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**(2014) 03 DEL CK 0019**  
**In the Delhi High Court**  
**Case No : W.P.(C) 6224/2013**

M/s. Glyph International Limited

APPELLANT

Vs

Union of India

RESPONDENT

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**Date of Decision : 20-03-2014**

**Acts Referred:**

Central Excises and Salt Act, 1944 — Section 11A, 35, 35A, 35B, 35B(1)  
Finance (No. 2) Act, 1998 — Section 109  
Finance Act, 1994 — Section 83, 86

**Citation :** (2014) 45 GST 437 : (2014) 34 STR 727 : (2014) 73 VST 121

**Hon'ble Judges :** S. Ravindra Bhat, J;R.V. Easwar, J

**Bench :** Division Bench

**Advocate :** J.K. Mittal, Advocate for the Appellant; Mukesh Anand, Advocate for the Respondent

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## **Judgement**

S. Ravindra Bhat, J.—The petitioner challenges the decision of the Central Excise Service Tax Appellate Tribunal (CESTAT) whereby it ruled that an appeal in respect of refund and rebate claims is not maintainable before it in view of Section 35EE of the Central Excise Act - since it finds specific mention in Section 83 after its amendment in 2011.

2. The facts briefly are that the petitioner is a service tax assessee. It made a refund claim in respect of service tax export turn-over. Aggrieved by an order refusing the refund, it preferred an appeal to the CESTAT u/s 86. The Tribunal by the order impugned in this case accepted the revenues' contention that a specific reference of Section 35EE (of the Central Excise Act) precluded an appeal u/s 86, and that the remedy available to the assessee was a revision to the Central Government.

3. The reasoning which persuaded the Tribunal to conclude that the appellate remedy u/s 86 was barred, is extracted below :

18. When the provision of Section 35EE was consciously incorporated into Section 83 of Finance Act, 1944 by legislature, they intended that the object of

the said Section is not expected to be defeated by Section 86 of Finance Act, 1994. As we have said earlier that legislature did not intend to make repetition of the law and procedure relating to various subjects incorporated in different sections of Central Excise Act, 1944 referred to in Section 83 of the Finance Act 1994, adoption of relevant applicable provisions of that Act has been made in Finance Act, 1944 to govern the administration of service tax law. Further, when section 35EE of Central Excise Act, 1994 was incorporated into section 83, that cannot be read as redundant or otiose and implementation of section 86 of Finance Act, 1994, cannot be independent of Section 83 of the Act. Legislature have not curtailed or abridged the substantive right of revision in respect of rebate claim entertainable by revisionary authority in terms of section 35EE Central Excise Act, 1994.

19. We have analyzed the character of rebate and refund to find out whether the appellant was really denied refund to seek redressal before Tribunal u/s 86 of Finance Act, 1994. It may be stated that adjudication of rebate claim may grant certain concession or result in no levy and may give rise to refund of tax paid on input service used in export of service.

20. In the present case first of all admissibility of rebate under notification No.12/2005 ST dated 19.4.2005 is to be decided and decision on such issue is left to revisionary authority (without denying the right to redressal) u/s 83 of Finance Act, 1994, read with section 35EE of Central Excise Act, 1944. Any construction that section 35EE appearing u/s 83 of Finance Act, 1994 not appearing u/s 86 takes away the right of redressal and section 35EE not appearing u/s 83 at the material time confers jurisdiction on Tribunal to hear rebate appeal is erroneous. Adopted provisions of Central Excise Act, 1994 in Section 83 of Finance Act, 1994 conveys its intention that intent and spirit of provisions of Central Excise Act, 1944 is not given go bye and the interpretation that defeats the object of the statute is avoided to achieve the object of adopting statute. The appellant is accordingly unable to gain from the decision in British Physical Laboratory (*supra*) cited by it. This leaves no scope for the appellant to say that revisionary authority is ousted of his jurisdiction to entertain rebate claim of input service used in export of service.

21. In view of the above analysis, the irresistible conclusion shall be that the Tribunal by virtue of section 83 of Finance Act, 1994, should not entertain the rebate claim covered by first proviso to section 35B(1) of Central Excise Act, 1944, in the appellate jurisdiction u/s 86 of Finance Act, 1994 because revisionary jurisdiction and appellate jurisdiction are clearly demarcated in law and nature and character thereof in common law is well understood. Consequently, Revenue succeeds in saying that rebate claim matters should go to revisionary jurisdiction. We hold accordingly. Single bench not having dealt jurisdiction issue in one of the appeals of the appellant that has no significance for our consideration and plea of judicial insistency is baseless.

4. Mr. Mittal, learned counsel for the assessee contends that the impugned order

is plainly erroneous, arguing that a specific inclusion of the Section 35EE by way of amendment to Section 83 (of the Finance Act) did not in any manner alter the width of the appellate remedy u/s 86. Learned counsel emphasised upon the expression "so far as maybe" u/s 83 and stated that the reference to various provisions - contained u/s 83 merely was meant to borrow the mechanism of the Central Excise Act since no independent enforcement mechanism of the Finance Act 1994 was enacted by Parliament. It was contended that for the entire period between 1994 - (when service tax liability was created for the first time), and 2012, all parties understood that all orders and decisions which assessees were aggrieved, could be appealed u/s 86. The change- by the impugned amendment was only meant for emphasising the fact that even matters covered under that provision by the Central Excise Act could be gone into by the concerned authority which in this case undoubtedly was the CESTAT. Learned counsel referred to the decision of the Karnataka High Court in *British Physical Laboratory VS. A.C., DRI & Ors.* 1983 ELT 2270.

5. Counsel for the respondent argued that the impugned order does not call for any interference as it correctly surmised that the inclusion of Section 35EE by way of reference had the effect of removing the appellate remedy and conferring the revisional jurisdiction upon the Central Government. Counsel stressed upon the fact that if the conclusions of the Tribunal were not endorsed, Parliamentary intent in specifically including Section 35EE would be rendered useless. It was therefore argued that the Tribunal's further reasoning that Section 83 did not take away the substantive right of redressal, but merely located it through a different jurisdiction, i.e., revision upon a different authority, either the Central Govt., is a substantial aspect which this Court did not overlook.

6. For convenience, the relevant provisions are extracted below. Section 83 of Finance Act, 1994, prior to 28.5.2012 read as under :

83. The provisions of the following section of the Central Excise Act, 1994, as in from time to time, shall apply, so far as may be, in relation to service tax as they apply in relation to a duty excise:-

9C, 9D, 11B, 11C, 12, 12A, 12B, 12C, 12D, 12E, 14, 14AA, 15, 33A, 35F, 35FF, to 350 (both inclusive), 35Q, 36, 36A, 36B, 37A, 37B, 37C, 37D, 38A and 40.

7. Section 35EE of Central Excise Act, 1944 has been made applicable to Finance Act, 1994, incorporating that Section to Section 83 of Finance Act, 1994 w.e.f. 28.5.2012 by adoption to 28.5.2012. Section 35EE of Central Excise Act, 1944 prior to 28.5.2012 read as under :

(1) The Central Government may, on the application of any person aggrieved by any order passed u/s 35A, where the order is of the nature referred to in the first proviso to, sub-section (1) of section 35B, annul or modify such order.

Provided that the Central Government may in its discretion, refuse to admit an application in respect of an order where the amount of duty or fine or penalty,

determined by such order does not exceed five thousand rupees.

Explanation : For the purposes of this sub-section, order passed u/s 35A includes an order passed under that section before the commencement of section 47 of the Finance Act, 1984 (21 of 1984) against which an appeal has not been preferred before such commencement and could have been, if the said section had not come into force, preferred after such commencement, to the Appellate Tribunal.

(1A) The Commissioner of Central Excise may, if he is of the opinion that an order passed by the Commissioner (Appeals) u/s 35A is not legal or proper, direct the proper officer to make an application on his behalf to the Central Government for revision of such order.

(2) An application under sub-section (1) shall be made within three months from the date of the communication to the applicant of the order against which the application is being made :

Provided that the Central Government may, if it is satisfied that the applicant was prevented by sufficient cause from presenting the application within the aforesaid period of three months, allow it to be presented within a further period of three months.

(3) An application under sub-section (1) shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf and shall be accompanied by a fee of -

(a) two hundred rupees, where the amount of duty and interest demanded, fine or penalty levied by any Central Excise Officer in the case to which the application relates is one lakh rupees or less;

(b) two hundred rupees, where the amount of duty and interest demanded, fine or penalty levied by any Central Excise Officer in the case to which the application relates is more than one lakh rupee.

(4) The Central Government may, of its own motion, annul or modify any order referred to in sub-section (1).

(5) No order enhancing any penalty or fine in lieu of confiscation or confiscating goods of greater value shall be passed under this section,-

(a) In any case in which an order passed u/s 35A has been enhanced any penalty or fine in lieu of confiscation or has confiscated goods of greater value, and

(b) In any other case, unless the person affected by the proposed order has been given notice to show cause against it within one year from the date of the order sought to be annulled or modified.

(6) Where the Central Government is of opinion that any duty of excise has not been levied or has been short-levied, no order levying or enhancing the duty shall be made under this section unless the person affected by the proposed

order is given notice to show cause against it within the time limit specified in section 11A.

8. The relevant part of Section 35B(1) of Central Excise Act, 1944 reads as under :

35B(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 Collector of Central Excise as an adjudicating authority;

(b) An order passed by the Collector (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 Collector of Central Excise u/s 35, as it stood immediately before the appointed day.

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

Provided that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to:-

(a) a case of loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse.

(b) a rebate of duty of excise on goods exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India.

(c) goods exported outside India (except to Nepal or Bhutan) without payment of duty.

(d) credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the rules made thereunder and such order is passed by the Commissioner (Appeals) on or after the date appointed u/s 109 of the Finance Act (No.2) Act, 1998.

9. It may be seen that Parliament always intended that an appellate remedy should be available in respect of refund and rebate claims. That power was exercisable by the CESTAT. The amendment of Section 83, in 2012 did not disturb the appellate remedy, i.e. Section 86; the amendment did not limit the appellate power in any manner whatsoever. It is a settled position of law that exclusion of jurisdiction of courts and tribunals should be by way of express provisions, or through necessary intendment. This was stated as follows, by the Supreme Court in Subal Paul Vs. Malina Paul and Another, held as follows:

21. If a right of appeal is provided for under the Act, the limitation thereof must also be provided therein. A right of appeal which is provided under the Letters Patent cannot be said to be restricted. Limitation of a right of appeal in absence of any provision in a statute cannot be readily inferred. It is now well-settled that the appellate jurisdiction of a superior court is not taken as excluded simply because subordinate court exercises its special jurisdiction. In G.P. Singh's "Principles of Statutory Interpretation". It is stated:

The appellate and revisional jurisdiction of superior courts is not taken as excluded simply because the subordinate court exercises a special jurisdiction. The reason is that when a special Act on matters governed by that Act confers a jurisdiction to an established court, as distinguished from a *persona designata*, without any words of limitation then, the ordinary incident of procedure of that court including any general right of appeal or revision against its decision is attracted.

22. But an exception to the aforementioned rule is on matters where the special Act sets of it a self-contained Code the applicability of the general law procedure would be impliedly excluded. (See *Upadhyaya Hargovind Devshanker v. Dhirendrasinh Virbhadrasinghji Solanki*).

(emphasis supplied)

10. In view of the above discussion, it is held that the amendment to Section 83 by making a specific reference to Section 35EE of the Central Excise Act, did not make any difference to the nature of jurisdiction exercisable by the CESTAT u/s 86; it continued to possess jurisdiction to decide on matters pertaining to rebate and refund. For this reason, the question of law is answered in favour of the assessee/appellant and against the revenue. Since CESTAT did not decide the matter on merits, its decision - holding that it lacked jurisdiction- is set aside. The CESTAT shall consequently decide the merits of the appeal pending before it, after hearing the parties. The appeal is allowed in the above terms without any order as to costs.