**(2016) 01 GUJ CK 0031**

**In the Gujarat High Court**

**Case No :** Special Civil Application No. 18043 of 2015

L and T Hydrocarbon Engineering Ltd. and Others APPELLANT

Vs

Union of India and Others RESPONDENT

**Date of Decision :** 06-01-2016

**Acts Referred:**

**Citation :** (2016) 01 GUJ CK 0031

**Hon'ble Judges :** Akil Abdul Hamid Kureshi and Mohinder Pal, JJ.

**Bench :** Division Bench

**Advocate :** Vijay Bairagra, Advocate for Trivedi & Gupta, for the Appellant;

**Final Decision :** Allowed

# Judgement

Akil Abdul Hamid Kureshi, J.—1. Case of the petitioners is that the Commissioner(Appeals)-respondent No. 2 is not deciding the appeals of the petitioners only on the ground that the Department''s appeal against the judgment of the Tribunal is pending before the High Court. Though no written instructions are issued by the Commissioner, it appears undisputed that the Commissioner has decided to keep the appeal of the petitioners in ''Call Book'' on account of pendency of the Department''s appeals before the High Court.

2. Undisputed facts are that the petitioner succeeded before the Custom Excise and Service Tax Appellate Tribunal ("CESTAT" for short) when the appeals were allowed by judgment dated 07.11.2012. Against such judgment of the Tribunal, the Department has preferred Tax Appeals Nos. 42 and 43 of 2013 and connected appeals, in which the High Court, while admitting the appeals on 24.07.2013, refused to grant stay against the judgment of the Tribunal.

3. Armed with the judgment of the Tribunal, the petitioners applied for refund of the excess duty collected. Refund applications came to be dismissed by the adjudicating authority, upon which the petitioners have filed several appeals before the Commissioner. These appeals are kept by the Commissioner in ''Call Book'' on the ground noted above.

4. In our opinion, when the High Court has refused to grant stay against the judgment of the Tribunal, the Commissioner cannot indirectly ensure such stay by refusing to process and decide the appeals of the petitioners. This is precisely what the Commissioner has done in the present case. Refusal to decide the appeals on the ground that the Department''s appeals are pending before the High Court would tantamount to ensuring stay against implementation of the decision of the Tribunal, which the High Court refused to grant. In order dated 26.11.2015 in SCA No. 18110 of 2015, following observations were made:-

"The petitioner, having succeeded before the Tribunal, applied for refund to the adjudicating authority. The adjudicating authority however rejected the refund claims, against which the petitioner has preferred appeal before the appellate Commissioner. Having heard learned Counsel for the parties, we expect the appellate Commissioner to decide such appeal latest by 28.02.2016. Learned Counsel Shri Ravani for the Revenue however submitted that the Commissioner has presently kept the appeal in call book as per the circular. In other words, has kept the hearing of the appeal in abeyance sine die. This is presumably because the Department''s appeal against the judgment of the Tribunal, which is in favour of the petitioner, is pending before the High Court. However, we notice that while admitting the appeal, the High Court has rejected the Department''s stay application. When, thus, the Court refused to stay implementation of the judgment of the Tribunal, benefit thereof must flow in favour of the assessee who has succeeded. The action of the Commissioner in keeping the appeal against the order of the adjudicating authority refusing to grant refund would be an indirect attempt to deny the benefit to the petitioner flowing from such judgment of the Tribunal when the High Court refused to grant protection. The Commissioner by way of indirect method cannot bestow the same unto himself. Under the circumstances, the Commissioner shall withdraw the appeal from the Call Book and dispose of the same as directed. The petition is disposed of with these directions."

5. In the result, the petition is allowed. Respondent No. 2-Commissioner(Appeals) is directed to decide the appeals in question of the petitioners expeditiously and dispose of the same preferably by 29.02.2016.

Direct service is permitted.