Commissioner of C. Ex. Vs. Lloyd Insulation (India) Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-13-2007

Judge : P Das

Appellant : Commissioner of C. Ex.

Respondent : Lloyd Insulation (India) Ltd.

Judgement :
1. In these appeals, all the respondents raised a common preliminary objections and therefore these appeals are taken up for hearing together for disposal.

2. Mr. Bipin Garg, learned Advocate appearing on behalf of the respondents submits that the appeals filed by the Revenue under Section 35B(2) of Central Excise Act. 1944, are not maintainable on the ground that the appeals were signed by the Commissioner himself. He further submits that the Commissioner himself filed the appeals without recording his opinion that impugned order is "not legal and proper" and he is exercising powers of his subordinate officer in violation of Section 35B(2) of Central Excise Act, 1944. In this connection, he relied upon the decision of the Tribunal in the case of CCE, Surat-I v.Shree Canesh Dyeing & Printing Works reported in 2006 (76) R.L.T. 858 (CESTAT-Mum.), and the case of CCE, Surat-I v. Varun Dyeing & Printing Mills & Ors. and Vice Versa reported in 2007 (78) R.L.T. 438 (CESTAT-Mum.).

3. Mr. K.K. Anand, learned Advocate on behalf of the respondent No. 4 and 5 adopted the same argument. He further submits that the Hon'ble Supreme Court in

the case of Hotel & Restaurant Association v. Star India Pvt. Ltd. reported in 2007 (5) STR 161 (S.C.), at paragraph 52 observed that it is settled that when a power is required to be exercised in a particular manner, the same has to be exercised in that manner or not at all. He submits that the power of the Commissioner under Section 35B(2) of Central Excise Act, 1944 is required to be exercised in the manner as prescribed in the said section and not otherwise. It is contended by the learned Advocates that the appeals filed by the Revenue should be dismissed on this preliminary ground.

4. The learned authorized representative (DR) on behalf of the Revenue submits that it is revealed from the grounds of appeal that the Commissioner expressed his opinion that the impugned order is not legal and proper. He further submits that the right of the Commissioner to authorize subordinate officer to file appeal before the Appellate Tribunal itself indicates that the Commissioner himself may file appeal before the Appellate Tribunal. He submits that Tribunal in the case of CCE. New Delhi v. Kay Iron Works (P) Ltd. , held that appeal filed by the Collector himself instead of authorizing any subordinate officer is proper.

5. After hearing both the sides and on perusal of the records, the relevant portion of Section 35B(2) of Central Excise Act, 1944 is as under: (2) 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 Division Bench of the Tribunal in the case of Shree Ganesh Dyeing & Printing Works (supra) held that appeal filed by the Commissioner himself under Section 35B(2) of Central Excise Act, 1944 is not legal and proper and grounds of appeal do not tantamount to formation of such opinion. The other Division Bench of the tribunal in the case of Kay Iron Works (P) ltd., (supra) held that appeal filed by the Commissioner himself instead of authorizing any subordinate officer is legal and proper.

6. In view of the conflicting decision, the issue deserves to be decided by the larger bench of the Tribunal as under: Whether the appeal filed by the Commissioner himself under Section 35B(2) of the Central Excise Act, 1944 is maintainable 7. Registry is directed to place the matter before the Hon'ble President for constituting a Larger Bench for considering the issue and for a decision on this preliminary objection of the appeals.