FAX : 011-26108426

REGISTERED / AD

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

Dated: **21/11/2012**

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. **A/1314/2012-EX[DB]** dated **07/11/2012**

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.**

Asstt. Registrar(EXCISE Appeal Branch)

Name and Address of Respondent

1 E/855/2005 **HONDSA SEIL POWER PRODUCTS LTD.**
RUDRAPUR

Name and Address of Appellant

2 **C.C.E. MEERUT II**
Opp. Saheed Park (Near Ashok ki Lat)
Delhi Road, Meerut (UP)

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Copy To
3Advocate(s) / Consultant(s): MR. AMIT JAIN, ADV,
C/O REPONDENT

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4 Bar Association, CESTAT, Delhi

5 Director Publications, Customs, Excise. I.P. Estate, Delhi

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

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, Satellite Road, Ahmedabad-15

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

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

12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

13 C.D.R. **14** Office Copy **15** Guard File

Asstt. Registrar(EXCISE Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. I

DATE OF HEARING/DECISION : 07/11/2012.

Excise Appeal No. 855 of 2005

[Arising out of the Order-in-Appeal No. 71/BPL/2012 dated 30/03/2012 passed by The Commissioner (Appeals), Central Excise, Bhopal.]

Hon'ble Shri Justice Ajit Bharihoke, President
Hon'ble Shri 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?	:

CCE, Meerut II — Appellant

Versus

M/s Honda. Seil Power Products Ltd. — Respondent

Appearance

Shri M.S. Negi, Authorized Representative (DR) – for the Appellant.

Shri Amit Jain, Advocate – for the Respondent.

CORAM : **Hon'ble Shri Justice Ajit Bharihoke, President**
Hon'ble Shri Rakesh Kumar, Member (Technical)

FINAL Oral Order No. A/1314/2012-EX(BR)

Shri Justice Ajit Bharihoke :-

This appeal is directed against the order-in-appeal dated 7/12/04 whereby the Commissioner (Appeals) set aside the order-in-original and remanded the matter back for re-adjudication in the light of documents submitted by the appellant.

2. Only grievance of the appellant/department is that after the amendment of Section 35A (3) of the Central Excise Act, 1944, which was substituted vide Section 128 of the Finance Act, 2001, power of the Commissioner to remand the matter back for fresh adjudication has been taken away, as such, the Commissioner (Appeals) had no jurisdiction to remand the matter back and the impugned order is therefore, liable to be set aside. Expanding on the argument, learned Shri M.S. Negi has taken us to the pre-amended section as well as amended Section 35 A (3) of the Central Excise Act and submitted that comparison of those two provisions would show that power to remand has been specifically dropped by way of amendment. Shri Negi has relied upon the judgment of Hon'ble Supreme Court in the case of **MIL India Ltd. vs. CCE, Noida** reported in **2007 (210) E.L.T. 188 (S.C.)**.

3. Shri Amit Jain, learned 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 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 learned Counsel urged for dismissal of appeal.

4. 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.

5. Erstwhile Section 128A (2) of the Customs Act, 1962 and amended Section 35A (3) of the Excise Act respectively deals with the powers of the Commissioner (Appeals). Both the sections use 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".

6. 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."

7. 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".

8. The aforesaid observation of the Supreme Court in the matter of MIL India Ltd. (supra) are in the nature of passing

remarks on the scope of powers of Commissioner (Appeals) hearing an appeal under Section 35A (3). Therefore, aforesaid observation of the Supreme Court in our view can not take precedence over the finding of the Supreme Court in the matter of Union of India vs. Umesh Dhimode (supra) based on the analysis of the provision itself.

9. 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.

10. Otherwise also Section 35A (3) of the Act as amended confers powers on the Commissioner (Appeals) to annul the order-in-original and also to pass just and proper order. There may be circumstances where only just and proper order could be remand of the matter 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 adduce evidence in support of his case then only order-in-appeal by the Commissioner (Appeals) could be to set aside the impugned order on the ground of failure of justice. This would create an anomaly and cause 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, only just and proper order in such a case would be the 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.

11. 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.

12. Appeal is therefore dismissed.

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Member (Technical)

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