(2007) 09 P&H CK 0071

In the Punjab And Haryana At Chandigarh

Commissioner APPELLANT

Vs

B.C. Kataria, General Manager, Dhillon Kool Drinks and Beverages Limited RESPONDENT

Date of Decision : 06-09-2007

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35A
Customs Act, 1962 — Section 128, 128A, 35G

Citation : (2008) 221 ELT 508

Hon'ble Judges : M.M. Kumar, J;Ajay Kumar Mittal, J

Bench : Division Bench

Judgement

M.M. Kumar, J.—This order shall dispose of C.E.A. Nos. 11 and 12 of 2006, which have been filed by the revenue u/s 35G of the Central Excise Act, 1944 (for brevity, ''the Act''), against the orders dated 14.3.2005 and 10.3.2005 respectively, passed by the Customs Excise & Service Tax Appellate Tribunal, New Delhi (for brevity, ''the Tribunal''), in Appeal Nos. E/367/05-NB-B and E/337/05-NB-B, as common question of facts are involved. The revenue has raised following question of law in both the appeals:

Whether Commissioner (Appeals) is still vested with the powers to remand back cases to the adjudicating authority consequent to the specific amendment in this regard carried out by the Finance Act, 2001 w.e.f. 11.5.201.

2. After hearing learned Counsel for the parties, perusing the Order-in-Original dated 23.3.2004, passed by the Adjudicating Authority (A-1), Order-in-Appeal dated 29.11.2004, passed by the Commissioner (Appeals) (A-2) and orders dated 14.3.2005 and 10.3.2005, passed by the Tribunal (A-3), we find that the matter is not res integra, inasmuch as, the same has already been decided in favour of the revenue by a Division Bench of this Court in the case of Commissioner of Customs, Amritsar v. Enkay (India) Rubber Co. Pvt. Ltd. (CUSAP No. 20 of 2006, decided on 8.3.2007). In the case of M/s Enkay (India) Rubber Co. Pvt. Ltd. (supra) the revenue has raised the issue as to whether the

power of remand, which was earlier conferred on the Commissioner (Appeals) by the Finance Act, 1980, was specifically taken away by the Finance Act, 2001 by amending the provisions of Section 128(3) of the Customs Act, 1962 (for brevity, ''the 1962 Act''). Those provisions are pari materia to Section 35A(3) of the Act before and after amendment. A Division Bench of this Court after referring to un-amended as well as amended provisions of Section 128A(3) of the 1962 Act has held as under:

After hearing learned Counsel for the parties, we find that there is merit in the contention raised on behalf of the Revenue. Once the power of remand has been expressly taken away by the Finance Act, 2001, which came into operation w.e.f. 11.5.2001, the Commissioner (Appeals) is divested of power to remand the case back to the Adjudicating Authority. It cannot be argued that the power of remand should still be read into the provision which survive after deleting the words ''or may refer the case back to the adjudicating authority with such directions as he may think fit for fresh adjudication or decision''. There is expression of necessary intendment in deletion of the aforementioned expression by the Legislature. In that regard we place reliance on the judgments of Hon''ble the Supreme Court in the cases of Hitendra Vishnu Thakur and Others Vs. State of Maharashtra and Others, ; Maharaja Chintamani Saran Nath Shahdeo Vs. State of Bihar and Others, ; and Garikapatti Veeraya Vs. N. Subbiah Choudhury, .

3. The ratio of the judgment as extracted above clearly brings out that amendment in Section 35A(3) of the Act was carried in the same manner by the Finance Act, 2001 itself in Section 128A(3) of the 1962 Act and a perusal of both the provisions in juxta position would show that they are same before and after amendment, which is reproduced as under: Section 128A(3) of the 1962 Act Section 35A(3) of the Act before before amendment: amendment:

The Commissioner (Appeals) may, after making such further inquiry as may be necessary, pass such order as he thinks fit confirming, modifying or annulling the decision or order appealed against, or may refer the case back to the adjudicating authority with such directions as he may think fit for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary:

Section 128A(3) of the 1962 Act after amendment:

(3) The Commissioner (Appeals) shall, after making such further inquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling the decision or order appealed against:

(3) The Commissioner (Appeals) may, after making such further inquiry as may be necessary, pass such order as he thinks fit confirming, modifying or annulling the decision or order appealed against, or may refer the case back to the adjudicating authority with such directions as he may think fit for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary:

Section 35A(3) of the Act after amendment:

(3) The Commissioner (Appeals) shall, after making such further inquiry as may be necessary, pass such order as he thinks just and proper confirming, modifying or annulling the decision or order appealed against:

4. Therefore, the ratio of Division Bench judgment in the case of M/s Enkay (India) Rubber Co. Pvt. Ltd. (supra) would squarely apply to the facts of the present case and the appeals filed by the revenue deserves to be allowed.

5. We are not impressed with the argument raised by learned Counsel for the assessee-respondent that the Commissioner (Appeals) would continue to enjoy power of remand after deletion of that power from Section 35A(3) of the Act, by amendment made by the Finance Act, 2001. We are of the considered view that reliance placed on the judgment of Gujarat High Court in the case of Commissioner of Central Excise Vs. Medico Labs and Another, is wholly misplaced as the Division Bench of this Court, of which one of us (M.M. Kumar, J.) is a member, in the case of M/s Enkay (India) Rubber Co. Pvt. Ltd. (supra) has concluded that by necessary intendment expressed by amendment carried by Finance Act, 2001 w.e.f. 11.5.2001, the power of remand from the Commissioner (Appeals) has been taken away. The reliance of learned Counsel for the assessee-respondent on the judgment of Hon''ble the Supreme Court as has been relied upon by the Division Bench of Gujarat High Court in the case of Union of India and Others Vs. Umesh Dhaimode, , is also not acceptable because in that case Hon''ble the Supreme Court was not dealing with a provision where earlier power of remand was given and by amendment that power was taken away. The short order by their Lordships'' in Umesh Dhaimode''s case (supra) is as under:

The then Judicial Commissioner, Goa, Daman and Diu, took the view that Section 128(2) of the Customs Act, 1962, as it then read, did not vest the appellate authority with the power to remand. Accordingly, he set aside such order and the Revenue is in appeal.

2. As the order under appeal itself notes, the aforesaid provision vested the appellate authority with powers to pass such order as it deemed fit confirming, modifying or annulling the decision appealed against. An order of remand necessarily annuls the decision which is under appeal before the appellate authority. The appellate authority is also invested with the power to pass such order as it deems fit. Both these portions of the aforesaid provision, read together, necessarily imply that the appellate authority has the power to set aside the decision which is under appeal before it and to remand the matter to the authority below for fresh decision.

3. We may point out that the respondent has not appeared but has filed an affidavit which suggests that the Customs, Excise and Gold (Control) Appellate Tribunal had also taken the view that the appellate authority, on an application made to it by another person in the same position as the respondent, could not have remanded this matter. If that order of the tribunal remains in operation, the

authority below shall, notwithstanding this order, not be entitled to proceed.

4. With this reservation, the appeal is allowed and the judgment and order under appeal is set aside. No order as to costs.

6. It is, thus, evident from the perusal of judgment of Hon''ble the Supreme Court that their Lordships'' were not dealing with a situation where earlier the power of remand was specifically conferred and by amendment it was taken away, which is the situation in the case in hand. It is for the aforementioned reason that this Court in the case of M/s Enkay (India) Rubber Co. Pvt. Ltd. (supra) has concluded that there is necessary intendment available which has been expressed through amendment that the legislature did not prefer the Commissioner (Appeals) to exercise the power of remand. Therefore, with utmost respect to the Division Bench of Gujarat High Court we are unable to persuade ourselves to apply the judgment of Hon''ble the Supreme Court in Umesh Dhaimode''s case (supra) to the facts of the present case, as has been done by their Lordships'' of the Division Bench of Gujarat High Court in Medico Labs''s case (supra).

7. For the reasons aforementioned these appeals succeeds. Order dated 14.3.2005 (A-3) in C.E.A. No. 11 of 2006 and order dated 10.3.2005 (A-3) in C.E.A. No. 12 of 2006, passed by the Tribunal as also the orders passed by the Commissioner (Appeals) are set aside. These matters are sent back to the Commissioner (Appeals) for decision in accordance with law. As the matter has been pending before the Tribunal as well as this Court, we deem it just and appropriate to direct the Commissioner (Appeals) to decide the appeals within a period of four months from the date of receipt of certified copy of this order.

8. The Appeal stands disposed of in the above terms.

