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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

Appeal No. : E/2162/2005-EX[DB]

Dated: **06/07/2012**

Assistant Registrar
C.E.S.T.A.T. New Delhi
To,
C.C.E.MEERUT-I
University Road Mangal Panday Nagar
Meerut U.P.

C.C.E.MEERUT-I (Appellant)

VS

PREM STEEL PVT.LTD. (Respondent)

I am directed to transmit herewith a certified copy of Final Order No. **A/759/2012-EX[DB]** dated **27/06/2012** 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
PREM STEEL PVT.LTD.
Begrajpur Meerut Road Muzaffar Nagar
U.P.

2. **Advocate(s) / Consultant(s):** SHRI C. H. SHANKAR, ADV., 46, BANK ENCLAVE, N. DELHI-

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

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

COURT-I

Date of hearing/ decision: 27.06.2012

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. 2162 of 2005 & C.O. No. 196 of 2005

(Arising out of order-in-Appeal No. 32-CE/MRT-I/CEX/IND/2012 dated 29.03.2005 passed by the Commissioner (Appeals) Central Excise, Meerut).

CCE, Meerut — Appellants

Vs.

M/s Prem Steels (P) Ltd. — Respondent

Present Shri R.K. Verma, AR for the appellant.
Present Sh. C. Harishankar, Advocate for the respondent.

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

FINAL Order No. A/759/2012-Ex (BR)

<u>Per. Justice Ajit Bharihoke (Oral)</u>:

This is the department's appeal directed against the Order-in-appeal No. 32-CE/MRT-I/CEX/IND/2012 dated 29.03.2005 whereby the Commissioner

(Appeals), Central Excise, Meerut-I set aside the order-in-original passed by the jurisdictional adjudicating authority and remanded the matter back for fresh decision after considering the assessee's claim for abatement after giving him proper opportunity of being heard.

2. The impugned order has been assailed on the sole ground that the Commissioner (Appeals) has no power to remand the matter back to the adjudicating authority for fresh adjudication, after the amendment of Section 35A of the Central Excise Act, 1944 by virtue of Section 128A(2) of the Finance Act, 2001. Respondent in his reply filed as Cross-objection has submitted that appeal is liable to be rejected as it has been filed against the finding of the High Court of Gujarat holding that Commissioner (Appeals) under Section 35A of the power to remand the case back for readjudication. Since only legal issue has been raised, there is no need to reproduce the facts of the case.

3. Ld. Sh. R.K. Verma, AR for the department has contended that the impugned order of remand passed by Commissioner (Appeals) is without jurisdiction. Expanding on the order ld. Sh. Verma submitted that as per Section 35A(3) the Commissioner (Appeals) shall after making further enquiry, as may be necessary pass an order as he think just and proper, confirming, modifying or annulling the decision or the order appealed against. This provision does not authorized the Commissioner (Appeals) to remand the matter back to the original adjudicating authority for fresh adjudication. In support of this contention Sh. Verma, AR has drawn our attention to pre-amended Section 35A wherein the power to remand the matter back to adjudicating authority was specifically given to the Commissioner (Appeals). Ld. AR submits that the fact that the aforesaid power by way of amendment has been taken away is clear indication of intention

of legislature to withdraw the power to remand from the Commissioner (Appeals). Thus, it is contended that impugned order remanding the case back for adjudication is liable to be set aside, being without jurisdiction.

4. On the contrary, ld. Counsel for the respondent has pleaded that the amendment of Section 35A by no means has taken away the power of the Commissioner (Appeals) to remand the matter. It is submitted that reading of Section 35A of the Act would show that this provision confers power on the appellate authority to confirm, modify or annul the decision or order appealed against and pass an order which is thinks to be just and proper. Ld. Counsel submits that an order of remand necessarily annul the decision and the appellate authority is also vested with the power to pass just and proper order. If both these portion of Section 35A(2) are read together, it necessarily imply that appellate authority has power to satisfy the decision under appeal and to remand the matter for fresh decision. In support of this contention ld. Counsel for the respondent has relied upon in the matter of **Union of India vs. Umesh Dhaimode reported in 1998 (98) ELT 584 (SC).**

5. Countering the argument of the respondent Sh. R.K. Verma, AR for the department has submitted that judgement relied upon by the respondent is not applicable to the facts of this case as it is in relation to the interpretation of erstwhile section 128A(2) of the Customs Act, 1962. ld. AR has referred to the judgement of Supreme Court in the matter of **MIL India Ltd. vs. CCE, Noida reported in 2007 (210) ELT 188 (SC)** in support of his contention.

6. 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.

7. 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".

8. 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."

9. 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".

10. 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 precedence over the finding of the Supreme Court in the matter of Union of India vs. Umesh Dhimode (supra) passed on the analysis of ~~the~~ similar provision itself.

11. 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.

12. 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.

13. 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.

14. Appeal is therefore dismissed.

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Member (Technical)

Pant