

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/2418 & 2698/2007EX in E/S/2064&2365/2007EX

Date 11/12/2007

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
C.C.E. DELHI III

UDYOG MINAR, UDYOG VIHAR, VANIJYA NIKUNJ,
PHASE V, GURGAON - 122016 (HARYANA)

C.C.E. DELHI III

Appellant

M/S MATRIX CLOTHING PVT. LTD.

STAY ORDER No. 1167-68/07

Vs
Respondent

I am directed to transmit herewith a certified copy of Final order No. 586-87/07 Excise
passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944

dated 28-11-07


Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent

M/S MATRIX CLOTHING PVT. LTD.

2. M/S. ENEXCO TEKNOLOGIES INDIA LTD.

KHANDSA ROAD, VILLAGE MOHAMMADPUR,
GURGAON.

(UNIT-II)

157, NAVRANGPURA, DISTT. GURGAON

2. Adv. / Consult SH. BIPIN GARG, ADV.,

B-1/1289-A, VASANT KUNJ,

N. DELHI-70

3. S.D.R.

~~4. J.C.D.R.~~

5. Bar association, CESTAT, New Delhi

6. M/s. Deeparchi Publications, M-93, marg. 43, saket, New

7. M/s Centax Publications (P) Ltd., 1512-E, Bhishm Pitamah

8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301

9. R. Venkatraman Constt. 44-B, S.Suncity, Ghaziabad -

10. Nidheshak publications, I.P.Estate, new Delhi


11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh,

12. Co, Law Institution

13. TAX INDIA, B-XI/8183, Vasant Kunj, New Delhi - 110070

14. Office Copy

15. Guard file


Assistant Registrar
(Excise Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO.II

E/Stay No.2064 & 2365/07, E/Appeal No.2418 & 2698/07

(Arising out of order in appeal No. 311/SSS/GGN.06 dated 30.5.07 and No.333-334/SS/GGN/07 dated 22.6.07 passed by the Commissioner (Appeals) of Central Excise, Gurgaon)

Hon'ble Mr.S.S. Kang, Vice President)
Hon'ble Mr T.V. Sairam, Member(Technical)

1. Whether Press reporters may be allowed to see the order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?
2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not ?
3. Whether Their Lordships wish to see the fair copy of the Order ?
4. Whether Order is to be circulated to the Departmental authorities?

no

CCE Gurgaon

Appellant
(Rep. by Shri Deepak Garg, SDR)

Vs

M/s Matrix Clothing Pvt Ltd
M/s Enexco Teknologies India Ltd

Respondent
(Rep. by Shri Bipen Garg, Advocate)

Coram: Hon'ble Mr S.S. Kang, Vice President
Hon'ble Mr.T.V. Sairam, Member (Technical)

Date of Hearing: 28.11.2007

Per S.S. Kang:

Final Order No. 586 - 587/2007EX
STAY ORDER No. 1167 - 1168/2007EX

Common issue is involved in these appeals. Therefore, they are being taken up together for disposal.

The revenue filed these appeals against the impugned order whereby the Commissioner (Appeals) has remanded the matter to the adjudicating authority. The contention of the revenue is that after amendment of the proviso to Section 35-A of Central Excise Act w.e.f. 11.5.2001, the power of remand of Commissioner (Appeals) has been withdrawn. Therefore, the impugned order is not sustainable.

The revenue relied upon the decision of the Hon'ble Supreme Court in the case of Mil India Ltd Vs CCE Noida reported in 2007 (79) RLT 1(SC) and decision dated 8.3.2007 of the Hon'ble High Court of Punjab & Haryana in the case of CCE Amritsar Vs M/s Enkay (India) Rubber Co Pvt Ltd. The contention of revenue is that Hon'ble Punjab & Haryana High Court in the case of Enkay (India) Rubber Co Pvt Ltd supra after taking into consideration the amended provisions of Central Excise Act, held that the Commissioner (Appeals) after 11.5.2001, has no power to remand . The ratio of the above decision is fully applicable on the facts of the case.

The respondents submitted that if after the amendment the Commissioner (Appeals) has power to pass such order as it deemed fit, modify the decision which also includes power to remand.

We find that the Hon'ble Supreme Court in the case of Mil India Ltd Vs CCE Noida has held as under:-

"In our view, the High court had erred in holding that the Tribunal could not have examined the question of dutiability, once on merits, the order of the Commissioner (Appeals) dated 22.3.2000 became final. Firstly, one must understand that excisability is a matter of principle. The Tribunal is the highest authority in hierarchy to decide on facts whether the bought

out items were dutiable or not. The Tribunal was not bound by the decision of the Commissioner (Appeals) on the question of dutiability or excisability. By order dated 22.3.2000, the Commissioner (Appeals) had remanded the matter to the adjudicating authority the question of quantification. Therefore, it was open to the appellant to appear before the adjudicating authority and submit contentions on quantification of duty liability. In the present matter in the second round, the appellant appeared before the adjudicating authority and pointed out in the alternative that the duty demanded from the appellants at the rate of Rs. 94,03,5000/- was erroneous as the appellants were entitled to the benefit of modvat credit. From this it cannot be said that the question of excisability or dutiability had become final. The conclusion of the Commissioner (Appeals) in his order dated 22.3.2000 was not binding on the Tribunal. Further one needs to understand the concept of assessment. An order of assessment under the taxing law does not become final before the adjudicating authority in every matter. It is subject to appeal before the Commissioner (Appeals). The Commissioner (Appeals) can even add or subtract certain items from the order of assessment made by the adjudicating authority and that order of the Commissioner (Appeals) could also be treated as an order of assessment. In complicated cases where costing is involved in the adjudicating authority can also refer the matter to an expert. The Act also makes provision for special audit. However, when the principle of law is evolved an appeal lies to the appellate Tribunal under the said Act. In fact, the power of remand by the Commissioner (Appeals) 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 35Aa so as to withdraw the powers of the Commissioner (Appeals) to remand matters back to the adjudicating authority for fresh consideration. Therefore, the Commissioner (Appeals) continues to exercise the powers of the adjudicating authority in the matters of assessment. Under Section 35-B any person aggrieved by the order of the Commissioner as an adjudicating authority is entitled to move the Tribunal in appeal. Section 35-B indicates that the decision of order passed by the Commissioner (Appeals) shall be treated as an order of an adjudicating authority. In the circumstances the high Court had erred in holding that the assessee was not entitled to agitate the question of dutiability in appeal before the Tribunal.

Further we find that the Hon'ble Punjab & Haryana High Court under whose jurisdiction the respondents are situated, in the case of Enkay India rubber Co. (supra) held that after amendment to Section 35-A, the Commissioner has no power to remand. In these circumstances, the impugned orders are set aside and the Commissioner(Appeals) is directed to decide the apapeals on merits in accordance with law. The appeals are allowed as indicated above.

(Order dictated and pronounced in the open Court).

(T.V. Sairam)
Member(Tech)
MPS*

(S.S. Kang)
Vice President