REGISTERED / AD

FAX : 011-26108426

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

Dated: **08/11/2012**

To

1. Appellant as per address in table below
2. Respondent as per address in table below

Final Order No. **A/1310/2012-EX[DB]** dated **06/11/2012**

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section **35-C(1)** of **the Central Excise and Salt Act, 1944.**

Assistant Registrar
EXCISE Appeal Branch

S.No	Application	Appeal	Name and Address of Appellant	Name and Address of Respondent
1.		E/2384/2005	**C.C.E.MEERUT-I** University Road Mangal Panday Nagar Meerut-I U.P	**ELECTRIC POLE MANUFACTURING** Civil-Sub-Division UPSEB Roorkee U.P

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Copy To
1. Advocate(s) / Consultant(s): SH. RAJESH CHHIBBER, ADV, FA-9, KAVI NAGAR, GHAZIABAD

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2. Bar Association, CESTAT, Delhi **3.** Director Publications, Customs, Excise. I.P. Estate, Delhi

4. M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

5. Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

6. Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

7. Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15

8. LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

9. TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

10. Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Ameer Pet, Hyderabad – 500038

11. C.D.R 12. Office Copy 13. Guard File

Assistant Registrar
EXCISE Appeal Branch

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi.
Court No. 1

Date of hearing/decision: 06.11.2012

Hon'ble Sh. Justice Ajit Bharihoke, President
Hon'ble Sh. 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 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?	

Excise Appeal No. 2384 of 2005
(Arising out of order in appeal No. 48-CE/MRT-I/2005 dated 31.03.2005 passed by Commissioner (Appeals), Central Excise, Meerut-I).

CCE, Meerut — Appellants

Vs.

M/s Electric Pole Manufacturing
Civil Sub Division, UPSEB — Respondent

Present Sh. I. Baig, AR for the appellants.
Present Sh. Rajesh Chhibber, Advocate for the respondent.

Coram: Hon'ble Mr. Justice Ajit Bharihoke, President
Hon'ble Sh. Rakesh Kumar, Member (Technical)

FINAL ORDER NO. A/ 1310/2012-EX (BR)

Per: Justice Ajit Bharihoke:

This appeal is directed against the impugned order dated 31.03.2005 of Commissioner (Appeals) whereby he set aside the order-in-original confirming duty demand against the respondent alongwith interest and equal amount of penalty and remanded the matter back for denovo adjudication.

2. The issue involved in this case is whether or not after the amendment in Section 35A of the Central Excise Act, introduced vide Section 128 of the Finance Act 2001 in May 2001, the Commissioner has been divested of his power to remand the matter to the adjudicating authority for fresh adjudication.

3. Shri I. Baig, ld. DR appearing for the appellant-department has contended that impugned order remanding the matter to the adjudicating authority for denovo adjudication is not sustainable in view of Section 35A(3) as substituted by Finance Act, 2001 dated 11.05.2001. Expanding on the argument ld. DR has taken us through the amended section as also the pre-amended section and submitted that comparison of the aforesaid provisions would show that by way of the amendment
of the Commissioner (Appeals) for
in Section 35A(3) the power to remand the matter for denovo adjudication has been taken away by the legislature, as such, the Commissioner (Appeals) have committed a grave error in setting aside the impugned order and remanding the matter to the adjudicating authority for fresh adjudication. In support of his contention ld. DR has relied upon the judgment of Supreme Court in the matter of **MIL India Ltd. vs. CCE, Noida reported in 2007 (210) ELT 188 (SC).**

4. Shri Rajesh Chhibber, ld. Advocate on the contrary has argued in support of the impugned order. He pleaded that perusal of the impugned order would show that the Commissioner (Appeals) was conscious of the amendment done in Section 35A (3) of the Central Excise Act and because of this reason he has referred to the

judgment of Hon'ble High Court at Ahmedabad in the matter of CCE, Ahmedabad vs. Medico Labs reported in 2004 (173) ELT Guj. Wherein Hon'ble High Court has held that even after the amendment of Section 35A(3) Commissioner (Appeals) has continuous power to remand the matter. Thus ld. Counsel urged for dismissal of appeal.

5. We have considered the rival contention and perused the relevant provisions of Customs Act, 1962 and the Excise Act as also the judgement relied upon by the parties.

6. Erstwhile Section 128A(2) of the Customs Act, 1962 and Section 35A (3) of the Excise Act respectively deals with the powers of the Commissioner (Appeals). Both the sections defined the powers of Commissioner (Appeals) in similar language which is reproduced thus:-

> "(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".

7. Interpretation of above provision came up before the Supreme court in the matter of UOI vs. Umesh Dhaimode (supra) and the Supreme Court after analyzing the provision held that power to remand the matter to the authority below for fresh decision is inbuilt in the aforesaid provision. The relevant observation of Supreme court is reproduced thus:-

> "2. As the order under appeal itself notes, the aforesaid provision vested the appellate authority with powers to pass such order as it deemed fit confirming, modifying or annulling the decision appealed against. An order of remand necessarily annuls the decision which is under appeal before the appellate authority. The appellate authority is also invested with the power to pass such order as it deems fit. Both these portions of the aforesaid

provision, read together, necessarily imply that the appellate authority has the power to set aside the decision which is under appeal before it and to remand the matter to the authority below for fresh decision."

8. As regards the judgement in the matter of MIL India Ltd. (supra) relied upon by the department, we may note that issue before the Supreme Court in the said matter was entirely different. However, the Supreme court while dealing with the matter observed thus:-

> "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 35A so as to withdraw the powers of the Commissioner (Appeals) to remand matters back to the adjudicating authority for fresh consideration".

9. The aforesaid observation of the Supreme Court in the matter of MIL India Ltd. (supra) are in the nature of passing remark on the scope of powers of Commissioner (Appeals) during the appeal under Section 35A (3). Therefore, aforesaid observation of the Supreme Court in our view can not take precedents over the finding of the Supreme Court in the matter of Union of India vs. Umesh Dhimode (supra) passed on the analysis of the provision itself.

10. The Gujarat High Court in the case of **CCE, Ahmedabad vs. Medico Labs reported in 2004 (173) ELT 117 (Guj.)** has also held that Commissioner (Appeals) continues to have power of remand even after the amendment of Section 35A(3) of the Central Excise Act, 1944 by Finance Act, 2001 w.e.f. 11.5.2001.

11. Otherwise also Section 35A(3) of the Act has amended confers powers on the Commissioner (Appeals) to annual the order-in-original and also to pass just and proper order. There may be circumstances where only just and proper order could be to remand the order for fresh adjudication. For example, if the order in original is passed without giving opportunity of being heard to the assessee or without permitting him to produce evidence in support of his case then only order with the Commissioner (Appeals) would be able to pass him to set aside the impugned order on the ground of failure of justice. This would create an anomaly with prejudice to the Revenue as it would bring an end to the litigation without adjudicating on the demand raised by the show cause notice. Therefore, just and proper order in such a case would be nothing but an order of remand to adjudicate the matter denovo after giving due hearing to the assessee. Thus, we are of the view that power to remand the matter back in appropriate cases is inbuilt in Section 35A(3) of the Central Excise Act, 1944.

12. From the above, it is apparent that the Commissioner (Appeals) have power to remand the matter back to the original adjudicating authority even after the amendment of Section 35A(3). Thus, we do not find any merit in the appeal filed by the department.

13. Appeal is therefore dismissed.

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Member (Technical)

Pant