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

Appeal No. ST/730 /2009 – SM[BR] Date 16/12/2009

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

To :
C.S.T. DELHI
17-B, I.P. ESTATE, IAEA HOUSE, NEW DELHI.

C.S.T. DELHI Appellant
Vs
M/S WORLD VISION, Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 1523 / 2009 –SM[BR] dated 17.11.2009 passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(SM Appeal Branch)

Copy to :
1. Respondent
M/S WORLD VISION,
36, KAILASH HILLS, EAST OF KAILASH, NEW DELHI.
2. Adv. / Consult SHRI S.KUMAR ADV.
I-2, MAIN ROAD, LAJPAT NAGAR-II
NEW DELHI -24.

3 S.D.R
~~4 J.C.D.R.~~
5 Bar association. CESTAT. New Delhi
6 Director Publications. Customs. Excise. I.P. Estate. New Delhi
7 M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8 Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 Raghuraman's 44-B. Regal Flat.Shipra Suncity. Indirapuram - 201010.Ghaziabad. DT. U.P.
10 M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)
11 M/s. Deeparchie Publications. M-93. Marg. 46. Saket. New Delhi 110017
12 Taxindiaonline.com Pvt.Ltd. B-XI/8183.Vasant Kunj. New Delhi - 110070
13 Taxmann Allied Service Pvt Ltd.. 21/35. West Punjabi Bagh. New Delhi - 110026
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A.Iscon Mall.Above Star India Bazar.Satellite Road.Ahmedabad-15
15 LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
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Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R.K.Puram, New Delhi-110066.
Principal Bench, New Delhi.

Service Tax Appeal No.730/09-SM

[Arising out of Order-in-Appeal No.61/ST/DLH dt.8.7.09 passed by the Commissioner,New Delhi)

For approval and signature

Hon'ble Mr. Rakesh Kumar, 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 would 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: :

CST, Delhi — Appellant

Versus

M/s. World Vision — Respondent

Appearance

Sh. S.K.Bhaskar, Authorised Departmental Representative(DR) For Appellant

Shri S.Kumar, Adv. For Respondent

Date of decision: 17.11.09

Final Order No. 1523/2009 SM (BR)

Per Rakesh Kumar:

This is an appeal filed by the Revenue against order-in-appeal No.61/ST/DLH/2009 dt.8.7.09 passed by the Commissioner(Appeals) by which the Commissioner(Appeals) set aside the order-in-original dt.20.12.07 passed by the Asstt. Commissioner and remanded the matter for denovo adjudication with certain directions. The Commissioner(Appeals) in the impugned order-in-appeal observed that the order-in-original passed by the Asstt. Commissioner is a non-speaking order which has been passed ex-parte in violation of the principles of natural justice. The Asstt. Commissioner was directed to verify the original invoices on which the Cenvat credit has been availed by the appellant during the relevant period under dispute and, thereafter, decide the matter after hearing the respondent. The Revenue's appeal is based on the ground that under the provisions of Section 35A(3) of Central Excise Act,1944, the Commissioner(Appeals) has no power to remand the matter and in this regard, the Revenue relies upon Hon'ble Supreme Court's order in the case of MIL India Ltd. vs CCE reported in 2007(210)ELT.188(SC).

2. Heard both the sides.

2.1 Shri S.K.Bhaskar, the Ld. DR, reiterating the grounds of appeal pleaded that the provisions of Section 35A(3) are applicable to the service tax cases also; that under Section

35A(3) of Central Excise Act,1944, the Commissioner(Appeals), after making such further enquiry as may be necessary, has to pass an appropriate order confirming, modifying or annulling the decision or the order appealed against and has no option to remand matter to the adjudicating authority; that though Section 85 of the Finance Act,1994 with regard to appeal to Commissioner(Appeals) in service tax matters, prescribes the procedure of filing appeal to Commissioner(Appeals) against the orders passed by the adjudicating authorities subordinate to the Commissioner of Central Excise, sub-section (5) of Section 85 clearly states that the subject to the provisions of this chapter, in hearing the appeals and making orders under this section, the Commissioner shall exercise the same powers and follow the same procedure as he exercises and follows in hearing the appeals and making the orders under the Central Excise Act,1944, that from Section 85(5), it is clear that in service tax appeals also, the Commissioner(Appeals) has to pass an order modifying, confirming or annulling the decision or order appealed against and he has no option to remand the matter back to the adjudicating authority and that in this regard, he relies upon the Hon'ble Supreme Court's judgment in the case of MIL India Ltd.(supra) wherein it has been held that in view of the explicit provisions of Section 35A(3), the Commissioner(Appeals) has no option to remand the matter. The learned DR also cited the judgment of the Tribunal in the case of CCE, Aurangabad vs Bajaj

Auto Ltd. reported in 2009(136)ELT.179 wherein the Tribunal, relying upon Hon'ble Supreme Court's judgment in the case of MIL India Ltd.(supra), held that after amendment to Section 35A(3), the Commissioner(Appeals) has not power, to remand the matter back to adjudicating authority. He also cited the judgment of the Tribunal in the case of Standard Drums & Barrel Mfg. Co. vs CCE, Mumbai-II reported in 2009(238)ELT.183 wherein the Tribunal held that in view of amended provisions of Section 35A(3), the Commissioner(Appeals) has no power to remand the matter and this judgment also relied upon Hon'ble Supreme Court's judgment in the case of MIL India Ltd.(supra). He also cited a recent judgment of Hon'ble Punjab & Haryana High Court in the case of CCE, Jalandhar vs B.C.Kataria reported in 2008(221)ELT.508(P&H) wherein the Hon'ble High Court held that Commissioner(Appeals) cannot remand the matter to the adjudicating authority; that Commissioner(Appeals) has been divested of such power after amendment to Section 35A(3) of Central Excise Act,1944 and similar amendment in Section 128A(3) of Customs Act,62.

2.2 Shri S.Kumar, Advocate, the learned Counsel for the respondent, pleaded that the appeals against orders passed by the officers subordinate to Commissioner in service tax matters, are governed by Section 85 of the Finance Act,1944 whose provisions are different from the provisions of Section 35A and, therefore by invoking of sub-section (5) of Section 85 providing that subject to the provisions of this chapter, in hearing the appeals and passing order under this Section, the Commissioner(Appeals) shall have the same powers and follow the same procedure, as he exercises and follows in hearing the appeals and passing order under Central Excise Act,1944, the department cannot say that the Commissioner(Appeals) while deciding the appeal in service tax matters has no powers to remand; and that sub-section (4) of Section 85 corresponds to sub-section (3) of Section 35A but from the language of sub-section (4), it is clear that the Commissioner(appeals)while hearing the appeals, has powers to pass such orders as he thinks fit including an order of enhancing the service tax, interest or penalty. He also pleaded that the applicability of provisions of Section 35A of the Central Excise Act,1944 to the service tax appeals to be decided by the Commissioner(Appeals) is confined only to the procedural matters like passing the order after hearing the ~~party~~ parties, allowing additional grounds of appeal, order to be in writing and communication of the order to the appellant and the department etc and that the provisions of sub-section (5) cannot be read so as to apply the provisions of sub-section (3) of Section 35A of the Central Excise Act,1944 to the service tax appeals.

3. I have carefully considered the submissions from both the sides and perused the records. This is a service tax appeal where the order-in-original demanding certain amount of service tax and disallowing certain amount of Cenvat credit had been passed by

the Asstt. Commissioner. The Commissioner(Appeals) observing that the Asstt. Commissioner has passed the order without hearing the appellant and without observing the principles of natural justice, remanded the matter to the Asstt. Commissioner with certain directions. The fact that the Asstt. Commissioner has passed the order ex-parte is evident from the order-in-original passed by the Asstt. Commissioner. The point, raised by the Revenue in its appeal is as to whether while hearing this appeal against the Asstt. Commissioner's order in service tax matter, the Commissioner(Appeals) has powers to remand the matter to the adjudicating authority for denovo adjudication. According to the Revenue, the provisions of Section 35A(3) are applicable and in view of settled law in this regard, the Commissioner(Appeals) has no powers of remand.

4. Though by virtue of Section 83 of the Finance Act,1994, certain provisions of Central Excise Act have been made applicable to service tax matters, Section 35, 35A and Section 35B are not among such provisions and with regard to the appeals against the orders passed by various categories of officers, there are independent provisions in the Finance Act,1994. Section 85 is with regard to the appeals to Commissioner(Appeals) against orders passed by the adjudicating authorities subordinate to the Commissioner of Central Excise and Section 86 is in respect of the appeals to Appellate Tribunal against orders passed by Commissioner of Central Excise or by Commissioner(Appeals).

Thus Section 85 of the Finance Act,1994 corresponds to Section 35 & 35A of Central Excise Act. Sub-section 1,2 & 3 of Section 85 of the Finance Act,1994 correspond to Section 35 of the Central Excise Act,1944 and sub-section (4) of Section 85 corresponds to Finance Act,1994 correspond to Section 35A(3) of Central Excise Act,1944. Sub-section (4) of Section 85 of Finance Act,1994 and Sub-section (3) of Section 35(A) of Finance Act,1994 are reproduced below:

> "Section 35A(3) of Central Excise Act,1944 –
>
> 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".
>
> "Section 85(4) of the Finance Act,1994 –
>
> "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. From comparison of the language of sub-section (3) of Section 35A of Central Excise Act and sub-section (4) of Section 85 of Finance Act,1994, it is seen that the language of the two provisions is different. While sub-section (3) of Section 35A of Central Excise Act states that Commissioner(Appeals), after making such enquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling the order appealed against, sub-section (4) of Section 85 states that the Commissioner(Appeals) shall hear and determine the appeal and subject to the provisions of this chapter, pass such orders as he thinks fit and such order may include an order enhancing the service tax, interest or penalty. Thus while Section 35A(3) specifically mentions the type of order which can be passed by the Commissioner(Appeals) i.e. order confirming, modifying or annulling the order or the decision appealed against, sub-section (4) of section 85 provides that Commissioner(Appeals) can pass such order as he thinks fit and such order may include an order enhancing the service tax, interest or penalty. Thus the order which can be passed by the Commissioner(Appeals) under Section 85(4) can include the orders remanding the matter to the original adjudicating authority in appropriate cases. In my view the provisions of sub-section (5) of Section 85 providing that the Commissioner(Appeals) in hearing the appeals and making order

under this section, shall exercise some powers and follow the same procedure as he exercises and follows while the hearing the appeals and making the order under Central Excise Act,44 cannot be interpreted to infer that the Commissioner(Appeals) while hearing service tax appeals under Section 85 of the Finance Act,1994 has no powers to remand the matter to the adjudicating authority in appropriate cases. Sub-section (5) of Section 85 is only about the procedural aspects and it cannot be interpreted to restrict the powers of the Commissioner(Appeals) under sub-section (4), as the provisions of sub-section (5) are subject to the provisions of chapter V of the Finance Act,1994 pertaining to service tax. Since the provisions of Section 85 of Finance Act,1994 and Section 35A of Central Excise Act,1944 are different, the judgments of Hon'ble Supreme Court, Hon'ble Punjab & Haryana High Court and Tribunal cited by the learned DR, all of which are with regard to the provisions of Section 35A(3) of the Central Excise Act,1944, are not applicable to this case. In view of this, I find no infirmity in the impugned order. The Revenue's appeal is dismissed.

Order dictated in the open Court.

(Rakesh Kumar)
Member Technical

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