

(2008) 11 GUJ CK 0058
In the Gujarat High Court
Case No : Tax Appeal No. 276 of 2007

Commr. of C. Ex. and Cus.

APPELLANT

Vs

Shree Ganesh Dyeing and Ptng. Works

RESPONDENT

Date of Decision : 13-11-2008

Acts Referred:

Central Excises and Salt Act, 1944 — Section 12E, 12E(1), 2, 35, 35A

Citation : (2010) 18 STR 353

Hon'ble Judges : D.A. Mehta, J;Abhilasha Kumari, J

Bench : Division Bench

Advocate : Harin P. Raval, for the Appellant; Paresh M. Dave, for the Respondent

Final Decision : Allowed

Judgement

D.A. Mehta, J.—The appellant-Revenue has proposed the following question:

Whether the Hon"ble Tribunal is empowered to reject/set aside:

i. the Revenue appeal only on the ground that the appeal was filed by the Commissioner himself and not by an officer subordinate to him on the basis of his authorisation.

ii. the Revenue appeal without considering the merits of the case.

2. On 23-7-2008 notice was issued for final disposal by this Court. Though the appeal is listed for admission hearing, with consent of the learned Advocates appearing for the respective parties the appeal is taken up for final hearing today.

3. The following substantial question of law arises for consideration:

Whether on the facts and in the circumstances of the case, Customs Excise and Service Tax Appellate Tribunal is justified in law in dismissing the appeal as being not maintainable?

4. In light of the view that the Court is inclined to adopt, it is not necessary to set out the details of issues on which the adjudication order came to be made by

the adjudicating authority. Respondent-assessee carried the matter in appeal before Commissioner (Appeals) and succeeded. Revenue preferred appeal before the Tribunal. At the hearing of the appeal before the Tribunal, the representative of the assessee raised a preliminary objection as to maintainability of the appeal on the ground that the appeal had been filed by Commissioner himself, instead of by the Central Excise Officer authorised by the Commissioner, as required by Section 35B(2) of the Central Excise Act, 1944 ("the Act").

5. The two Members comprising the Bench recorded differing opinions on the preliminary issue. Member (Judicial) accepted the preliminary objection, while Member (Technical) rejected the preliminary objection. Hence the following question was formulated for the opinion of the third Member:

Whether in view of the facts and the legal position as explained in the order of Member (Technical) and Member (Judicial) the appeal of the Revenue is to be rejected on the preliminary objection raised by the Counsel for the Respondent.

The third Member vide order dated 28-4-2006 concurred with the view expressed by Member (Judicial). Thus, by a majority opinion, the appeal came to be dismissed as being not maintainable.

6. Mr. Harin P. Raval appearing for appellant-Revenue invited attention to provisions of Section 35B(1) of the Act to submit that the said provision granted a substantive right of appeal to any person who is aggrieved and such a right cannot be taken away by the Tribunal, even if there was non-compliance with procedural requirements of Sub-section (2) of Section 35B of the Act. It was further submitted that even Sub-sections (3), (4) and (5) of Section 35B of the Act were procedural in nature. That Sub-section (6) of Section 35B of the Act provided for filing an appeal as prescribed by the Rules and in the prescribed form. Referring to the definition of "Central Excise Officer" appearing in Section 2(b) of the Act, it was submitted that the said definition also included the Commissioner of Central Excise and, therefore, when the said words appear in Sub-section (2) of Section 35B, the term "Central Excise Officer" would also take within its sweep the Commissioner of Central Excise, who would be entitled to prefer an appeal. Referring to Section 12E(1) of the Act, it was submitted that the powers which Central Excise Officer can exercise were specified by said provision and, therefore, also Commissioner, Central Excise was entitled to prefer appeal.

Inviting attention to Sub-section (2) of Section 35B of the Act it was contended that formation of opinion by the Commissioner was not necessary when the Commissioner himself files an appeal. That the Tribunal could not have come to the conclusion that appeal was not maintainable. Reliance was placed on Karnataka High Court decision in the case of Commissioner of C. Ex., Bangalore-II I.T.C. limited. 2008 (221) E.L.T. 331 (Kar.) in support of the aforesaid proposition. Lastly, it was submitted that even if the Tribunal came to the conclusion that the appeal was defective, the same having been filed by Commissioner himself, instead of the person authorised, the defect was curable

and the Tribunal ought have granted opportunity for rectifying the defect.

7. On behalf of respondent-assessee, learned Advocate Shri Paresh M. Dave submitted that insofar as the Tribunal had held that Commissioner turns could not have preferred the appeal, in light of the subsequent decision by a Larger Bench of the Tribunal, the assessee agreed that the said view of the Tribunal was incorrect and the appeal of Revenue could not have been dismissed as being not maintainable. In relation to the requirement of formation of opinion, attention was invited to the Apex Court decision in the case of Collector of Central Excise, Vadodra Vs. Rohit Pulp Paper Mills,

8. The basic controversy revolves around correct construction of provisions of Section 35B, more particularly Sub-section (2) of the said Section. Hence for the sake of ready reference, the relevant extract of the provisions may be reproduced here-under:

Section 35B. Appeals to the Appellate Tribunal. (1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order

(a) a decision or order passed by the Commissioner of Central Excise as an adjudicating authority;

(b) an order passed by the Commissioner (Appeals) u/s 35A;

(c) an order passed by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) (hereafter in this Chapter referred to as the Board) or the Appellate Commissioner of Central Excise u/s 35, as it stood immediately before the appointed day;

(d) an order passed by the Board or the Commissioner of Central Excise, either before or after the appointed day, u/s 35A, as it stood immediately before that day.

(2) The Commissioner of Central Excise may, if he is of opinion that an order passed by the Appellate Commissioner of Central Excise u/s 35, as it stood immediately before the appointed day, or the Commissioner (Appeals) u/s 35A, is not legal or proper, direct any Central Excise Officer authorised by him in this behalf (hereafter in this Chapter referred to as the authorised officer) to appeal on his behalf to the Appellate Tribunal against such order.

9. On a plain reading, it becomes apparent that u/s 35B(1) of the Act any person who is aggrieved by any one of the four categories of orders mentioned therein is entitled to prefer an appeal against such an order before the Appellate Tribunal. u/s 35B(1)(b), an order passed by Commissioner (Appeals) u/s 35A of the Act is also appealable; similarly the order made by Appellate Commissioner of Central Excise u/s 35, as it stood immediately before "the appointed day", is also appealable under Clause (c) of Sub-section (1) of Section 35B of the Act.

10. However, when one comes to Sub-section (2) of Section 35B of the Act, it becomes clear that the right statutorily granted to file an appeal under Sub-

section (1) of Section 35B of the Act is defined by provisions of Sub-section (2) of Section 35B of the Act when Commissioner intends to prefer an appeal challenging the appellate orders made by either Commissioner (Appeals) or the Appellate Commissioner. The Commissioner is not entitled to challenge the other orders specified in other clauses of Sub-section (1) of Section 35B of the Act in exercise of powers under Sub-section (2) of Section 35B of the Act.

11. Section 35B(2) of the Act is made up of two parts or two stages. The first stage is formation of an opinion by Commissioner that the order made by the appellate authority is not legal or proper, the second stage being filing of an appeal against order of appellate authority by directing any Central Excise Officer authorised by the Commissioner in this behalf to file an appeal on behalf of the Commissioner. Thus, the Commissioner is vested with a discretion, in the first instance to form an opinion as to whether appellate order is legal or proper and then exercise the discretion to decide whether an appeal should be preferred or not, having come to the conclusion that the order is not proper or legal.

12. In the circumstances, the first stage as to formation of an opinion, cannot be treated as an idle formality and the view expressed by Member (Technical) that once the grounds of appeal state that the order of appellate authority is not legal and proper, it would be sufficient compliance with the requirement of formation of an opinion, even if no separate opinion is formed. In this context, the statement of law made by the Apex Court in the case of Collector of Central Excise, Vadodara v. Rohit Pulp Paper Mills (supra) may, be usefully referred to. "The provisions of Section 35B(2) clearly require as a pre-requisite to the direction to any Central Excise Officer to file an appeal the formation of the opinion by the Collector that the order against which the appeal is to be filed is "not legal or proper"."

13. The contention that where Commissioner decides to file the appeal himself, he need not form an opinion, is an incorrect reading of the requirement of the provision. There could be innumerable instances where, even after forming an opinion that the order of the appellate authority is not legal or proper, the Commissioner may decide not to prefer an appeal, for example in a case where the tax effect is low or meagre. Therefore, the statutory scheme envisaged by the Legislature cannot be read to operate differently in different situations: that formation of opinion is a necessary pre-requisite when the appeal is to be filed by an authorised officer, and is not a pre-requisite condition when the appeal is to be filed by the Commissioner himself. Therefore, the first stage regarding the formation of opinion is a mandatory requirement of Section 35B(2) of the Act, which cannot be treated to be a procedural formality. In a given case, it would be always open to the Tribunal to call upon the Department to point out to the Tribunal as to whether an opinion has or has not been formed by the Commissioner before the appeal was preferred, either by Commissioner himself or by the authorised officer. The formation of opinion by the Commissioner has to be prior in point of time to the point of time when the appeal is preferred.

14. However, this aspect of factual verification as to whether an opinion has been formed by Commissioner or not, is not to be confused with the powers of the Tribunal. The learned Counsel for the appellant-Revenue had submitted during course of hearing that the Tribunal is not entitled to review the formation of opinion by the Commissioner. There can be no dispute as to the said proposition but that is not to say that the Tribunal cannot factually ascertain whether there is compliance with the statutory requirement of Sub-section (2) of Section 35B of the Act, namely, fulfilment of the mandatory pre-requisite condition before an appeal is lodged with the Tribunal.

15. Insofar as the second stage is concerned, the view expressed by the majority of the Members of the Tribunal is legally incorrect. When a person is statutorily entitled to delegate powers to another person to file an appeal on behalf of the first named person, it goes without saying that the power which can be delegated is the power which the first named person would be entitled to exercise. Hence, until and unless the Commissioner is entitled to file an appeal, there is no question of the Commissioner authorising another officer to file appeal on behalf of the Commissioner. The language of the latter part of Sub-section (2) of Section 35B of the Act itself makes this more than abundantly clear when the provision uses the phrase "to appeal on his behalf. Hence it is not necessary to dilate any further on this aspect of the matter.

16. Therefore, if the record reveals, and the Tribunal on ascertainment finds, that an appeal has been preferred by Commissioner or the authorised officer without any prior formation of opinion by the Commissioner, the appeal would be invalid and cannot be treated to be a valid appeal in eyes of law, entitling the Tribunal to dismiss the same as not being maintainable. However, in a case where an opinion has been formed prior to filing of the appeal, merely because the appeal is filed by the Commissioner himself, the Tribunal cannot dismiss the appeal as an invalid appeal and such an appeal has to be entertained on merits and decided accordingly.

17. The reference to provisions of Sections 2(b) and 12E of the Act cannot in any way change the aforestated legal position. In fact the term "Central Excise Officer" in Section 35B(2) of the Act cannot be read to mean and include the Commissioner. There can be no case where a Commissioner will direct a Commissioner. Section 2 opens with the words: "In this Act, unless there is anything repugnant in the subject or context". Thus, the reading has to be contextual. Similarly, the provisions of Section 12E(1) also would not be of any help.

18. In the circumstances of the case, the question formulated by the High Court is answered in the negative i.e. in favour of the Revenue and against the assessee. The appeal before the Tribunal shall now stand restored to the file of the Tribunal for being decided in accordance with law, after applying the law as laid down herein-before. The appeal is allowed accordingly in the aforesaid terms, with no order as to costs.