**Asiatic Enterprises Vs. Commissioner of C. Ex. and Cus.**

**Asiatic Enterprises Vs. Commissioner of C. Ex. and Cus.**

**SooperKanoon Citation** : sooperkanoon.com/43699

**Court** : Customs Excise and Service Tax Appellate Tribunal CESTAT Calcutta

**Decided On :** Sep-18-2006

**Reported in** : (2008)(224)ELT406Tri(Kol.)kata

**Judge** : T Anjaneyulu

**Appellant** : Asiatic Enterprises

**Respondent** : Commissioner of C. Ex. and Cus.

**Judgement** :

1. Heard both sides. Vide the impugned Order, the Commissioner of Central Excise and Customs, Bhubaneswar has ordered for recovery of a Service Tax amount of Rs. 45,889.00 (Rupees forty-five thousand eight hundred and eighty-nine) from the appellants and crediting the same to the Consumer Welfare Fund under Section 11-AB in terms of Section 11B of the Central Excise Act, 1944, by setting aside the Order of the Deputy Commissioner, Rourkela, who has erroneously ordered for refunding the same to the assessee.

2. At the stage of admission of this appeal in this Tribunal, learned J.D.R., Shri A. Hore for the Revenue raises a point that since the value of the appeal is less than Rs. 50,000.00 (Rupees fifty thousand), the Tribunal may not exercise the discretion vested in it in admitting the appeal. The issue relates to the liability to pay Service Tax on services received on goods transport operators and the same was shifted to the service recipients by Notification No. 42/97-S.T., dated 5-11-97, which inserted Rule 2(d)(xvii) of the Service Tax Rules, 1994.

3. Learned Counsel for the appellants submits that Section 86 of the Finance Act, 1994 provides filing of an appeal before the Appellate Tribunal without vesting any power of discretion for admitting the appeal where the value is below Rs. 50,000.00 (Rupees fifty thousand).

Section 83 of the Finance Act, 1994 adopts certain provisions of the Central Excise Act, 1944, which specifically excludes the provisions of Section 35B of the Central Excise Act, 1944. There is a discretion vested with the Tribunal under Section 35B of the Central Excise Act, 1944 under the second proviso to Sub-section (1), either to refuse or to admit an appeal, where the disputed duty, penalty or fine does not exceed Rs. 50,000.00 (Rupees fifty thousand). According to the learned Counsel, the legislature in its wisdom felt it necessary to enact an independent provision for filing an appeal in the Appellate Tribunal under Section 86 of the Finance Act, 1994 without any reference to Section 35B of the Central Excise Act, 1944 under Section 83 of the Finance Act, 1994. Further he submits that the Appellate Tribunal acquires powers to hear appeals and make Orders under Section 35C of the Central Excise Act, 1944 and not under Section 35B of the Central Excise Act, 1944. Similar provision is made, vide Sub-section 7 of Section 86 of the Act giving powers to the Appellate Tribunal in respect of hearing appeals and making Orders in a limited manner and nothing to be construed under this provision as discretionary powers as provided under the second proviso to Section 35B(1) of the Central Excise Act, 1944.

4. In view of the aforesaid contentions raised by both sides, it is necessary to have a comparative study of both the provisions of Sections 35B and 35C of the Central Excise Act, 1944 with reference to the provisions of Sections 83 and 86 of the Finance Act, 1994. For better appreciation and comparative study, essence of the relevant provisions of Sections 35B and 35C of the Central Excise Act, 1944 as also Sections 83 and 86 of the Finance Act, 1944 are mentioned below :---------------------------------------------------------------------------------Section 35B of the Provision - Appeal to the Appellate TribunalCentral Excise Act,--------------------------------------------------------------------------------Sub-Section

(1) deals with filing in appeal by aggrieved person.--------------------------------------------------------------------------------First proviso to excludes jurisdiction of the Appellate Tribunal in certainSub-Section

(1) matters like loss of goods, rebate of duty on export, goods exported outside India without payment of duty.--------------------------------------------------------------------------------Second proviso to grants discretion to the Appellate Tribunal to refuse orSub-Section

(1) admit an appeal where the duty or penalty or fine in dis- pute is below Rs. 1,50,000/-.--------------------------------------------------------------------------------Sub-Section (1A) transfer of pending matters to Central Government which relates to issues contained in first proviso to Section 35B(1).--------------------------------------------------------------------------------Sub-Section

(2) Review by Committee of Commissioners and direction for filing of appeal by the Revenue.--------------------------------------------------------------------------------Sub-Section

(3) Limitation of 3 months for filing appeal.--------------------------------------------------------------------------------Sub-Section

(4) Filing of Cross Objection and limitation of 45 days for its filing.--------------------------------------------------------------------------------Sub-Section

(5) Discretion of the Appellate Tribunal to condone delay in filing Cross Objection.--------------------------------------------------------------------------------Sub-Section

(6) deals with Appeal and Application Fees----------------------------------------------------------------------------------------------------------
Section 35C of the Provision - Orders of the Appellate TribunalCentral Excise Act,--------------------------------------------------------------------------Sub-Section

(1) Power of the Appellate Tribunal in hearing appeals and making Orders---------------------------------------------------------------------------Sub-Section
(1A) Granting of adjournment in hearing by the Appellate Tribunal---------------------------------------------------------------------------Sub-Section

(2) Rectification of Order---------------------------------------------------------------------------Sub-Section (2A) The Appellate Tribunal to hear and decide appeal within 3 years. Proviso deals with validity of Stay Order and vacation of Stay Order after 180 days---------------------------------------------------------------------------Sub-Section

(3) The Appellate Tribunal to send a copy of the Order to Commissioner---------------------------------------------------------------------------Sub-Section

(4) Finality of the Order of the Appellate Tribunal--------------------------------------------------------------------------- Section 83 of the Finance Act, 1994 adopts the following Sections of the Central Excise Act, 1944 in relation to the Service Tax as they apply in relation to a duty of excise : Sections - 9C, 9D, 11, 11B, 11BB, 11C, 11D, 12, 12A, 12B, 12C, 12D, 12E, 14, 15, 33A, 35F to 35-O, 35-Q, 36, 36A, 36B, 37A, 37B, 37C, 37D and 40.

In the aforesaid provisions, Section 35B is omitted.---------------------------------------------------------------------------Section 86 of the Provisions in relation to the Service Tax Finance Act,---------------------------------------------------------------------------Sub-Section

(1) deals with the filing of an appeal by the aggrieved assessee under Sections 73, 83A, 84 and 85.---------------------------------------------------------------------------Sub-Section

(2) deals with the powers of the Board to direct the Commis- sioner of Central Excise to file an appeal before the Tribunal.---------------------------------------------------------------------------Sub-Section
(2A) empowers the Commissioner of Central Excise to direct any Central Excise

Officer to file an appeal on his behalf.--------------------------------------------------------------------------Sub-Section

(3) provides limitation of three months in filing an appeal.--------------------------------------------------------------------------Sub-Section

(4) empowers the respondents to file Cross Objections within a period of 45 days of the receipt of the notice in an appeal.--------------------------------------------------------------------------Sub-Section

(5) empowers the Appellate Tribunal in condoning the delay, if an appeal or memorandum of Cross Objections filed beyond the expiry of the relevant period.--------------------------------------------------------------------------Sub-Section

(6) deals with the mode of filing an appeal in a verified manner accompanied by a prescribed lee.--------------------------------------------------------------------------Sub-Section

(7) deals with the powers of the Appellate Tribunal in hearing the appeals and making Orders following the same procedure envisaged under the Central Excise, 1944. This provision appears to be similar to the provision of Sub-section

(1) of Section 35C of the Central Excise Act, 1944.--------------------------------------------------------------------------

5. The comparative study of the above-referred provisions of both the Acts reveal that Sub-section

(7) of Section 86 is limited in respect of exercizing power by the Appellate Tribunal in hearing the appeals and making Orders under the Central Excise Act, 1944 and not in respect of admission of appeal. The Appellate Tribunal acquires powers to hear the appeals and make Orders ' under Section 35C of the Central Excise Act, 1944 and not under Section 35B of the said Act. The discretion vested with the Appellate Tribunal to refuse or admit an appeal where the value of the appeal is below Rs. 50,000.00 (Rupees fifty thousand) under the second proviso to Section 35B(1) of the Central Excise Act, 1944, is not available to the Appellate Tribunal

under Section 86(7) of the Finance Act, 1994 or any other provision of the said Act for refusing or admitting an appeal. No separate provision under the Finance Act, 1994 is incorporated for hearing appeals and making Orders by the Appellate Tribunal, as provided under Section 35C of the Central Excise Act, 1944. It is seen that Section 86(7) similar to the provisions of Section 35C of the Central Excise Act, 1944 and not Section 35B, as such, the second proviso to Section 35B cannot be pressed into service under the Finance Act, 1994. This means that an appeal lie before the Appellate Tribunal by an aggrieved assessee against the Orders passed under Sections 73, 83A, 84, 85 of the Service Tax Rules 1994, irrespective of the valuation. Apart from the above, there appears to be substantial question of law involved in the present appeal and furthermore, this Tribunal had entertained two more appeals of the same appellants, though the value therein, much below Rs. 50,000.00 (Rupees fifty thousand).

6. In the light of the aforesaid discussions, the present appeal is admitted. Registry is directed to list the matter in its turn. Order accordingly.