

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

Appeal No. E/2356/2007-SM[BR]&E/STAY/1990/2007-SM[BR]

Date 09/01/2008

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

To :  
M/S HONDA MOTOR VYCLE & SCOOTER INDIA PVT.  
LTD.  
PLOT NO 1, SECTOR-3, IMT, MANESR, GURGAON  
(HARYANA)


M/S HONDA MOTOR VYCLE & SCOOTER INDIA PVT.  
LTD.

Appellant

Vs  
Respondent

C.C.E. DELHI III  
I am directed to transmit herewith a certified copy of Final order No. 27/2008-SM[BR]&S/17/2008 dated 8.10.2007

passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944

  
Assistant Registrar  
(SM Appeal Branch)

**Copy to :**

1. Respondent

C.C.E. DELHI III

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

2. Adv. / Consult

MR.P.A.S. RAO

12, DDA, MIG FLATS, SARAI JULLENA, NEW DELHI 110025.

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  
(SM Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,  
PRINCIPAL BENCH, COURT NO.III

Excise Stay Application No.1990 of 2007-SM (BR)  
In Appeal No.2356 of 2007-SM (BR)

(Arising out of Order-in-Appeal No.300 SSS GGN 2007 dated 23.5.2007  
dated 23.5.2007 of the Commissioner of Central Excise (Appeals),  
Gurgaon).

For approval and signature:

**Hon'ble Mr. P.K. Das, Member (Judicial)**

- 
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 Department Authorities?
- 

yes

M s. Honda Motor Cycle & Scooter

.....Appellants

Versus

CCE, Delhi-III

.....Respondent

Appearance:

Shri P.A. Rao, Advocate for the appellants.

Shri S. Gautam, Authorised Departmental Representative (DR) for the respondent.

Final

Order No.....

27/08 SM(BR)

Dated: 8.10.2007

Stay

order No

17/08 SM(BR)

Per P.K. Das:

Ld. DR raised the preliminary objection in this matter. He submits that the case relates to the rebate of duty and the order was passed by the Commissioner (Appeals) and, therefore, this Tribunal has no jurisdiction under sub-section (1) of Clause (b) of First Proviso to Section 35 B of the Central Excise Act, 1944.

2. Ld. Advocate on behalf of the appellant vehemently raised objection against the contention of the Id. DR. He submits that in this case the Commissioner filed an appeal under Section 35 B of the Central Excise Act before the Commissioner (Appeals) and the order was passed in terms of sub-section (4) of Section 35 E of the said Act and, therefore, it is not an order passed under Section 35 A of the Act. He submits that the said proviso is applicable against an order passed by the Commissioner (Appeals) under Section 35 A of the Act. But in this case, the Commissioner passed an order in terms of sub-section (4) of Section 35 E of the Act. He submits that Section 35E(4) of the Act provides to treat the application of the adjudicating authority or the authorized officer as an appeal. He relied upon the decision of the Hon'ble Supreme Court in the case of Bajaj Co. Ltd. Vs. State of Bihar and Ors. – AIR 1955 SC (661) SC. He further submits that the Commissioner (Appeals) denied the rebate claim without considering the

valuation of the goods and, therefore, it is a case of valuation and not the rebate claim.

3. Ld. DR on behalf of the Revenue submits that in this case show cause notice proposed to deny the rebate claim on export. The Commissioner (Appeals) directed to pay back the excess amount paid to them against the rebate claim, therefore, this Tribunal has no jurisdiction to decide the matter.

4. After hearing both the sides and on perusal of the records, it is seen that the Commissioner (Appeals) passed the order under Section 35A (3) of the Central Excise Act, 1944. Sub-section (1) of Clause (b) of first proviso to Section 35 B of the Act provides 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) of the said sub-section (i.e. an order passed by the Commissioner (Appeals) under Section 35A). Clause (b) of 1<sup>st</sup> proviso to Section 35 B(1) relates to 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. Ld. Advocate strongly relied upon Section 35 E of the said Act, which provides powers of the Chief Commissioner of Central or Commissioner of Central Excise to pass certain

order. Sub-section (4) of Section 35 E provides that where the authorized officer the adjudicating authority makes an application to the Commissioner (Appeals), such application shall be heard by the Commissioner (Appeals), as if such application were an appeal made against the decision or order for the adjudicating authority. Thus, it is clear that Section 35 E (4) provides that the application filed by the Revenue before the Commissioner (Appeals) would be treated as an appeal. Therefore, the contention of the Id. Advocate that Section 35E(4) creates a legal fiction in respect of passing of the order of the Commissioner (Appeals) has no relevance. The power of passing of the order by the Commissioner (Appeals) is under Section 35A of the Act. Therefore, the contention of the Id. Advocate is not sustainable. It is seen that by show cause notice dated 20.8.2004, it was proposed to reject the rebate claim of Rs.4,52,953/- under Rule 8 of Central Excise Rules, 2002 read with Notification No.40/2001-CE(NT) dated 26.6.2001, as amended. The Commissioner (Appeals) by order-in-appeal dated 23.5.2007 directed the appellants to pay back the amount of Rs.2,42,427/- along with interest against rebate claim. Thus, it is clear that the case relates to rebate of duty on export. Therefore, I find that as the case relates to rebate of duty and the order is passed by the Commissioner (Appeals) under Section 35 A of the Act, therefore, this Tribunal has no jurisdiction to decide the matter.

Accordingly, the appeal along with the stay application are rejected and as not maintainable.

Order dictated & pronounced in open court on 8.10.2007.

( P.K. Das )

Member (Judicial)

Ckp.