CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT No. I

Service Tax Appeal No.70268 of 2021

(Arising out of Order-in-Appeal No.42/ST/ALLD/2021 dated 10.02.2021 passed by Commissioner (Appeals) CGST & Central Excise, Allahabad)

M/s A. N. Construction, **.....Appellant**
(Prop. Muhammad Irshad, Village-Chakdiha,
Bharatganj, Allahabad-212104)

VERSUS

Commissioner of Central Excise &
CGST, Allahabad **....Respondent**
(38, M.G. Marg, Civil Lines, Allahabad)

APPEARANCE:

Shri Abhinav Mehrotra, Advocate & Shri Satendra Kumar, Advocate for the Appellant
Ms. Chitra Srivastava, Authorized Representative for the Respondent

CORAM: **HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**

FINAL ORDER NO.- 70630/2024

DATE OF HEARING : 04.10.2024
DATE OF DECISION : 04.10.2024

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No.42/ST/ALLD/2021 dated 10.02.2021 passed by Commissioner (Appeals) Central Excise & CGST, Allahabad. By the impugned order following has been held:-

"5. In view of the above, I set aside the impugned order and remand the matter for de novo adjudication, to the original adjudicating authority to decide the case afresh, preferably within six months from date of receipt of this Order. The appellant are also directed to co-operate with the adjudication proceedings and submit all the necessary documents to ascertain the nature of services and abatement, viz. Agreement/Work Orders/Contracts/

invoices/Bank Statement etc. to the adjudicating authority within thirty days of receipt of this Order. The appeal filed by the appellant is disposed of accordingly."

2.1 I have heard Shri Abhinav Mehrotra & Shri Satendra Kumar, Advocates for the Appellant and Ms. Chitra Srivastava, Authorized Representative for the Revenue.

2.2 Arguing counsel for the Appellant submits that Commissioner (Appeals) could not have remanded the matter back to the Original Authority in view of the specific provisions in the Section 35 appearing such remand provided for a decision in the matter by modifying, upholding and annulling the order appealed against. Though, he has a good case on limitation.

2.3 Learned Authorized Representative reiterates the findings recorded in the impugned order.

3.1 I have considered the impugned order alongwith submissions made in the appeal and during the course of arguments.

3.2 Section 35A(3) of the Central Excise Act provides as follows:-

> ***SECTION 35A. Procedure in appeal.*** *— (1) …*
>
> *(2) …..*
>
> *(3) [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 :]*
>
> ***Provided*** *that an order enhancing any penalty or fine in lieu of confiscation or confiscating goods of greater value or reducing the amount of refund shall not be passed unless the appellant has been given a reasonable opportunity of showing cause against the proposed order :*
>
> ***Provided*** *further that where the [Commissioner (Appeals)] is of opinion that any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, no order requiring the appellant*

to pay any duty not levied or paid, short-levied or short-paid or erroneously refunded shall be passed unless the appellant is given notice within the time-limit specified in section 11A to show cause against the proposed order.

(4) …...

(4A) ….

(5) …….

Section 85 (4) & (5) of the Finance Act, 1994 reads as follows:

SECTION 85. Appeals to the Commissioner of Central Excise (Appeals).—

(1) ….

(2) …..

(3) ……

(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 orders 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 and 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).

From perusal of above provisions, it is quite evident that powers of Commissioner (Appeal) in the matters relating to the Appeal, filed before him under the Central Excise Act, 1944 and under

Finance Act, 1994 are identical. Subsection (5) of Section 85, make these powers co-terminus with the powers available under the Central Excise Act, 1994.

3.3 Power to remand the matters back to original authority was specifically provided for by Section 35A (3) prior to amendments made in the said section by the Finance Act, 2001. When the said amendment withdrawing the power to remand was made in the Central Excise Act, 1944, J S TRU vide his letter dated 28.02.2001 clarified as follows:-

> *"29. …... It has also been proposed that Commissioner (Appeals) shall not remand the case back for de-novo adjudication but should decide the cases after making necessary enquiry, wherever required. These changes in the law will come into force on enactment of the Finance Bill."*

3.4 In case of MIL India Ltd [2007 (210) E.L.T. 188 (S.C.)] Hon'ble Supreme Court has observed as follows:

> *"4. …….In fact, the power of remand by the Commissioner (A) has been taken away by amending Section 35A with effect from 11-5-2001 under the Finance Bill, 2001. Under the Notes to clause 122 of the said Bill it is stated that clause 122 seeks to amend Section 35A so as to withdraw the powers of the Commissioner (A) to remand matters back to the adjudicating authority for fresh consideration. Therefore, the Commissioner (A) continues to exercise the powers of the adjudicating authority in the matters of assessment. Under Section 35B any person aggrieved by the order of the Commissioner as an adjudicating authority is entitled to move the Tribunal in appeal. Section 35B indicates that the decision of order passed by the Commissioner (A) shall be treated as an order of an adjudicating authority. ….."*

4.1 In case of Devansh Exports [2012 (28) S.T.R. 469 (Tri. - Kolkata)] Kolkata Bench observed as follows:

> *"Hon'ble Supreme Court in the case of MIL India Ltd. (supra) held that the power of remand by the Ld.*

Commissioner (Appeals) has been taken away by amended Section 35A w.e.f. 11-5-2001 under the Finance Act, 1994. For the better appreciation whether the above decision is applicable to the instant case the relevant provisions of law are extracted hereunder :

Sub-section (3) of Section 35A before amendment

"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".

However the situation has changed after the amendment carried out by Finance Act, 2001 came into effect from 11-5-2001. The changed legal position of sub-section (3) of Section 35A is as under :-

Sub-section (3) of Section 35A after amendment

"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".

From the above, it follows that the power of remand was explicitly provided under unamended sub-section (3) of Section 35A prior to 11-5-2001 and the same was taken away by the removal of the expression "or may refer the case back to the adjudicating authority".

The Tribunal in the case of Commissioner of Central Excise, Noida v. Orient Crafts Ltd. reported in 2011 (21) S.T.R. 302 (Tri.-Del.), held that :

"It is settled law that the Commissioner (Appeals) dealing with the appeals under Central Excise Act, 1944 lacks jurisdiction to remand the matter to the Adjudicating Authority. The law provides that in case the Commissioner

(Appeals) finds any infirmity in the order passed by the Adjudicating Authority or the order is found to be unsustainable, the Commissioner (Appeals) is certainly entitled to set aside such order and thereupon pass an appropriate order on merits by himself but not to remand the matter. Being so, Commissioner (Appeals) dealing with the appeals in relation to the service tax also is not empowered to remand the matter but he has to decide the matter by himself".

Thus in case of service tax also, the Commissioner (A) is not empowered to remand the matter, he has to decide the matter by himself. Therefore the order of ld. Commissioner (Appeals) remanding the case to the lower authority, is not sustainable. However, We agree with the findings of the ld. Commissioner (Appeals). Therefore, the amendment to Section 35A would apply to the present case. However, we find that the above aspects are required to re-examined by the lower adjudicating authority. Accordingly, we remand the matter to the lower adjudicating authority for deciding the issue afresh. It is made clear that all the issues are kept open. Needless to say, a reasonable opportunity of hearing may be given to the respondents. Appeal is allowed by way of remand…."

4.2 In view of the above Section learned Commissioner (Appeals) is mandated to make such order as he deems just proper, confirming, modifying or annulling the decision or order appealed against. In view of the above said provisions I deem it fit that the matter should have been decided by the learned Commissioner (Appeals) instead of remanding it back to the Original Authority. The said observation is made in interest of justice for the reason that by remanding the matter back to original authority the appellant is forced into another round of litigation at the level of adjudicating authority, which could be avoided and which was the objective of amendments made in

Section 35A of the Central Excise Act, 1944 by the Finance Act, 2001.

4.3 Thus I am of the view that matter needs to be remanded back to the First Appellate authority for a decision on merits.

5.1 Appeal allowed. Matter remanded back to the learned Commissioner (Appeals) for a decision within three months from the date of this order.

5.2 Appellant is directed not to seek refund of any pre-deposit made in filing the appeal before this Tribunal till the disposal of appeal by learned Commissioner (Appeals).

(Dictated and pronounced in open court)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

LKS