

**The Commissioner of Customs and Vs. Apseb (Ap-epdcl)**

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

**Decided On :** Nov-27-2006

**Judge :** S Peeran, J T T.K.

**Appellant :** The Commissioner of Customs and

**Respondent :** Apseb (Ap-epdcl)

**Judgement :**

1. The Revenue is aggrieved with Order-in-Appeal No. 3/2004 dated 22.9.2004 passed by the Commissioner (A) holding that the officer who had filed the appeal before the Commissioner (A) was not properly authorized. The Commissioner (A) has also taken a note that the Commissioner while authorizing an authority has directed lower officer to file an appeal i.e. Asst. Commissioner, which is not legal and proper. She has noted that the authority who has passed the order is Joint Commissioner. Only such authority should have been directed to file the appeal and not a lower authority. She relied on several judgments. The finding recorded in Para 4 to 7 are reproduced herein below.

04. I have carefully gone through the case records and examined the position. The Review Order No. 2/2002 dated 13.5.2002 in C. No. V/2/46/2002 (Rev) has recorded the grounds for opining that the impugned order is not "legal and proper", while directing and authorizing the Appellant, an authority lower than the adjudicating authority in rank, to file an appeal with this forum on behalf of the adjudicating authority. The relevant statutory provision, Section 352(2) of the Central Excise Act, 1944 is extracted hereunder: (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, (emphasis supplied] 05. An interpretation of the phrase "such authority" in the statute should be totally and not partially consistent with its reference preceding the phrase. In the provision extracted above, the phrase "such authority" is consistent only to the extent of the authority whose decision is being reviewed under that provision, and not any other authority. Judicial interpretation is that the authorization may be made only to the same rank of the officer passing the order appealed against. In Commissioner of C. Ex., Mumbai-I v. PIRAMAL SPG. and WVG. Mills Ltd. reported in 2002 (149) E.L.T. 1198 (Tri. - Mumbai); Hon'ble Tribunal held: 8. In a number of cases we have considered the importance of such an authorisation. A Commissioner (Appeals) hears appeals against orders passed by the officers sub-ordinate to a Commissioner of Customs or a Commissioner of Central, Excise. As the law earlier stood, the executive Commissioner had the power to review any order passed by such a subordinate officer where he was of the impression that such order was neither legal nor proper. The law was specifically amended to afford greater protection to the assesseees against the Revenue minded Commissioners whereby the power of review was taken away.

Presently where the Commissioner is of the opinion that an order passed a subordinate officer is required to be reviewed, he has to empower and authorise an officer of the same rank as the one who made the doubtful order to file an application to the Commissioner (Appeals) to determine whether the order is (1) correct (2) legal or (3) proper in terms of Section 35EA(2) of the Act. The law required the Commissioner (Appeals) to hear such application made by the adjudicating authority as an appeal before him. Commissioner of Central Excise, NAGPUR v. Bajaj Plastics Limited before the Hon. Tribunal by the Department is the sustainability of the dismissal of a Departmental appeal by Commissioner (Appeals) solely on the ground that the Assistant Commissioner filed an appeal

against the Additional Commissioner's order on authorization by the Executive Commissioner. Hon. Tribunal held: 3. in the Revenue's Appeal, reliance has been placed on two decisions of CEGA namely: CCE, Bangalore v. Falcon Tyres Limited ; Sun Export Corporation v. Collector of Customs to claim that the Appeal filed by any other authorized officer is not invalid. The Commissioner (Appeals) has received upon the judgment of the CEGAT in the case of Dhampur Sugar Mills Co. Ltd. v. CCE, Meerut the 'adjudicating authority' can be directed to file an appeal in terms of Section 35E(2). The contrary decisions of CEGAT cited in support by the Revenue only try to read the other provisions, where any authorized officer can file appeal and by reading harmoniously held that "an authorized officer can also file appeal. The said proposition being against the express provision of law as analysed by the later decisions of the Tribunal, the latter decisions including the ones cited by the Respondents have to be preferred.

4. Consequently the Revenue Appeal deserves to be rejected. Hence rejected.

07. The cited case laws are squarely applicable to the instant appeal. Respectfully following the decisions taken by Hon. Tribunal, I hold that the instant Appeal has therefore been filed by improper authorization, and cannot be considered.

Revenue is aggrieved with this order and contend that the authority need not be given to such person only. It can be given to any officer of the Department and the term "such person" cannot be read to mean the person who has passed the order, it can be any Excise officer.

Therefore, the Commissioner authorizing any excise officer in terms of Section 35E(2) of the Central Excise Act is valid. Large number of judgments are cited in this matter.

2. The learned Counsel submits that a lower person in rank than the person who has passed the order cannot be authorized to file an appeal before the Commissioner (A). The term "such authority" appearing in Section 35E(2) of Central Excise Act refers to the person who has passed the order and not a lower officer. Therefore, the citations referred to by the Revenue in the memo of appeal have no applicability to the present case. He submits that the citations referred by

the Commissioner (A) are the cases which are to be applied to the present case. He further submits that even on merits, the issue is covered in their favour. He submits that the activity carried on by them such as bending, cutting of MS steels does not amount to manufacture. He prays for dismissing the Revenue appeal.

3. On a careful consideration, we notice that the term "such authority" appearing in the Section 35E(2) refers only to the person who has passed the order. The Commissioner of Central Excise cannot authorize a lower officer than the officer who has passed the order to file a Review Application before the Commissioner (A). The Commissioner (A) in the impugned order has correctly followed the citations on this point, which are already extracted supra. The citations referred to in the appeal memo have no bearing on this case. Hence, there is no merit in this appeal and the same is rejected.

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