14

TELEGRAM : CEGCANAL
Website : www.cestat.gov.in

REGISTERED / AD
Email : delhi@cestat.gov.in

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

CUSTOMS APPEAL BRANCH

Appeal No. ST/184 /2007 - CU[DB] Date **20/12/2011**

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

To :
M/S RKBK LTD.
99 G.T.ROAD, KATKA, JHUNSI, ALLAHABAD

M/S RKBK LTD. Appellant

Vs

C.C.E ALLAHABAD Respondent

I am directed to transmit herewith a certified copy of **Final order No.ST/648/ 2011 CU[DB]** dated 20.12.2011 passed by the Tribunal under **Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax**

Assistant Registrar
(Customs Appeal Branch)

Copy to :

1. Respondent
C.C.E ALLAHABAD
38,M.G.MARG, CIVIL LINES,
ALLAHABAD

2. Adv. / Consult : Sh. Alka Arren, Adv
C/O Appellant

3. C.D.R
4. Bar association. CESTAT. New Delhi
5. Director Publications. Customs. Excise. I.P. Estate. New Delhi
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registrar
(Customs Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

Date of Hearing:30.08.2011
Date of Decision: 20/12/2011

Service Tax Appeal No.184 of 2007

M/s. RKBK Ltd. Appellant

Versus

CCE, Allahabad Respondent

[Arising out of common Order-in-Appeal No.ST-148/2006 & 127/06 dated 2.1.2007 passed by the Commissioner of Central Excise & Service Tax, Allahabad]

For approval and signature:

Hon'ble Smt. Archana Wadhwa, Member (Judicial)
Hon'ble Shri Rakesh Kumar, Member (Technical)

---

1. Whether Press Reporters may be allowed to see 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?

Appearance: Rep. by Shri Alka Arren, Advocate for the appellant.
Rep. by Shri K.K. Jaiswal, DR for the respondent.

CORAM : **Hon'ble Smt. Archana Wadhwa, Member (Judicial)**
Hon'ble Shri Rakesh Kumar, Technical Member

Final Order No. ST/648/11 Dated : 20/12/2011

Per Rakesh Kumar:

The appellant are a dealer operated godown operator for M/s. IOC Ltd. (IOCL) for which they have agreement between them and IOC. In terms of their agreement with IOC, they have to make provisions for storage of lubricants along with an office with furniture, telephone, water, electricity, toilet and other amenities as per requirement, providing safe custody of the products and materials kept in the godown, provision for all types of secretarial assistance including receiving of payments from the customers and depositing the same in IOC's Bank Account and liaisioning with the bank, operation and supervision of the godown, maintaining adequate manpower of the staff of requisite competence and skill for fulfilling all the required jobs to be carried out under the work order, etc. For all these operations, the appellant, as per their agreement with IOCL received an amount of Rs.760/- per KL (for lubes)/MT(for greases) of sales /dispatch ex-godown. According to the Department, the services being provided by the appellant to the IOCL were clearing & forwarding agent's services, as defined under Section 65(25) of the Finance Act, 1994 and taxable under Section 65(105)(i) ibid, but the appellant had neither obtained service tax registration nor were paying any service tax. A show cause notice dated 25.3.2004 was, therefore, issued to the appellant for –

(a) demand of service tax amounting to Rs.5,43,618/- from the Appellant on an amount of Rs.94,38,446.84 received by them from IOCL for providing the above mentioned services for the period 1.3.2000 to 31.12.2003, along with interest on it at the applicable rate under Section 75 of the Finance Act, 1994; and

(b) imposition of penalty on the appellant under Section 75A, 76, 77 and 78 of the Finance Act, 1994.

1.1 In the course of adjudication proceedings before the Asstt. Commissioner, the appellant pleaded that the rate of Rs.760/- per KL being charged by them from IOCL for various charges also includes reimbursable expenses like godown rent, transportation, salary of the staff, electricity, travel, telephone, etc. which though had not shown separately in the invoices issued by them to the IOCL, had been incurred by them and in respect of which they were eligible for reimbursement. The appellant, therefore, pleaded before the Asstt. Commissioner that the service tax should be charged only on their commission and it should not include the reimbursable expenses. Accepting these contentions of the appellant, the Asstt. Commissioner vide order-in-original dated 15.12.2004, confirmed the service tax demand of only Rs.94,272/- along with interest and dropped the remaining demand of Rs.4,49,346/- and besides this, imposed penalty under Section 75 A, Section 77 and Section 78 of the Finance Act, 1994

1.2 The above order of the Asstt. Commissioner was reviewed by the jurisdictional Commissioner under Section 84 of the Act for which a show cause notice dated 13.11.2006 was issued to the appellant. The show cause notice was issued on the ground that the service tax on the C& F Agent services being provided by the appellant to the IOCL was chargeable on the gross amount charged by them and no deduction for reimbursable expenses was permissible. The Commissioner vide Order-in-Review bearing the date 29.12.06 confirmed the service tax demand of Rs.5,43,618/- including the amount of Rs.94,272/- already confirmed and paid by the appellant. Besides this, he also ordered recovery of interest on the service tax and imposed penalties under Section 75 A, Section 76, Section 77 and Section 78 of the Finance Act, 1994. Against this order of the Commissioner, this appeal has been filed.

4. Heard both the sides.

5. Ms. Alka Arren, Advocate for the appellant pleaded that the review order is time barred, as the same has been passed after the expiry of the limitation period of two years, that while the order-in-original had been passed by the Asstt. Commissioner on 15.12.2004, the review order has been issued by the Commissioner on 29.12.2006, that signing of order on the note sheet is not the passing of the review order and in this regard, she relies upon the judgement of the Tribunal in the case of **CCE, Pune-I Vs. Charnia Company reported in 2007 (215) ELT 129 (Tribunal-Mumbai),** that even on merits, the impugned order is not correct as the service tax was chargeable only on the commission received by the appellant after excluding the reimbursable expenses.

6. Shri K.K. Jaiswal, ld. Departmental Representative pleaded that as is clear from the note sheet of the Commissionerate file from which the review order had been issued, the Commissioner had signed the review order on 8.12.2006 and it is only the fair copies of the order, which were issued on 29.12.2006, that in view of this, the review of the Assistant Commissioner's order has been done in time, that on merits, the issue involved in this case stands decided against the appellant by the judgement of the Tribunal in the case of **CCE, Chandigarh Vs. Team S & S reported in 2011 (21) STR 290 (Tribunal-Delhi)** and **Naresh Kumar & Cop. Pvt. Ltd. reported in**

2008 (11) STR 578 (Tribunal-Kolkata), wherein it was held that in case of C& F Agent services, the tax is chargeable on the gross amount charged and no deduction on account of godown rent, house keeping, courier expenses, electricity, staff remuneration, loading and unloading charges, etc. is admissible and that in view of this, there is no infirmity in the impugned order.

7. We have carefully considered the submissions from both the sides and perused the records. The main plea of the appellants is that the review order passed by the Commissioner under Section 84 of the Finance Act, 1994 is time barred, in as much as while the Assistant Commissioner had passed the order on 15/12/04, the show cause notice for its review by the Commissioner was issued on 13/11/06 and after considering the replies of the appellant in which they requested for decision on merits without any personal hearing, the Commissioner passed the order on 29/12/06 i.e. after the expiry of the limitation period prescribed under Section 84 (5) of the Finance Act, 1994.

8. Section 84 of the Finance Act, 1994 is reproduced below :-

> **Section 84. Revision of orders by the [Commissioner] of Central Excise** – (1) The [Commissioner] of Central Excise may call for the record of a proceeding under this Chapter [in which an adjudicating

authority subordinate to him has passed any decision or order] subordinate to him and may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Chapter, pass such order thereon as he thinks fit.

(2) No order which is prejudicial to the assessee shall be passed under this section unless the assessee has been given an opportunity of being heard.

(3) The [Commissioner] of Central Excise shall communicate the order passed by him under sub-section (1) to the assessee, the [such adjudicating authority] and the Board.

(4) No order under this section shall be passed by the [Commissioner] of Central Excise in respect of any issue if an appeal against such issue is pending before the [Commissioner] of Central Excise (Appeals).

(5) No order under this section shall be passed after the expiry of two years from the date on which the order sought to be revised has been passed."

9. From perusal of this Section, it will be clear that while the order passed by an officer subordinate to the Commissioner can be reviewed by the Commissioner, if the review action is pre-judicial to the assessee, an opportunity for hearing is required to be given and the order passed by the

Commissioner is required to be communicated to the assessee and also to the Board. **Sub-section (5) of Section 84 states in the clear terms that no order under this Section shall be passed after expiry of 2 years from the date on which the order sought to be revised had been passed.** Passing of order as a reviewing authority is different from taking a decision to review. Hon'ble Supreme Court in the case of **CCE vs. M.M. Rubber Co.** reported in **1991 (55) E.L.T. 289 (S.C.)** while interpreting the scope of the expression "the date of the decision or order of the adjudicating authority" in sub-Section (3) of Section 35E of the Central Excise Act, 1944 has in para 12 and 13 of the judgment held as under :-

> **"12. It may be seen therefore, that, if an authority is authorised to exercise a power or do an act affecting the rights of parties, he shall exercise that power within the period of limitation prescribed therefor. The order or decision of such authority comes into force or becomes operative or becomes an effective order or decision on and from the date when it is signed by him. The date of such order or decision is the date on which the order or decision was passed or made ; that is to say when he ceases to have any authority to tear it off and draft a different order and when he ceases to have any *locus paetentiae.* Normally that happens when the order or decision is made public or notified in some form or when it can be said to have left his hand. The date of**

communication of the order to the party whose rights are affected is not the relevant date for purposes of determining whether the power has been exercised within the prescribed time.

13. So far as the party who is affected by the order or decision for seeking his remedies against the same, he should be made aware of passing of such order. Therefore Courts have uniformly laid down as a rule of law that for seeking the remedy the limitation starts from the date on which the order was communicated to him or the date on which it was pronounced or published under such circumstances that the parties affected by it have a reasonable opportunity of knowing of passing of the order and what it contains. The knowledge of the party affected by such a decision, either actual or constructive is thus an essential element which must be satisfied before the decision can be said to have been concluded and binding on him. Otherwise the party affected by it will have no means of obeying the order or acting in conformity with it or of appealing against it or otherwise having it set. This is based upon, as observed by Rajamanner, CJ in *Muthia Chettiar* v. *CIT* (supra) "a salutary and just principle". The application of this rule so far as the aggrieved party is concerned is not dependent on the provisions of the particular statute, but it is so under the general law."

9.1 Thus for the purpose of review, the date of the passing the order would be the date on which the order or decision is made public or notified in some form or when it can be said to have left the adjudicator's hand. Unlike the Tribunals or the courts, where the orders are pronounced in the open court, the orders passed by a Commissioner of Customs/Central Excise as adjudicating Authority or as reviewing authority under Section 84 of Finance Act, 1994 are not pronounced in the open court. Therefore, in such cases, the date of passing the order would be the date on which the order was dispatched to the assessee, not the date on which the decisions was recorded in the review file as on this date it can be said that the adjudicating authority has ceased to have authority to tear it off and draft a different order. In contrast to this, in terms of the ratio of the above-mentioned judgment of the Apex Court, for the assessee, the limitation period for filing appeal would start from the date of communication of the order to him.

10. Another important ratio of the Apex Court's judgment in case of **CCE vs. M.M. Rubber Co.** (supra) is that when a time limit is prescribed under Section 35E for the reviewing authority to exercise its review power, the same must be exercised within the limitation period and order passed after

the expiry of limitation period would be invalid and ineffective. In this regard, para 17 and 18 of the judgment are reproduced below.

> **"17. Thus if the intention or design of the statutory provision was to protect the interest of the person adversely affected, by providing a remedy against the order or decision any period of limitation prescribed with reference to invoking such remedy shall be read as commencing from the date of communication of the order. But if it is a limitation for a competent authority to make an order the date of exercise of that power and in the case of exercise of *suo motu* power over the subordinate authorities' orders, the date on which such power was exercised by making an order, are the relevant dates for determining the limitation. The ratio of this distinction may also be founded on the principle that the Government is bound by the proceedings of its officers but persons affected are not concluded by the decision.**
>
> **18. Section 35E comes under the latter category of an authority exercising its own powers under the Act. It is not correct to equate the Board, as contended by Sri Gaurishankar Murthy, to one of the two parties to a quasi-judicial proceeding before the Collector and the Board's right under Section 35E to the exercise of the right of appeal by an aggrieved assessee from an order passed to its prejudice. The power under Section 35E is a power of superintendence conferred on a superior authority to ensure that the subordinate officers exercise their powers under the Act**

correctly and properly. Where a time is limited for the purposes by the statute, such power, as under Section 33A(2) of the Indian Income-tax Act, 1992 referred to in *Muthia Chettiar* (supra), should be exercised within the specified period from the date of the order sought to be reconsidered. To hold to the contrary would be inequitable and will also introduce uncertainties into the administration of the Act for the following reason. There appears to be no provision in the Act requiring the endorsement, by a Collector, of all orders passed by him to the Board. If there is such a practice in fact or requirement in law, the period of one year from the date of the order is more than adequate to ensure action in appropriate cases particularly in comparison with the much shorter period an assessee has within which to exercise his right of appeal. If, on the other hand, there is no such requirement or practice and the period within which the Board can interfere is left to depend on the off-chance of the Board coming to know of the existence of a particular order at some point of time, however distant, only administrative chaos can result. We are, therefore, of the opinion that the period of one year fixed under sub-section (3) of Section 35E of the Act should be given its literal meaning and so construed, the impugned direction of the Board was beyond the period of limitation prescribed therein and therefore invalid and ineffective."

11. Thus the review power under Section 84 of the Finance Act, 1994, which is the power of superintendence conferred on a superior authority to ensure that the subordinate officers exercise their powers under the Act correctly and properly, has to be exercised by passing an order within the limitation period prescribed, which starts from the date on which the order sought to be reviewed was passed. As discussed in para 9 & 9.1 above, under Sec. 84 the date of passing the review order by the Commissioner, would be the date on which he ceases to have any locus poenitentiae and the matter can be said to have left his hand, which would be the date of dispatch of the order.

12. In this case, we find that since the Assistant Commissioner's order has been passed on 15/12/04, in view of the provisions of sub-Section (5) of Section 84, the review order should have issued within a period of 2 years i.e. by 14/12/06, while in this case, we find that while the order was signed on the note sheet of the review file on 8/12/06, the fair copy of the order for issue/distatch was signed only on 29/12/06. Though the endorsement regarding dispatch signed by the Superintendent (review) and enclosed with the order bears the date "8/12/06" below the signatures of the Superintendent, forwarding of the fair copy on 8/12/06 would be impossible

when the fair copy itself was signed on 29/12/06. Moreover, on the endorsement sheet it can easily be seen that the actual date of dispatch was on in January 2007, which was corrected to 8/12/06 by hand. Since it is clear that the order to be dispatched was signed by the Commissioner on 29/12/06, the order has been passed after the expiry of 2 years from the date of the passing of the Assistant Commissioner's order. In view of this, the impugned order is not sustainable and, hence, has to be set aside. Ordered accordingly. The appeal is allowed.

[order pronounced on……20/12/2011]

(Archana Wadhwa)
Member (Judicial)

(Rakesh Kumar)
Member (Technical)

Ckp.