissioner's (Appeal) should be set aside and the Addl.

Commissioner's order should be restored.

5. The Learned advocate for the respondent while referring to the provisions under Section 35E (2) and Section 35E(4) submits that the Section 35E(4) provides for making an application by adjudicating authority or authorised officer to the appellate tribunal or the commissioner (Appeals) within the period of 3 months from the date of intimation of the order under Sub-section 1 or Sub-section 2 to the adjudicating authority.

6. Both the Section 35E(2) and 35E (4) contemplates that the direction to file an appeal can be issued only to the adjudicating authority. It was submitted that the Supreme Court has in the case of C.C.E, v. M.M.Rubber held un unequivocal terms that the directions to file an appeal under the terms of Section 35E(2) can be given to the adjudicating authority. The relevant findings in the case of the M.M. Rubber Co. is as under: It may be seen that the directions 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 7. It was submitted that the decision of the tribunal in the case of GTC Industries Ltd. v. Commissioner of C.Ex. New Delhi

2002 (144) ELT 6342 (Tri. Delhi). wherein the Hon'ble Tribunal held that only such authority who has passed the order in the capacity as an adjudicating authority can be directed to file an appeal, an appeal by the department to the Supreme Court by way of special leave, to appeal/application was dismissed by the Supreme court as reported in 2003 (156) ELT A 214. This decision of the tribunal also distinguish the decision of the Tribunal in the case of Falcon Tyres Ltd. and Sun Export Corporation by holding that the same had been rendered prior to the Supreme Court's decision in the case of Collector v. M.M. Rubber.

8. It was submitted that the department has erred in placing reliance on the decision of the Tribunal in the case of C.C.E. v. Blue Star Spinning Mills Ltd. specifically followed in the case of C.C.E. v. Usha Conductors (P) Ltd. in as much as the decision in the case of Blue Star Spinning Mills Ltd. overlooks the facts that Section 35E(2) specifically provides that the directions to file an appeal can only be to an adjudicating authority.

It also overlooks the fact that in terms of Section 35E(4) the application to he filed before appellate tribunal or the Commissioner (appeal) is to be within 3 months from the date of receipt of order under Section 35E (1) or Section 35E(2) to the adjudicating authority.

The decision in the case of Blue Star Spinning Mills Ltd. and the decision of the tribunal in the case of Mirah Exports (P) Ltd. v. C.C.wherein the facts of that case the Board had directed the Collector of Custom to file an appeal before the appellate tribunal against the order of Addl. Collector. At that, point of lime the Addl. Collector was treated on par with the Collector and proceeding at this basis, he Tribunal held that even though the order was passed by the Addl.

Collector there was no infirmity in the Board's order directing the Collector to file appeal. It was submitted that the decision in the case of Mirah Exports (P) Ltd. was rendered prior to Supreme Court's decision in the case of M.M. Rubber and consequently does not lay down the correct law.

9. The decision of the tribunal in the case of Blue Star Spinning Mills is also not good law as the said decision is contrary to the observations of the Supreme Court

in the case of M.M. Rubber. Tt was submitted that even if the observation of the Supreme Court in para 6 of the said decision are considered as obiter dictum even then such obiter is a binding precedent. In this regard reliance is placed on the decision of the Bombay High Court in the case of Golden Tobacco Company Ltd. v. Union of India 1983 ELT 2238 (Bom.) wherein in paragraph 20 the Hon'ble High Court as held that obiter of the Supreme Court decision is also binding. To the same effect is the decision of the Madras High Court in the case of Madras High Court in the case of Supdt. of Central Excise, Kottayam v. MRF. 1979 (4) E.L.T.J. 89 (MAD) wherein the high Court in paragraph 8 of the said decision held that the obiter dictum of the Supreme Court is binding.

10. It was accordingly submitted that the Commissioner (Appeal) order is correct in law and should not be interfered with.

11. We have considered the submission. For better understanding the relevant extract of Section 35E (1), (2) and (4) are reproduced below.

Section 35E Powers of Board or (Commissioner of Central Excise) to pass certain Order (1) The Board may of its own motion, call for and examine the record of any proceedings 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 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) Where in pursuance of an order under Sub-section (1) or Sub-section (2) the adjudicating authority or the authorized officer makes an application to the Appellate Tribunal or

the Commissioner (Appeals) within a period of three months from the date of communication of the order under Sub-section (1) Or Sub-section (2) to the adjudicating authority, such application shall be heard by the Appellate Tribunal or the Commissioner (Appeals) as the case may ho, as if such application were an appeal made against the decision or order of the adjudicating authority and the provisions of this Act regarding appeals, including the provisions of Sub-section (4) of Section 35B shall,. So far as may be apply to such application.

12. A careful reading of the Section reveals that the Legislature has conferred powers on the Board and the Commissioner of Central Excise to review orders of the adjudicating authority. According to Section 35E(1) the Board may direct the Commissioner who passed the adjudication order or any other Commissioner to apply to the appellate Tribunal for determination of such points arising out of the adjudication order. Originally the words "any other Commissioner" was not there in the Section. In fact the above words were inserted by an amendment in the Finance Act 2001. However, 35E(2) confers powers on the Commissioner of Central Excise to review the order of any officer subordinate to him. In Section 35E(2) the Commissioner may direct such authority to apply to the commissioner (Appeals) for determination of such points arising out of the decision of the adjudication order. We can find a distinct difference in Section 35E(1) & E(2). In Section 35E(1) the Board can authorize the adjudicating authority or any other Commissioner whereas as per Section 35E(2), the Commissioner may direct only such authority, who passed the adjudication order. Had the intention been to authorize any officer other than the adjudicating authority also under the provisions of Section 35E(2) then there would have been no need to amend Section 35E(1) so as to enable the Board to authorize not only the Commissioner who adjudicated the case but any other Commissioner and therefore it appears that as per the wording of Section 35E(2) such adjudicating authority means the same level authority who has adjudicated the case and not the authority subordinate to him.

13. This view also finds support from the recent (sic) decision of the Lerger Bench in the case of Commissioner of Central Excise, Surat-I v.Shri Pradeep Kumar vide Order No. M/298 & 229/WZB/2005/EB/C-I dtd.29.11.2005 where under provision of Section 35E(1) Board has authorized Commissioner to file an appeal before the

Tribunal but appeal was filed by superintendent appeals who was authorised by the Commissioner to file appeal under the provision of Section 35F(4). The Larger Bench observation that the authorized officer has to be an officer of the level of adjudicating authority and not an officer subordinate to him.

14. In view of above, we uphold the order of Commissioner (Appeals) and reject the appeal filed by the Revenue.

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