(2014) 04 GUJ CK 0062

In the Gujarat High Court

Case No : Tax Appeal No. 276 of 2014

Commissioner of Service Tax APPELLANT

Vs

Associated Hotels Ltd. RESPONDENT

Date of Decision : 03-04-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35, 35A, 35A(3)
Customs Act, 1962 — Section 128(2)
Finance Act, 1994 — Section 85, 85(4)

Citation : (2014) 45 GST 210 : (2014) 27 GSTR 213 : (2015) 37 STR 723 : (2014) 72 VST 517

Hon'ble Judges : Sonia Gokani, J;Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Sejal K. Mandavia, Advocate for the Appellant

Final Decision : Dismissed

Judgement

Akil Abdul Hamid Kureshi, J.—Revenue has challenged the judgment of the Customs, Excise and Service Tax Appellate Tribunal dated 5-9-2013 raising following question for our consideration:

Whether the Customs, Excise and Services Tax Appellate Tribunal (CESTAT), West Zonal Bench, Ahmedabad is correct in holding that in service tax matters the Commissioner (Appeals) has power to remand the case back to the adjudicating authority for de novo adjudication?

Short question is whether the Commissioner (Appeals) exercising powers u/s 85 of the Finance Act, 1994 has the power to remand the proceedings back to the adjudicating authority. It would not be necessary to record the facts since this is a pure question of law, barring observing that in the impugned judgment, the Tribunal relying on the decision of the Delhi High Court in CST v. World Vision [2012] 35 STT 279/20 taxmann.com 592 held that u/s 85(4) of the Finance Act, 1994, the Commissioner (Appeals) would have power to remand a case to the adjudicating authority for fresh Consideration.

2. Section 85 of the Finance Act, 1994 pertains to appeals to the Commissioner of Central Excise (Appeals). Sub-section (1) thereof provides that any person aggrieved by any decision or order passed by an adjudicating authority subordinate to the Commissioner of Central Excise may appeal to the Commissioner of Central Excise (Appeals). Sub-section (3) provides for the period of limitation for filing such an appeal. Sub-sections (4) and (5) which are relevant for our purpose, read as under:

(4) The Commissioner of Central Excise (Appeals) shall hear and determine the appeal and, subject to the provisions of this Chapter pass such orders as he thinks fit and such order may include an order enhancing the service tax, interest or penalty:

Provided that an order enhancing the service tax, interest or penalty shall not be made unless the person affected thereby has been given a reasonable opportunity of showing cause against such enhancement.

(5) Subject to the provisions of this Chapter, in hearing the appeals and making orders under this section, the Commissioner of Central Excise (Appeals) shall exercise the same powers land follow the same procedure as he exercises and follows in hearing the appeals and making orders under the Central Excise Act, 1944 (1 of 1944).

It can thus be seen that under sub-section (4) of section 85 of the Finance Act, 1994, the Commissioner (Appeals) hearing the appeals can pass such orders as he thinks fit subject to the provisions of Chapter 130 in which the said section is contained and such orders may include an order enhancing the service tax, interest or penalty. Proviso to sub-section (4) provides that no order enhancing the service tax, interest or penalty shall be made without affording a reasonable opportunity to the person affected. Sub-section (5) of section 85 provides that subject to the provisions of the said Chapter, in hearing the appeals and making orders, the Commissioner shall exercise the same power and follow the same procedure as he exercises and follows in hearing the appeals and passing orders under the Central Excise Act, 1944.

3. In plain terms, sub-section (4) of section 85 of the Finance Act, 1994 is worded widely and gives ample powers to the Commissioner while hearing and disposing of the appeals to pass such orders as he thinks fit including an order enhancing tax, interest or penalty. Such powers would, therefore, inherently contain the power to remand a proceeding for proper reasons to the adjudicating authority. In absence of any specific bar in this respect, in our opinion, the appellate powers flowing from sub-section (4) of section 85 would clothe the Commissioner (Appeals) with power to even remand the proceedings. If proper inquiry is not conducted or the proceedings is decided ex parte, it would not be necessary in every case that the Commissioner (Appeals) converts himself to the adjudicating authority and conducts the entire inquiry necessary for proper adjudication of the issues. In such a case, the Commissioner (Appeals) may as

well decide to remand the proceedings, and we see no limitation on his powers to do so.

4. This is precisely how the situation has been viewed by various courts. Way back in the year 1961, a Division Bench of the Andhra Pradesh High Court in the case of Thimmasamudram Tobacco Co. Vs. Asst. Collector of Central Excise, Nellore Dn. Nellore, , in the context of section 35 of the Central Excise Act, 1944, as it stood at the relevant time, held that the power of remand is inherent in the appellate jurisdiction conferred on an appellate authority. Mere absence of such a specific provision in section 35 which speaks only of appellate authority passing such order as he thinks fit confirming, altering or annulling the decision or order appeal against, does not disable the appellate authority from sending the matter to the authority that passed the order for fresh inquiry.

5. In the case of Union of India and Others Vs. Umesh Dhaimode, , the Supreme Court in the context of section 128(2) of the Customs Act, 1962 as it stood at the relevant time, held and observed as under:

2. As the order under appeal itself notes, the aforesaid provision vested the appellate authority with powers to pass such order as it deemed fir 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

6. The Delhi High Court in the case of World Vision (surpa), in the context of section 85 of the Finance Act, 1944 itself confirmed the decision of the CESTAT holding that the Commissioner (Appeals) would have power to remand the proceeding to the adjudicating authority.

7. Insofar as section 85(4) of the Finance Act, 1994 is concerned, our view is clear and we agree with the view expressed by the Tribunal in the impugned judgment.

8. Counsel for the Revenue, however, drew our attention to section 35A(3) of the Central Excise Act, 1944 which came to be amended with effect from 11.5.2001. Prior to the amendment, the said provision read as under:

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.

After 11.5.2001, the amended section 35A(3) reads as under:

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.

9. On the basis of such changes made in sub-section (3) of section 35A, counsel would contend that the powers of remand which were previously specifically granted to the Commissioner (Appeals) were taken away. This conscious omission by the Legislature would necessarily mean that after 11.5.2001, the Commissioner (Appeals) would not have power to remand the proceedings in terms of section 35A(3) of the Central Excise Act, 1944. She would relate such limitation of powers to the present case by referring to sub-section (5) of section 85 of the Finance Act, 1994 which as we have noticed, provides that the Commissioner (Appeals) while hearing the appeals u/s 85 of the Act, follows the same procedure and exercises same powers which he does while hearing the appeals under the Central Excise Act, 1944.

10. Even after the amendment in section 35A(3) of the Central Excise Act, 1944, this Court in the case of Commissioner of Central Excise Vs. Medico Labs and Another, held that the Commissioner of Central Excise would retain the powers of remand. The Court relied on a decision of the Supreme Court in the case of Umesh Dhaimode (supra).

11. Ms. Mandavia for the appellant however, would draw our attention to a later decision of the Supreme Court in the case of MIL India Ltd. Vs. Commissioner of Central Excise, Noida, in which in the context of the nature of order passed by the appellate Commissioner, whether it can be treated as an order of assessment, the Court observed that with effect from 11.5.2001, by amending section 35A of the Central Excise Act, power of remand of the Commissioner (Appeals) has been taken away.

12. In the present case, we are not concerned with the power of remand of the Commissioner (Appeals) u/s 35A(3) of the Central Excise Act, 1944. In such a situation, the question would arise whether the decision of this Court in the case of Medico Labs (supra) would continue to hold the field even after the decision of the Supreme Court in the case of MIL India Ltd. (supra). The person aggrieved, be it Revenue or the assessee, would of course, contend that when there was conscious decision of the Legislature to amend certain power of remand which was previously specifically provided in the statute, the same would amount to taking away powers which hitherto existed. We need not however, enter into this arena because in the present case, we are not concerned with this provision of appeal.

13. We, however, cannot accept the argument of Ms. Mandavia that by virtue of sub-section (5) of section 85, the same limitation on the Commissioner (Appeals) to remand a proceedings contained in section 35A(3) of the Central Excise Act, 1944 must apply in the appeals u/s 85 of the Finance Act, 1994 also. This is so because, sub-section (5) of section 85 though requires the Commissioner

(Appeals) to follow the same procedure and exercise same powers in making orders u/s 85, as he does in the Central Excise Act, 1944 in appeals, this sub-section itself starts with the expression "subject to the provisions of this Chapter". Sub-section (4) of section 85 itself contains the width of the power of the Commissioner (Appeals) in hearing the proceedings of appeal u/s 85. The scope of such powers flowing from sub-section 85(4) therefore cannot be curtailed by any reference to sub-section (5) of section 85 of the Finance Act, 1994. In the result, the appeal is dismissed.