

(2004) 09 GUJ CK 0076
In the Gujarat High Court

Case No : Tax Appeal No"s. 199 and 200 of 2004

Commissioner of Central Excise

APPELLANT

Vs

Medico Labs and Another

RESPONDENT

Date of Decision : 21-09-2004

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35A(3)

Citation : (2004) 192 CTR 112 : (2004) 117 ECR 276 : (2004) 173 ELT 117

Hon'ble Judges : Sharad D. Dave, J;B.J. Shethna, J

Bench : Division Bench

Advocate : Jitendra Malkan, for the Appellant;

Final Decision : Dismissed

Judgement

B.J. Shethna, J.—Both these appeals are disposed of by this common order, after hearing learned standing counsel Mr. J.M. Malkan for the appellant-CCE, Ahmedabad.

2. Order in original No. MP/63-65/DA/2000, dt. 27th March, 2000 was passed by the Dy. Commr. Central Excise, Division-IV, Ahmedabad, against M/s Medico Labs. Aggrieved by the same, M/s Medico Labs had filed Appeal No. 332 of 2003 before Commr.(A)-I, which was allowed by Mr. V.K. Jain, Commr.(A)-I, Central Excise, Ahmedabad, by his order dt. 12th June, 2003 and the matter was remanded for de novo consideration after setting aside the impugned order passed in original by the authority on 27th Aug., 2000.

3. M/s Medico Labs had filed refund claim of Rs. 85,812, which was sanctioned to them. On the basis of objection raised by the audit in post audit of refund claim, a show-cause notice dt. 20th March, 1992 was issued to M/s Medico Labs on the ground that the refund was erroneously granted in their favour as they have not produced any documents to show that the duty burden was not passed on by the Department (sic). However, later on Asstt. CCE, Division-IV, had withdrawn the said notice on 30th Oct., 1995. But, on review filed by the Department, the

Commr.(A), Central Excise, Vadodara remanded the matter to the authority for de novo adjudication by order dt. 5th Aug., 1999. However, in the de novo proceedings, the adjudicating authority confirmed the demand of Rs. 85,812 on the ground that they have failed, to produce any evidence to show that the incentive of duty was not passed by the Department (sic) to their customer. This order dt. 27th Aug., 2000 passed by the adjudicating authority in de novo proceedings was challenged in Appeal No. 332 of 2003 before the Commr.(A), Central Excise, Ahmedabad by M/s Medico Labs.

4. It was contended in the appeal before the Commr. (A) by the appellant, M/s Medico Labs, that they had already filed refund claim of Rs. 1,20,790 on 23rd May, 1991 for the excess duty paid by them for their invoice value which included central excise duty, but due to oversight the excess duty paid by them was not charged by the customs, and only the invoice value inclusive of central excise duty was charged by them and initially the Asstt. CCE had sanctioned refund of Rs. 85,812 and the remaining claim of Rs. 34,978 was dismissed as having become time-barred. Accordingly, they were paid Rs. 60,927 by cheque and remaining amount of Rs. 24,885 as credit in RG 23A Pt.-II and, thereafter, they were served with show-cause notice for recovery of previous refund. It was submitted that at the relevant point of time, Asstt. CCE had already examined the case on merits and found that his predecessor in office had examined the issue of unjust enrichment before sanctioning refund claim and accordingly he withdrew the show-cause notice.

5. Considering the facts and circumstances of the case and the material on record as well as submissions made by the appellant, the Commr.(A), Central Excise, Ahmedabad, allowed the appeal and set aside the order in original passed by the adjudicating authority and sent it for de novo consideration by remanding the matter to the adjudicating authority on the ground that the refund claim was earlier sanctioned by the earlier authority and, therefore, it was obvious that all the documents pertaining to refund claim would be lying with the office of the authority and though the appellant had claimed the original documents pertaining to the refund claim, they were specifically denied by the Asstt. CCE by letter dt. 28th April, 2003. Under the circumstances, the Commr.(A), in the interest of justice, remanded the matter to the original authority with the direction to go through the original documents pertaining to the refund claim of the appellants after supplying copies of the said documents to the appellant for making their submissions good on the basis of the said documents and after considering the submissions of the parties, directed the authority to decide the matter afresh by a speaking order in accordance with law (Annex. B). This was challenged in Appeal No. 2478 of 2003 by the CCE, Ahmedabad before the Tribunal.

6. Order in original dt. 31st Aug., 1999 was passed against M/s Texchem Corporation by the Dy. Commr., Central Excise, Division-IV, Ahmedabad, which was challenged in Appeal No. 341 of 2003 by the appellant, M/s Texchem

Corporation, before the Commr.(A), Ahmedabad. The said appeal came to be allowed by Mr. V.K. Jain, Commr.(A)-I, Central Excise, Ahmedabad by his order dt. 4th June, 2003 (Annex. B) and the order in original passed by the authority was quashed and set aside and the matter was remanded to the original adjudicating authority to decide the case as indicated in the order. We have already narrated in detail the facts of M/s Medico Labs, therefore, we have not narrated the facts of this case in detail, as common point is involved in both these appeals. Whether the Commr.(A) has any power of remand after amendment to Section 35A(3) which came into force w.e.f. 11th May, 2001 ?

7. The aforesaid order dt. 4th June, 2003 passed in appeal was also carried in appeal by the Commr., Central Excise, Ahmedabad, before the Tribunal in appeal. As stated earlier, in both the appeals common question of law came to be decided by the learned Single Member of the Tribunal by his impugned common order dt. 14th Oct., 2003 (Annex. A) whereby the learned Tribunal dismissed both the appeals. Hence, both these appeals.

8. The following two common questions of law have been framed by the appellant in both these appeals :

"(i) Whether the Commr.(A) continues to have the power of remand even after the amendment of Section 35A(3) of the Central Excise Act, 1944, by Finance Act, 2001 ?

(ii) Whether a single Member Bench can overrule a decision of the larger Bench on the same issue ?

We will deal with the second question first. In view of the difference of opinion between two Benches of the Tribunal on the issue as the single Member of East Regional Bench took view in 2002 (82) ECC 132 that even after the amendment the Commr. of Appeals has inherent power to remand the matter to the original adjudicating authority for de novo consideration. The referring Bench agreed with the same view. But it was noted that a Division Bench of Mumbai Bench of the Tribunal had taken a different view in 2002 (144) ELT 385 and held that after amendment w.e.f. 11th May, 2001, the Commr.(A) had no power of remand, the larger Bench of the Tribunal was called upon to decide the question "Whether Commr.(A) does have jurisdiction to remand the appeal before him after the amendment to Section 35A of Central Excise Act, 1944 by Finance Bill, 2001, w.e.f. 11th May, 2001 ?

The aforesaid question was answered in the negative by the larger Bench of the Tribunal by its order dt. 12th May, 2003 (Annex. C) by agreeing with the view taken by the West Region Bench in Vipor Chemicals (P) Ltd. v. Commr. of Customs (supra) and not agreeing with the view taken by the East Regional Bench in case of CCE v. Indian Aluminium Co. (supra).

9. It may be stated that the Department had never contended before the Commr. (A) in appeals filed by the other side that he had no power of remand the matter

after the amendment in Section 35A of the Central Excise Act, 1944, which came into force w.e.f. 11th May, 2001 and though both the appeals filed by the assessee came to be decided separately on 12th June, 2003 and 4th June, 2003, respectively, by Mr. V.K. Jain, Commr.(A), Central Excise, Ahmedabad, the Department had never brought it to the notice of the Commr.(A) about the larger Bench judgment of the Tribunal taking the view that the Commr. (A) has no jurisdiction to remand the case in appeal.

It appears that in view of the decision of the larger Bench of the Tribunal delivered on 12th May, 2003 the Department had taken up this contention before the learned Tribunal in both the appeals filed by them, but learned single Member of the Tribunal by his detailed impugned common order dt. 14th Oct., 2003 expressed his inability to agree with the view taken by the larger Bench of the Tribunal that Commr.(A) has no jurisdiction to remand the matter in appeal in view of the judgment of the Hon''ble Supreme Court in the case of Union of India and Others Vs. Umesh Dhaimode, and the judgment of the Andhra Pradesh High Court in the case of Thimmasamudram Tobacco Co. Vs. Asst. Collector of Central Excise, Nellore Dn. Nellore, as according to him the judgment of the larger Bench of the Tribunal delivered on 12th May, 2003 was not laying down the correct law and he was bound by the judgment of Hon''ble Supreme Court rather than the judgment of larger Bench of the Tribunal.

10. The appellant-CCE, Ahmedabad, in both these appeals has annexed the order dt. 12th May, 2003 passed by the Tribunal in other cases. From the said judgment of larger Bench of the Tribunal, it clearly appears that heavy reliance was placed by the Tribunal on the judgment of the Hon''ble Supreme Court in cases of (i) Shashikant Laxman Kale v. Union of India : AIR 1990 SC 2114 (ii) K.P. Varghese v. ITO AIR 1981 SC 1922 for coming to the conclusion that in appeal Commr.(A) has no power to remand the case.

With utmost respect to the larger Bench of the Tribunal, it had not considered the later judgment of the Hon''ble Supreme Court in case of Union of India v. Umesh Dhaimode (supra). Relying on this decision of Umesh Dhaimode (supra) the learned single Member of the Tribunal, in our considered opinion, rightly held that he was bound by the judgment of the apex Court rather than the judgment of the larger Bench of the Tribunal. He was bound to follow the judgment of the Hon''ble Supreme Court, which he did and rightly held that the Commr.(A) continues to have the power of remand under post 2001 provisions of the Central Excise Act, 1944.

11. In view of the above, we are of the considered opinion that, without properly understanding the judgment of the Tribunal, the appellant has framed second question of law in both these appeals, viz., "Whether a single Member Bench can overrule a decision of the larger Bench on the same issue." There is no question of overruling the judgment of the larger Bench. As stated earlier, the learned single Member has held that the judgment of the larger Bench of the appeal per incuriam in view of the judgment of the Hon''ble Supreme Court and he is bound

by the Hon"ble Supreme Court judgment and not by the judgment of the larger Bench of the Tribunal.

12. Once, we accept the judgment of the single Member of the Tribunal taking view against the Department, then the Commr.(A) continues to have the power of remand even after the amendment of Section 35A(3) of the Central Excise Act, 1944 by Finance Act, 2001, then the first question does not remain to be decided as substantial question of law.

13. We must also state that even after amendment, which has come into force w.e.f. 11th May, 2001, powers of remand by allowing the appeal of the Commr. (A) have not been taken away specifically. In that view of the matter, we are of the considered opinion that the appellate authority, viz., Commr.(A) was vested with the power while deciding the appeal as he deemed fit by confirming, modifying or annulling the decision or order appealed against him. In our considered opinion, order of remand necessarily annuls the decision, which is under appeal before the appellate authority. Therefore, we entirely agree with the view taken by the learned single Member of the Tribunal that even after amendment of Section 35A of the Central Excise Act, the appellate authority has the power to set aside the decision, which is under appeal before it and it has power to remand the matter to the authority below for its fresh consideration.

In view of the above discussion, both these appeals fail and are hereby dismissed.