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

STAY Application No. : E/Stay/2066/2010, E/Stay/2067/2010
Appeal No. : E/2165/2010-EX[DB], E/2166/2010-EX[DB]

Dated: **30/08/2012**

Assistant Registrar
C.E.S.T.A.T. New Delhi
To,
GARG ISPAT UDYOG LTD
G-459-63, Industrial Area, Bhiwadi, Distt-
Alwar, Rajasthan.

GARG ISPAT UDYOG LTD (Appellant)

VS

C.C.E. JAIPUR I (Respondent)

I am directed to transmit herewith a certified copy of Final Order No. **A/989-990/2012-EX[DB]**, StayOrder No. **SO/1402-1403/2012** dated **29/08/2012** passed by the Tribunal under section **35-C(1) of the Central Excise and Salt Act, 1944.**

Assistant Registrar
EXCISE Appeal Branch

Copy To,
1. Respondent
C.C.E. JAIPUR I
N.C.R.Building, Statue Circle, "C"
Scheme, jaipur 302005.

2. Advocate(s) / Consultant(s): SH. J. P. KAUSHIK, ADV.,
A-111/3, SFS FLATS, SAKET,
N. DELHI-17

3. C.D.R
4. Bar Association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp. ICICI Bank of Defence Colony, 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, 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. Gaurd File

Assistant Registrar
EXCISE Appeal Branch

14. **SH J.D.GUPTA,MANAGING DIRECTOR**
M/s Garg Ispat Udyog Ltd, G-459-63,
Industrial Area, Bhiwadi, Distt-
Alwar,Rajasthan.

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. III

Excise Stay Application Nos. 2066-2067 of 2010
Excise Appeal Nos. 2165-2166 of 2010

[Arising out of Order-in-Appeal No. 232-233(DK)/CE/JPR-I/2010 dated 22.4.2010 passed by the Commissioner of Central Excise (Appeals), Jaipur I]

For approval and signature:
Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Mathew John, Member (Technical)

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1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? : No
2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? : Yes.
3. Whether Their Lordships wish to see the fair copy of the Order? : Seen
4. Whether Order is to be circulated to the Departmental authorities? : Yes.

M/s. Garg Ispat Udyog Ltd. — Appellants
M/s. J.D. Gupta, Managing Director

Vs.

Commissioner of Central Excise — Respondent
Jaipur

Appearance:

Shri J.P. Kaushik, Advocate for the Appellants
Shri Sunil Kumar, SDR for the Respondent

CORAM:
Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Mathew John, Member (Technical)

Date of Hearing : 7.2.2012
Date of decision : .2012

MISC **ORAL ORDER NO.** 264 /2012-EX (BR)
STAY ORAL ORDER NO 1402-1403/2012-EX (BR)
FINAL ORDER NO. A/989-990/ 2012-EX (BR)

Per Archna Wadhwa (for the Bench):

Duty of Rs. 40,96,119/- stands confirmed against M/s. Garg Ispat Udyog Ltd. along with imposition of penalty of identical amount. In addition, penalties of varying amounts stands imposed upon the other applicant appellants.

2. After hearing both the sides, it is seen that the impugned order of the Commissioner (Appeals) has dismissed the appeals for non-compliance with the stay order passed by him vide which M/s. Garg Ispat Udyog were directed to deposit an amount of Rs.20 lakhs. It is seen that the said appellant had already deposited an amount of Rs. 15 lakhs towards duty. However, inasmuch as the appellants did not comply with the said directions of the Commissioner (Appeals) to further deposit an amount of Rs.20 lakhs, all the appeals stand dismissed for non-compliance.

3. For better appreciation, we reproduce relevant paragraphs from the impugned orders of the Commissioner (Appeals):

> "7. *The appellant no. 1 vide their letter dated 15.4.2010 has informed this office that they are not in a position to deposit the said amount due to some unavoidable circumstances and made a request to exempt them from depositing the said amount and reconsider it. I observe that the appellant has failed to comply with the Stay Order No. 02-03 (DK)JPR-I/2010 dated 24.2.2010 and has not made deposit of Rs.20,00,000/- (Rs. Twenty lakh only)*

by the stipulated time of 30 days from the receipt of the Stay order nor has given any specific reasons in the letter dated 15.4.2010 which may be justifying the either extension of time limit or variation in the quantum of pre-deposit or exemption from pre-deposit."

passing

As is seen from the above, after ~~plassign~~ of the said order, the applicant had moved an application dated 15.4.2010 for modification of the earlier stay order passed by the Appellate authority. Commissioner (Appeals) vide his impugned order had rejected the modification application as also dismissed the appeals vide the same order.

4. We find that the Tribunal in the case of Prem Nath Mongas Foods Beverages Pvt. Ltd. vs. CCE as reported in [1993 (63) ELT 245 (Tri)] has held that the Commissioner (Appeals) has powers to modify the stay order passed by him. Non consideration of the said modification application results in failure of justice. The Court also observed that inasmuch no show cause notice was issued to the appellants prior to the dismissal of the appeal for non-compliance with the stay order, the impugned orders are required to be set aside and matter needs to be remanded.

To the similar effect is the Tribunal's decision in the case of Premchand Agarwal & Ors. Vs. CC Calcutta as reported in [1998 (29) RLT 168 (CEGAT). Tribunal while taking note of the fact that modification application as also the appeals stand dismissed by one order only, observed that there is a patent illegality in the order of the Commissioner (Appeals) inasmuch as the application for modification filed by the applicants was required to be disposed of independently, after giving a chance of personal hearing to the appellants and an opportunity to them to putforth their case. The Tribunal also observed that a show cause notice is required to be given before the disposal of the appeals on the ground of non-compliance. Reference is also made to another decision of the Tribunal in the case of Classic Rubber and Allied Products as reported in 2001 (46) RLT 911 (CEGAT-Ban)] laying down that before dismissing the appeal for non-compliance with the provisions of Section 35F, the appellants should have been given an opportunity.

5. By applying the ratio of the above decision to the facts of the case, we find that admittedly the modification application was filed by the applicant and Commissioner (Appeals) was under a legal obligation to dispose of the said application. To reject the application and to dismiss the appeals simultaneously vide the same MO ~~modification~~ order does not meet the requirement of fair proceedings. Inasmuch as the applicant would come to know about the dismissal of the modification application vide the same impugned order along with the dismissal of its appeal. Even if the appellate authority deemed it fit to reject the modification application, interest of justice required him to extend the period to deposit the directed amount and to let the applicant also know about the same. In the absence of intimation about the decision on the modification of the application, the appellant cannot be expected to know about the same. As such, dismissal of the appeal for non-

compliance along with rejection of the modification application violates the basic principle of natural justice.

6. In view of our foregoing discussion and keeping in the view the applicant had already deposited an amount of Rs. 15 lakhs, we dispense with the condition of pre-deposit of balance amount of duty and penalties imposed upon both the applicants and set aside the impugned order and remand the matter to Commissioner (Appeals) for reconsideration of the modification application before him. Needless to say a separate order should AR ~~have to~~ be passed on the modification application filed before him and be intimated to the applicant accordingly.

7. Both the stay petitions as also the appeals get disposed of in the above manner.

(Pronounced in the open Court on)

(Archana Wadhwa)
Member(Judicial)

(Mathew John)
Member(Technical)

ss

8. I have gone through the order recorded by Member (Judicial). Since I am not agreement with the order recorded by Member (Judicial), I am recording this separate order.

9. As already stated the facts of the case are that the Commissioner (Appeal) called for pre-deposit of a part of the duty confirmed, and waiving the rest of the duty and penalty, for hearing of the appeal. Appellants filed an application for modification of stay order without giving any reason why the earlier order should be modified or why the appellant could not comply with the order. The Commissioner (Appeal) did not find any merit in the modification application. He dismissed the modification application and appeal together. Basically the appeal is dismissed because the condition of stay order has not been complied with.

10. The Appellants rely on the decision of the Tribunal in Premnath Monga Foods and Beverages Vs. CCE 1993 (63) E.L.T. 245 (Tribunal) to the effect that the Commissioner (Appeal) should have issued a Show Cause Notice in such cases before rejecting the appeal. Such a procedure is not followed by any judicial forum and there is no justification for burdening the Commissioners (Appeal) with such a procedure. If such procedure is prescribed litigants can keep filing applications for modification and Commissioners (Appeal) will be busy issuing Show Cause Notices in such cases. If an opportunity is given for a hearing it should meet the ends of justice. In this case a hearing also was not given.

11. There are no enacted legal provisions in the matter of application for modification of stay prescribing the grounds on which such application can be made, how many applications can be made and how many hearings should be given. So I am of the view that the matter should be decided on the facts of each case such that this method is not used as a delaying tactic. I am of the view that ruling regarding issue of Show Cause Notice in such situations can only help abuse of the process of law by evaders.

12. The facts in the case of Prem Nath Mooga Foods and Beverages (supra) are very different and I do not see any reason why that decision should be applied in this case. In that case the assesse had a case that the adjudication order by which classification list was approved was without Show Cause Notice and thus without complying with principles of natural justice. An order passed in such a situation cannot be relied upon in this case where fraudulent activity like taking Cenvat credit on the basis of invoices without receipt of goods. Further in this case the appellant asked for modification of stay order without giving any reasons.

13. Wherever an appellant had produced fresh facts justifying reconsideration of earlier order, the Courts have ruled in favour of fresh consideration of the matter. The following decisions relied upon by Tribunal while deciding the case of Prem Nath Mooga Beverages may be seen,-

(a) T. N. Electricity Board Vs. CEGAT-1991 (55) ELT 165

(b) Punjab Paints, Colours and Varnish Works Vs. CEGAT - 1987 (32) ELT 656

In these cases the assesse had submitted fresh facts which were relevant for re-considering the application. On the other hand the case at hand is a case where the appellant did not give any valid reason for modification of stay. So it is very obvious that the appellant was just trying to gain time by filing a modification application and I am of the view that the Commissioner (Appeal) was right in rejecting the appeal for the reason that stay order has not been complied with.

14. The modification application filed by the appellant already stands rejected by the Commissioner (Appeal) for valid reasons. Allowing the appellant to go for another round of proceeding without further pre-deposit in this matter does not meet the ends of justice. I am using the expression "ends of justice" with an understanding that Revenue also needs justice and not just the assessee. I also take note of the fact that as per section 35F of

Central Excise Act, pre-deposit is the rule and waiver of pre-deposit is an exception.

15. So in my view if the appellant, at this stage wants to get the benefit of a hearing before the Commissioner (Appeal) the appellant should be asked to make the pre-deposit called for by the Commissioner (Appeal).

(Mathew John)
Member(Technical)

POINT OF DIFFERENCE OF OPINIOIN

In the facts and Circumstances of the case whether the appeal should be remitted back for issuing order on application for modification of stay application filed by the Appellant before the Commissioner (Appeal) and then decision of the appeal as ordered by Member (Judicial)?

Or

Whether the applicant should be asked to make the pre-deposit ordered by the Commissioner (Appeal) and then argue his case before the Commissioner (Appeal) as ordered by Member (Technical)?

(Archana Wadhwa)
Member(Judicial)

(Mathew John)
Member(Technical)

The Registry may place the matter before the President CESTAT for resolving the above difference in views.

(Archana Wadhwa)
Member(Judicial)

(Mathew John)
Member(Technical)

MPS*

<u>Per Archana Wadhwa</u>

After going through the order of my learned brother, I would like to express some views. The issue required to be addressed in the present appeal is not as to whether Commissioner (Appeals) should have allowed or rejected the modification application. It is prerogative of the authorities before whom such modification applications are filed to consider the same on merits and take appropriate decision. Without commenting upon the result of modification application, the point required to be decided is as to whether Commissioner (Appeals) was justified in dismissing the appeal for non-compliance on the same very date and vide same very order vide which the modification application was rejected. Principles of natural justice require him to intimate his decision on modification application to the appellants and to grant some more time to him for making a pre-deposit, as a consequence of rejection of the modification application. Interest of justice require the above course of action to be adopted by Commissioner (Appeals). Such type of orders passed by Commissioner (appeals) rejecting the modification application as also dismissing the appeal vide the same order is not in the interest of justice and result in denial of justice to the litigants. The proper course of action, in my view, was to decide the modification application, to intimate the result of such decision to the appellants and in case of rejection, extend the period to deposit and then to decide the appeal subsequently. ~~Des~~ This patent illegality in the orders of the Commissioner (Appeals) cannot be rectified at the stage of higher appellate forum and has to be rectified by him only. It may not be out of context to mention here even the CESTAT whenever they reject the modification application, extend the period to deposit the directed amount in the interest of justice. Commissioner (Appeals) should have followed the said procedure and that is why the matter stands remanded to Commissioner (Appeals).

(Archana Wadhwa)
Member(Judicial)

ss

Pronounced

Per: D.N.PANDA

1. Present reference under Misc Order No. 264 of 2012 arose against difference of opinion between learned members of the Division Bench of the Tribunal at the stage of hearing of interim applications Nos. 2066 and 2067 of 2010 praying for stay of realization of the demands involved in appeal Nos. E-2165 and 2166 of 2010 instituted against order of learned Com (A) dismissing first appeals of the appellants by order dated 21.04.2010 for their failure to make deposit of Rs. 20.00 lakhs ordered by him vide stay order No. 02-03(DK) JPR I/2010 dated 24.2.2010 and failing to justify (in the application dated 15.04.2010 filed by the appellants) the reason why extension of time for predeposit of the said amount shall be allowed or the reason why terms of the stay order shall be varied.

2. At the outset of hearing of the present reference, objection of Revenue was that instead of pronouncing the point of difference recorded by both members of the Bench on 15/03/2012 at page 8 of the Misc. Order N0. 264 of 2012, a separate order recorded by learned judicial member at page 9 and 10 of the said Misc. order was pronounced on 16.03.2012. The order so pronounced being recorded subsequent to recording of the difference by members that should not guide the reference. Learned counsel appearing for appellants had no answer to such objection of Revenue.

3. When objection as above came up, record was examined. It was noticed that the Registry while placing the

matter before Hon'ble President for exercise of his administrative jurisdiction to order the reference, did not mention about the order appeared at page 9 and 10 of the aforesaid Misc. Order.

4. Record further revealed that stay applications aforesaid were heard by the Division Bench on 07.02.2012 and order thereon was reserved. Both members differing in their opinion recorded their separate orders and drew point of difference on 15.03.2012 at page 8 of the Misc. order under their signature with direction to the Registry to place the record before Hon'ble President. Thus became *functus officio.* Thereafter at page 9 and 10 of the Misc. Order, a separate order was recorded by the learned judicial member and that was pronounced on 16.03.2012. Whether pronouncement of such separate order was within the knowledge of learned Technical member is not known to record while golden rule of law is that judicial decision making process should be transparent and judicial independence should remain unimpaired as well as judicial decision uninfluenced. Fair play and transparency are *sine qua non* in judicial decision making process and judicial independence and judicial decorum are inevitable necessity of justice delivery system.

5. Time and again Apex Court has reminded that Justice is rooted in confidence and justice is the goal of a quasi-judicial proceeding also. If the functioning of a quasi-judicial authority has to inspire confidence in the minds of those subjected to its

jurisdiction, such authority must act with utmost fairness. Its fairness is obviously to be manifested by the fair play and demonstrated without a close mind which is in consonance with the scheme of impartial judicial act. The principle that justice must not only be done but it must eminently appear to be done as well is equally applicable to quasi judicial proceeding if such a proceeding has to inspire confidence in the mind of those who are subject to it. Apex Court in the case of *Commissioner of Income Tax* v. *Anjum M.H. Ghaswala and others* (2002) 1 SCC 633 has held that once an authority is required to act in a particular manner stipulated by the provisions, the authority is bound to act accordingly and cannot deviate from doing so.

6. Apex Court in Para 51 of the judgment in the case of *M/s. Kranti Associates 2011 (273) ELT 345 (SC)* after considering various judgments formulated certain principles touching transparency in fair justice delivery system. In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Transparency is the *sine qua non* of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor (1987) 100 Harward Law Review 731-737). If a Judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person

deciding is faithful to the doctrine of precedent or to principles of incrementalism.

7. Judicial proceedings always require: (i) no man shall be a judge in his own cause and (ii) justice should not only be done but manifestly and undoubtedly seem to be done. These maxims yield the result that no party to litigation can be dealt to the detriment of justice. Essence of fair and objective administration of law is that the decision of the Judge or the Tribunal must be absolutely unfettered by any extraneous considerations and what law and the provisions of law may legitimately do cannot be permitted to be done by any other means.

8. Authority exercising appellate jurisdiction is left absolutely free to decide the matter before him and his decision must be absolutely unfettered by any force. If his jurisdiction is controlled by any means, that forges fetters on the exercise of appellate jurisdiction completely inconsistent with the well accepted notion of judicial process. Law regulates exercise of judicial powers but does not interfere to the independence in decision making in any manner. For all such reasons aforesaid, it may be stated that Revenue's objection is not devoid of merit and with utmost respect it may be said that all that what has been said above is to emphasize the necessity of self-imposed discipline in

obeisance to such weighty institutional considerations like the need to maintain transparency, decorum and comity.

9. The following points of difference as that arose between learned members may be examined in the light of law relating to interim orders, judicial propriety and power of learned Commissioner (Appeals) to deal with an application for modification or variation of stay order passed by him at the first appellate stage:

POINT OF DIFFERENCE OF OPINION

In the facts and circumstances of the case whether the appeal should be remitted back for issuing order on application for modification of stay application filed by the Appellant before the Commissioner (Appeal) and then decision of the appeal as ordered by Member (Judicial)?

Or

Whether the applicant should be asked to make the pre-deposit ordered by the Commissioner (Appeal) and then argue his case before the Commissioner (Appeal) as ordered by Member (Technical)?

10. Appeals pass through two stages i.e., stage of stay hearing and the stage of appeal hearing as is laid down by Apex Court in the case of *Alex Enterprises* v. *Union of India* - 2009 (236) E.L.T. 10 (S.C.). Right of appeal being conditional as held

by Apex Court in the case of *Vijay Prakash D. Mehta* - 1989 (39) E.L.T. 178 (S.C.) = 1988 (4) SCC 402, the first stage is to cross the hurdle of pre-deposit. Only after that stage, subject to compliance to the interim order, if any, assessee gets right to be heard on appeal in full length and fair opportunity is granted to place his case to decide the contentious issues involved.

11. While interest of Revenue weighs consideration, undue hardship that an assessee may suffer by an interim order also equally invites attention of the Courts while hearing interim applications. So also, the law laid down by Apex Court in *Dunlop India Ltd* - 1985 (19) E.L.T. 22 (S.C.), Vijay D. Mehta - 1988 (4) SCC 402: 1989 (39) ELT 178 (SC), Benera Valves – 2006 (204) ELT 513 (SC) and Ravi Gupta – 2009 (237) ELT 3 (SC) govern the field. Main purpose of passing an interim order is to evolve a workable formula or a workable arrangement to the extent called for by the demands of the situation keeping in mind the frame work of the legislation and to ensure that no irreparable injury is occasioned. Courts are therefore required to strike a delicate balance after considering the pros and cons of the matter lest larger public interest is not jeopardized and both litigants before the Court are equally dealt under law. Every effort is made to ensure that no prejudice is occasioned to the litigants and no remand of a matter is made hurriedly to virtually grant substantial relief to a party to whom that is not due.

12. At this stage it would be proper to reproduce the anxiety of Apex Court expressed in para -7 judgment in ACCE, West Bengal vs. Dunlop India Ltd. & others - 1985 (19) ELT 22 (SC) in respect of interim orders passed in Revenue matters, which reads as under:-

> "**7.** *We have come across cases where the collection of public revenue has been seriously jeopardised and budgets of Governments, and Local Authorities affirmatively prejudiced to the point of precariousness consequent upon interim orders made by courts. In fact, instances have come to our knowledge where Governments have been forced to explore further sources for raising revenue, sources which they would rather well leave alone in the public interest, because of the stays granted by Courts. We have come across cases where an entire Service is left in a stay of flutter and unrest because of interim orders passed by courts, leaving the work they are supposed to do in a state of suspended animation. We have come across cases where buses and lorries are being run under orders of Court though they were either denied permits or their permits had been cancelled or suspended by Transport Authorities. We have come across cases where liquor shops are being run under interim orders of court. We have come across cases where the collection of monthly rentals payable by Excise Contractors has been stayed with the result that at the end of the year the contractor has paid nothing but made his profits from the shop and walked out. We have come across cases where dealers in food grains and essential commodities have been allowed to take back the stocks seized from them as if to permit them to continue to indulge in the very practices which were to be*

prevented by the seizure. We have come across cases where land reform and important welfare legislations have been stayed by courts. Incalculable harm has been done by such interim orders. All this is not to say that interim orders may never be made against public authorities. There are, of course, cases which demand that interim orders should be made in the interests of justice. Where gross violations of the law and injustices are perpetrated or are about to be perpetrated, it is the bounden duty of the Court to intervene and give appropriate interim relief. In cases where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizen's faith in the impartiality of public administration, a Court may well be justified in granting interim relief against public authority. But since the law presumes that public authorities function properly and bona fide with due regard to the public interest, a Court must be circumspect in granting interim orders of far reaching dimensions or orders causing administrative, burdensome inconvenience or orders preventing collection of public revenue for no better reason than that the parties have come to the Court alleging prejudice, inconvenience or harm and that prima facie case has been shown. There can be and there are no hard and fast rules. But prudence, discretion and circumspection are called for. There are several other vital considerations apart from the existence of a prima facie case. There is the question of balance of convenience. There is the question of irreparable injury. There is the question of the public interest. There are many such factors worthy of consideration. We often wonder why in the case indirect taxation where the burden has already been passed on to the consumer, any *interim relief should at all be given to the manufacturer, dealer and the like :"*

13. Ld. Commissioner (Appeals) appears to have been guided by the result of investigation appearing in -para 2 of stay order No.02-03 (DK) CE/JPR - I/2010 dated 23/24.02.2010 and seemed to have primafacie view that appellant availed Cenvat Credit without goods being received in its factory, which caused prejudice to the interest of Revenue for which predeposit of Rs.20,00,000/- within 30 days of the receipt of stay order was ordered by him.

14. According to the investigation result, there was evasion of duty by appellant company making false claim of cenvat credit of Rs.40,15,803/- diverting the HR coils purchased from SAIL at Jaipur and the sales depots at Bharatpur of Jaipur on the falsified GRs issued by transporter in the name of the appellant without being such goods received at the factory of the appellant M/s. Garg Ispat Udyog Ltd. at Biwadi. Goods were sent to different premises under direction of the appellant company and its Director. Such transactions were made under code mark "J" on the right hand top corner of GRs and Bills and such alphabet "J" indicated that the goods were delivered at Jaipur instead of Biwadi. Purchases were falsely recorded by the appellants without the impugned goods reached their factory. Apparent was not real. The appellant company issued false sale invoices without goods being delivered and also without the invoices

disclosing description of the goods. One Shri J.D. Gupta and Neeraj Sharma came to picture who were instrumental to cause evasion to Revenue.

15. Investigation also revealed that most of the consignments diverted were unloaded at various cutters' premises at Jaipur. Excess payments of freight paid by cheques were partly returned in cash to the appellant company without explaining any good reason why such refunds were made. Section 14 evidence established oblique motive of parties. Instruction issued by aforesaid 2 persons for diversion of the impugned goods was categorical admission in the statement recorded. Statutory records were manipulated to make pretence of consumption of goods in manufacture although such goods were diverted.

16. Physical inventory during investigation resulted in excess stock of 12.05 MT of HR Coils/ scrap as per Panchnama dated 6.10.06. Excess generation of scrap was false and such falsity was recorded to make artificial sale thereof in absence of such generation. Evidence recorded from Shri Ajay Kumar Jain, Director of M/s. Naman Castings Pvt. Ltd. revealed that said company was purchasing scrap from the appellant without sale thereof being covered by invoices.

17. Statement dated 6.10.06 recorded from Shri Sunil Singh, Proprietor of M/s. Biwadi Behrore Road Lines revealed that copies of blank GRs of the said transport concern was made available to the appellant company without providing vehicles.

Such blank GRs were instrumental to cause subterfuge to Revenue recording false transportation of goods without the same actually transported. Recovery of 4.5 Lakhs of cash from the premises of Shri J.D. Gupta, Director of the appellant company in the course of search revealed that such amount was outcome of sale proceed of HR Coils sold as such showing those were rejected/defective goods.

18. Some of the aforesaid material facts backed by evidence appears to have guided the first appellate authority to direct predeposit of Rs.20,00,000/- Lakhs for hearing the appeal. Upon failure by appellants to make such predeposit, appeals were dismissed.

19. In the opinion of the ld. Judicial Member modification application dated 15.04.2010 moved before first Appellate Authority ought to have been disposed by a separate order and informed to the appellant and if that authority deemed fit to reject modification application, it should have extended date of pre-deposit. Observing that Rs.15,00,000/- was already deposited by the appellant, further deposit to hear appeal was waived and matter was remanded for the consideration of the modification application by learned Commissioner (Appeals).

20. On the contrary ld. Technical Member recorded the far reaching consequence of modification application opining that litigants shall follow dilatory tactics filing modification applications before first appellate authority to keep him busy in

issuing show cause notices to waste time in spurious litigations. He also observed that there is no legal provision in respect of modification application to be dealt by first appellate authority. Accordingly, entertaining such modification application issuing show cause notice shall be abuse of process of law by evaders. Also it was observed that appellant failed to give any valid reason for modification of stay order for which ld. Commissioner (Appeals) rightly rejected the application. In para 14 of the order it is recorded by ld. Technical Member that pre-deposit is a rule and waiver thereof is an exception. Accordingly, he opined that appellants should be asked to make pre-deposit.

21. In Hari Singh Mann vs. Haribhajan Singh Bajwa & Others (2001) 1 SCC 109 it has been held that once a matter is finally disposed of by a court, the said court in the absence of statutory provision becomes *functus officio* and is disentitled to entertain a fresh prayer for the same relief unless the former order is set aside by a court of competent jurisdiction in a manner prescribed by law. The court becomes *functus officio* the moment the official order disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or an arithmetical error.

22. It is not permissible for any one to reopen a proceeding by a modification application for review of the earlier order in disregard of the statutory bar of review. A three judges bench of

Apex Court in the case of Major Chandra Bhan Singh – (1979) 1 SCC 321 following the precedent in Harbhajan Singh vs. Karam Singh, (1966) 1 SCR 817 approving the earlier privy counsel decisions on Baijnath Ram Grenka Vs. Nand Kumar Singh 40 IA 54: ILR 40 Cal 552: 15 Bom LR 500; Ananth Raju Shetty vs. Appu Hegade AIR 1919 Mad. 244; Patel Chunibhai Dajibhai vs. Narayan Rao Jambekar AIR 1965 SC 1457 held that review is a creature of statute but not an inherent power and cannot be entertained in the absence of a statutory provision in that regard. So also want of jurisdiction to review could not be cured by waiver and court is not obliged to grant relief to a party disentitled to the same.

23. In the case of Dr. (SMT) Kuntish Gupta vs. Management of Hindu Kanya Mahavidyalaya, Sitapur (UP) and others – 1987 (4) SCC 525 it has been held that it is now well settled that a quasi judicial authority cannot review its own order unless the power of Review is expressly conferred on it by the statute under which it derives its jurisdiction. It has further been reiterated in the case of Kalabharati Advertising vs. Hemant Vimal Nath Narithania and others – (2010) 9 SCC 437 that unless the statute or rules so permit, a review application is not maintainable against judicial or quasi-judicial orders. In the absence of any provision in the statute granting an express power of review, it is manifest that a review can not be made and order of review, if passed, is ultra vires, illegal and without

jurisdiction [Vide Patel Chunibhai Dajibha vs. Narayanrao Khanderao Jambekar- AIR 1965 SC 1457 and Harbhajan Singh vs. Karam Singh.(1966 1 SCR 321].

24. Power of review must be conferred by law either expressly or specifically or by necessary implication and in the absence of any provision in the Act or Rules is a nullity being without jurisdiction. Accordingly in the absence of any statutory provision providing for review, entertaining an application for review or under the garb of clarification, modification or correction is not permissible. Review being a statutory remedy, Court cannot confer a jurisdiction upon any authority not vested with it. Conferring jurisdiction upon a court, or tribunal or authority is a legislative function and the same cannot be conferred either by the court or by the consent of the parties. An order passed without jurisdiction is a nullity and any order passed in pursuance thereof, also remains unenforceable and unexecutable.

25. It has also been held in CCE, Vadodara vs. Steel CO. Gujarat Ltd. - 2004 (163) ELT 403 (SC) that the power of review is not an inherent power and must be expressly granted. It has not been granted under the Central Excise Act, 1944. While dealing with powers of Tribunal relating to modification application, Hon'ble High Court of Bombay in 8 of judgment in Baron International Ltd. vs. UOI – 2004 (163) ELT 150 (Bom.) held as under:

*"**8.**Our experience shows that in almost all the applications moved to seek modification of the Tribunal's order contain only grounds of review. They are freely entertained by the CEGAT and the same are sometime accepted or rejected on merits with detailed order. Such exercise, apart from labour, must be consuming major part of its working hours. This wastage of labour and working hours can easily be saved by the CEGAT, if application moved in this behalf is prima facie, examined by CEGAT to find out whether any change in circumstance after the previous order, is shown with sufficient material in that behalf; or any other reason prima facie; exists warranting modification of the previous order on the ground which was not available when the previous order was made. At the threshold, if such preliminary enquiry is made by the Tribunal, we are sure in most of the cases application may not be required to be heard on merits. Had such enquiry been made by the CEGAT in this behalf in this case, we are sure, Tribunal would have saved its labour and time and would not have been required to devote nine pages for writing impugned order. We direct that henceforth the Tribunal shall first make prima facie; enquiry whether application needs consideration on merits as indicated by us hereinabove before considering any application for modification of its previous order on merits. If the Tribunal finds that prima facie case for modification is made out, then, only a Tribunal shall deal with such application on merits. The Tribunal shall be justified in rejecting frivolous applications at the threshold."*

26. On behalf of appellant it was argued by ld. Counsel that the application dated 15.04.2010 was not considered, although the appellant stated that it is not in a position to deposit the amount in terms of stay order due to some unavoidable circumstances. It was also submitted that Rs.15,00,000/- was deposited before adjudication even though the goods came from SAIL's Bharatpur and Jaipur Dept. He relied on the decision in the case of Ador Polycontainers Ltd. vs. CCE, Aurangabad reported in 2001 (42) RLT 802 (CEGAT) to submit that when the appellant failed to deposit the amount directed in the stay order, modification application should have been considered by the Commissioner (Appeals) and appeal should not have been dismissed. He further relied on the decision in the case of CCE, Kolkata-II vs. Shree Gobinddeo Glass Works Ltd. reported in 2011 (263) ELT 178 (Cal.) to submit that before dismissing the appeal show cause notice should have been issued. The Commissioner (Appeal) failed to do so.

27. On the other hand, ld. DR submits that when the show cause notice with the evidence recorded under section 14 of Central Excise Act 1944 brought the appellant to the charge of false claim of the cenvat credit, that made it liable to pay back the cenvat credit availed wrongly. Accordingly deposit of the duty to make good of the loss suffered by Revenue was warranted and consequence of law was to follow to deal the evader. The stay order dated 23/24.2.2010 passed by the first

appellate authority brought out the manner how the appellant made false claim of cenvat credit. First appellate authority noticed contravention of law made by them as detailed in the show cause notice. He examined the submission of the appellant where the financial difficulties pleaded was recorded as is apparent from para 6 of the stay order passed by Commissioner (Appeals) in the case of Company and in para 7 of the same order in the case of Director. There was nothing new fact or circumstances brought out by application dated 15.4.2010 by the appellant to claim same relief as that was made earlier. Therefore, on self same ground appellant's appeal was bound to be dismissed without any power of modification with the Commissioner (A) by Central Excise Act 1944. It was also submitted that Tribunal cannot confer power on the Commissioner (Appeals) to make modifications of the stay orders which is not permitted by law. He relied on the decision in the cases of Ambassy Contractors Pvt. Ltd. vs. CCE, Bangalore-III -2010 (256) ELT 349 (Kar.) and Lind Exports vs. Union of India reported in 2011 (269) ELT 53 (Del.) to submit that pre-deposit directed by the Commissioner (Appeals) was proper and there should not be intervention to the same.

28. Heard both sides and perused the record.

29. Law relating to the power of modification has been elaborately discussed in the preceding paragraphs. Ld. DR was right to say that the ground of financial difficulty was before ld.

Commissioner (Appeals) at the stage of stay hearing itself and the application dated 15.4.2010 is on the self same ground of relief claimed asking the first appellate authority to review his order which is not permissible under law. Therefore, he has rightly acted in accordance with law in absence of express or implied power to review his own order as has been held in the series of Apex Court decisions discussed herein before. Reliance of appellant on the decision of Ador Polycontainers Ltd. vs. CCE, Aurangabad reported in 2001 (42) RLT 802 (CEGAT) is not profitable for no discussion of the judgements of the Apex Court in the said order. Further reliance of the appellant in the case of CCE, Kolkata-II vs. Shree Gobinddeo Glass Works Ltd. reported in 2011 (263) ELT 178 (Cal.) relates to a decision of dismissal of appeal by Tribunal. It may be stated that Tribunal being final Court of fact, Hon'ble High Court directed in para 29 of the judgment that the proper course of dismissal of appeal by Tribunal should be issuing show cause notice before passing such an order in the event of failure to make pre-deposit. That judgment having decided the law relating to dismissal of appeal by Tribunal following principle of natural justice, the appellant shall not gain out of that judgments since the appellant has availed remedy of appeal against order of dismissal passed by learned Commissioner (Appeals).

30. So far as the citations made by the Revenue is concerned, Hon'ble High Court of Karnataka has held that upon

consideration of the relevant facts stated in the modification application that was rejected by Tribunal. Reliance in the case of Lindt Export vs. Union of India reported in 2011 (269) ELT 53 (Del.) is on the point of dismissal of appeal on the ground that the appellant through its Counsel in that case informed Hon'ble Court that it was not possible for the appellant to make the deposit suggested by the Hon'ble Court unless 2 or 3 months time was allowed. Hon'ble Court declined to grant any further time to the appellant and dismissed the appeal of the appellant in that case.

31. Law being succinctly clear on the bar of exercise of power of review by an authority not expressly vested with such power by law and no Court can legislate on such power, the law discussed in para 11 of the Miscellaneous order by the ld. Technical Member weigh heavily for which his conclusion in para 15 deserves to be agreed. Accordingly, the reference is answered stating that appellant should be asked to make pre-deposit ordered by the Commissioner (Appeals) to get opportunity of hearing of the appeal.

32. Registry to place the records before the referring bench for passing appropriate order.

[Pronounced in the open Court on 27.7.2012.

(D.N. PANDA)
JUDICIAL MEMBER

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Majority order in E/Stay Nos. 2066-2067 of 2010 in E/Appeal Nos. 2165-2166 of 2010-Ex(DB)

In view of the majority opinion, after waiving the requirement of pre-deposit for hearing the appeal filed with the Tribunal, the impugned order in appeal is set aside with liberty to the appellant to comply with Stay Order No.02-03(DK)JPR-I/2010 dated 24.2.2010 issued by the Commissioner (Appeals) directing pre-deposit of Rs.20 lakhs ordered by him within 30 days of receipt of this order for hearing of the appeal on merits by the Commissioner (Appeals). If such pre-deposit is not made, the appeals before the Commissioner (Appeals) will stand dismissed and consequently the order in original will get restored.

(ARCHANA WADHWA)
Member (Judicial)

(MATHEW JOHN)
Member Technicla