
(2011) 09 KAR CK 0013

In the Karnataka High Court

Case No : CEA No's. 107 and 126 of 2009

Commissioner of Central Excise and St, Large Taxpayer Unit,
Bangalore

APPELLANT

Vs

Dell International Services India Private Limited

RESPONDENT

Date of Decision : 22-09-2011

Acts Referred:

Central Excise Act, 1944 — Section 35 B

Citation : (2012) 51 VST 432

Hon'ble Judges : Ravi Malimath, J;N. Kumar, J

Bench : Division Bench

Advocate : Y. Hariprasad, for the Appellant; G. Shivadass and Harish R., for the Respondent

Final Decision : Dismissed

Judgement

N. Kumar, J.—The Revenue has preferred these appeals challenging the order passed by the Tribunal holding that a second review is not possible and thereby upholding the order passed by the Commissioner. The assessee claimed refund in terms of GOI Notification 12/2005 ST April 19, 2005. The said claim was rejected on the ground that he has not complied with the legal requirement. Aggrieved by the said order the assessee preferred an appeal contending that he has satisfied all the conditions of the said notification to make him eligible for rebate sanction. The appellate authority set aside the order-in-original directing the assessee to prefer a claim with the jurisdictional Assistant/Deputy Commissioner of Central Excise. Accordingly he preferred and processed the claim for sanction in accordance with law. Against the said order, the assessee preferred an appeal to the Tribunal. The Tribunal allowed the appeal by remanding the matter back to the Commissioner (Appeals) for a denovo decision on merits within three months. Thereafter, the Commissioner heard the matter and passed an order on January 31, 2008 by setting aside the order passed by the adjudicating authority and held that the assessee is rightly eligible for the grant of rebate of taxes paid

on eligible input services which do fall within the definition of "input services" used for providing output services exported. He directed the original authority to work out his rebate in respect of the eligible input services/inputs and allow the same as rebate under the provisions of the Export Service Rules, 2005. The said order was received by the Committee of Commissioners on March 4, 2008 and after going through the order, they decided to accept the same on May 29, 2008. Therefore they did not object to the order and directed preferring of an appeal against the said order. The Chief Commissioner, on his own, felt that the acceptance of the order by the Committee of Commissioners is not proper in view of the fact that the issue was pending before the Tribunal in ST/115/2008. Consequent to the decision of the Chief Commissioner a second review was undertaken by the Committee of Commissioners on July 31, 2008. In the second review there was a difference of opinion between the Commissioners. Thereafter the Chief Commissioner decided to file an appeal before the Tribunal on August 13, 2008. Accordingly, the appeal was filed on August 20, 2008. There was a delay of 78 days in preferring the appeal. Therefore an application for condoning the delay was also filed along with the memorandum of appeal. In the appeal before the Tribunal the assessee contended that once the Review Committee of Commissioners decided to accept the order the matter ends there. There is no legal provision of law enabling them to sit in judgment over the decision of the Review Committee and therefore the present appeal filed is not maintainable. The Tribunal took note of the judgment of the Tribunal in the case of Commissioner of Customs, Tuticorin v. Madura Coats Pvt. Ltd. (2007) 216 ELT 86 (Tri.-Chennai) where at para 21 it is held as under :

21. On my careful consideration, I am of the opinion that the learned Member (Judicial) has rightly held in his order that once the review committee has taken a decision not to file the appeal before CESTAT, then in such circumstances they become functus officio. The facts of the case clearly disclose that the Chief Commissioner was aggrieved with the Review Committee's order and he has prevailed upon the review committee to review the position. Learned Member (Technical) in his order in para 10 has held that section 35B of the Finance Act does not mandate that the review once done cannot be reopened or revised. The section 35B of CE Act does not provide any remedy for reopening the review committee's decision. There is no provision in law to enable any other authority to sit over the review committee's decision. It is clear from the record that the Chief Commissioner has played a role in influencing the said Commissioners to recall their order passed as review committee Members dropping the matter and to accept the Commissioner (Appeals) impugned order. It is very clear from the record that the review committee has been influenced by the Chief Commissioner and the order is not free from bias. There is no provision u/s 35B of the CE Act to reopen or review the review committee's order. Therefore, the committee has become functus officio as held by Member (Judicial). I agree with his finding and the case law relied by him. The case law relied by Member (Technical) is clearly distinguishable and not applicable to the facts of the case as held in 2005 (192)

ELT 623 The decision once taken by authority not to file an appeal cannot be later reviewed and application seeking condonation of delay on that count cannot be entertained as held by Member (Judicial) and I agree with the same. The COD application is required to be rejected and so also the appeal. The matter should be placed before the original Bench for passing final order. Registry, Bangalore to return the files to the Registry, Chennai to place the matter before original Bench for passing the final order.

2. Following the aforesaid judgment the Tribunal held that the second review is not possible and therefore it dismissed the appeal. Aggrieved by the said order the Revenue is in appeal.

3. The learned counsel appearing for the Revenue assailing the impugned order contends that there is no prohibition in law for the members of the review committee to review the decision taken by them earlier. The decision taken by them at the second review is valid and as there was difference of opinion among the Members at the time of second review the Chief Commissioner has jurisdiction to take a decision to prefer an appeal and therefore the appeal preferred is legal and valid and therefore he submits that the Tribunal was not justified in dismissing the appeal as not maintainable.

4. Per contra, the learned counsel appearing for the assessee contended that in the absence of an express provisions in the Act providing for such a second review the decision to prefer an appeal, taken for the second time is one without the authority of law and therefore the appeal is not maintainable. The Tribunal was justified in taking the said view and he submits that no case for interference is made out. In order to appreciate the rival contentions it is necessary to look into section 86 which deals with the appeals to the Tribunal which reads as under : 86. Appeals to Appellate Tribunal.-(1) Any assessee aggrieved by an order passed by a Commissioner of Central Excise u/s 84, or an order passed by a Commissioner of Central Excise (Appeals) u/s 85, may appeal to the Appellate Tribunal against such order.

(2) The Board may, if it objects to any order passed by the Commissioner of Central Excise u/s 84, or the Commissioner of Central Excise may, if he objects to any order passed by the Commissioner of Central Excise (Appeals) u/s 85, direct the Central Excise Officer to appeal to the Appellate Tribunal against the order.

(3) Every appeal under sub-section (1) or sub-section (2) shall be filed within three months of the date on which the order sought to be appealed against is received by the assessee, the Board or by the Commissioner of Central Excise, as the case may be.

(4) The Central Excise Officer or the assessee, as the case may be, on receipt of a notice that an appeal against the order of the Commissioner of Central Excise or the Commissioner of Central Excise (Appeals) has been preferred under sub-section (1) or sub-section (2) by the other party may, notwithstanding that he

may not have appealed against such order or any part thereof, within forty-five days of the receipt of the notice, file a memorandum of cross-objections, verified in the prescribed manner, against any part of the order of the Commissioner of Central Excise or the Commissioner of Central Excise (Appeals) and, such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in sub-section (3).

(5) The Appellate Tribunal may admit an appeal or permit the filing of a memorandum of cross-objections after the expiry of the relevant period referred to in sub-section (3) or sub-section (4) if it is satisfied that there was sufficient cause for not presenting it within that period.

(6) An appeal to the Appellate Tribunal shall be in the prescribed form and shall be verified in the prescribed manner and shall, except in the case of an appeal referred to in sub-section (2) or sub-section (2A) a memorandum of cross-objections referred to in sub-section (4), be accompanied by a fee of two hundred rupees.

(7) Subject to the provisions of this Chapter, in hearing to the appeals and making orders under this section, the Appellate Tribunal shall exercise the same powers and follow the same procedure as it exercises and follows in hearing the appeals and making orders under the Central Excise Act, 1944 (1 of 1944).

For the purpose of this case what is relevant is sub-section (2A). The Committee of Commissioners if they object to any order passed by the Commissioner of Central Excise (Appeals) u/s 85 can direct any Central Excise Officer to prefer an appeal on its behalf to the Appellate Tribunal against the order. Therefore an appeal lies against the order of the Commissioner of Central Excise passed u/s 85 only in the event of the Committee of Commissioners objecting to the correctness of the said order. If there is no objection from any of the members if they accept the said order as correct, the question of preferring an appeal against the said order passed u/s 85 by the Commissioner of Central Excise would not arise. It is only when they object, where the said decision to object is unanimous or there is difference of opinion among the Commissioner among the Commissioners to constitute the Committee, then, they shall state the point or points on which they differ and make a reference to the jurisdictional Chief Commissioner, who shall, after considering the facts of the order if he is of the opinion that the order passed by the Commissioner of Central Excise (Appeals) is not legal or proper direct any Central Excise Officer to prefer an appeal to the appellate jurisdiction against the order. Therefore under the scheme of the Act it is clear that even if the Committee of Commissioners differ in their opinion and wants an appeal to be filed and sets points on which they differ, the jurisdictional Chief Commissioner to whom the reference is made is not bound to act on such reference. On such reference being considered by him and only if it is of the opinion that the order passed by the Commissioner of Central Excise is not legal or proper he may direct the Central Excise Officer to prefer an appeal. The intention of the Legislature in enacting this provision is manifest. It is to avoid

frivolous appeals. When once the Commissioner of Appeals has taken a decision the said decision has to be scrutinized by a committee consisting of two Chief Commissioners of Central Excise or two Commissioners of the Central Excise as the case may be. Only if they are of the view that the order passed by the Commissioner of Appeals is erroneous and not acceptable to them then they have to state the points on which they differ and then make a reference to the Jurisdictional Chief Commissioner. Here again the Jurisdictional Chief Commissioner cannot act mechanically and prefer an appeal. He has to apply his mind, take an independent decision and only if he is satisfied that a case for appeal is made out then only an appeal could be filed. In the scheme of the things the Legislature has not provided any provision for reviewing the decision once taken by the Committee of Commissioners or the Chief Commissioner. It is settled law that the power of review cannot be implied. It is the power which should be expressly provided under the statute. Merely because there is no prohibition under the Act for any authority to exercise the power of review, the authority would not get jurisdiction to review its own orders. It is only if such an express power is conferred under the statute on the authority it can review its order. If no such power is conferred there is no power of review. In that view of the matter, once the Committee of Commissioners on a careful examination of the order of the Commissioner of Appeals did not differ in their opinion and decide to accept the said order the matter ends there. The Chief Commissioner is not vested with any power to call upon the Committee of Commissioners to take a second look to review the order so that he could take decision to prefer an appeal. Such a procedure is not contemplated under law. In the nature of proceedings such a power cannot be conferred on the Chief Commissioner also. On a harmonious interpretations of the various provisions it is clear that once a decision is taken by the Committee of Commissioners the said decision is final and binding on the Chief Commissioner also. Therefore a review of its earlier decision by the Committee of Commissioners at the instance of Chief Commissioner is one without the authority of law. They had no jurisdiction and therefore the said proceedings which are commenced by virtue of the purported review for the second time is one without jurisdiction. Therefore the Tribunal was justified in holding that the appeal filed on the basis of the second review is not maintainable. In that view of the matter, we do not see any merit in this appeal. The appeal is dismissed. The substantial question of law is answered in favour of the assessee and against the Revenue.