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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/2825/2009-EX[DB], E/2826/2009-EX[DB

Dated: **13/07/2012**

Assistant Registrar
C.E.S.T.A.T. New Delhi
To,
C.C.E. DELHI I
C.R. BUILDING, I.P. ESTATE, NEW
DELHI 110002

C.C.E. DELHI I (Appellant)

VS

M/S.BOX SHEET CONTAINER, (Respondent)

I am directed to transmit herewith a certified copy of Final Order No. **A/807-808/2012-EX[DB]** dated **09/07/2012** 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
M/S. BOX SHEET CONTAINER,
D-53, AVTAR ENCLAVE, PASCHIM
VIHAR,DELHI-110063.

2. **Advocate(s) / Consultant(s):**

NONE

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
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Assistant Registrar
EXCISE Appeal Branch

14. **SHRI KAPIL DHAWAN,**
D-53, AVTAR ENCLAVE, PASCHIM
VIHAR,DELHI-110063.

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

COURT-I

Date of hearing/ decision: 09.07.2012

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. 2825 - 2826 of 2009

(Arising out of order-in-Appeal No. 122-124/CE/DLH/2009 dated 04.08.2009 passed by the Commissioner (Appeals) Central Excise, Delhi-I).

CCE, Delhi-I — Appellants

Vs.

M/s Box Sheet Container
Sh. Kapil Dhawan — Respondent

Present Shri Nagesh Pathak, AR for the appellant.
None for the respondent.

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

FINAL Order No. A/807-808/2012-ExCBR

Per. Justice Ajit Bharihoke (Oral):

These are the department's appeals directed against the Order-in-appeal No. 122-124/CE/DLH/2009 dated 04.08.2009 whereby the Commissioner (Appeals), Central Excise, Delhi-I set aside the order-in-original passed by the jurisdictional adjudicating authority and remanded the matter back for readjudication.

2. Only issue is raised in these appeals are that the appellant after amendment of Section 35A of the Central Excise Act, 1944 whereby expressly conferred power to remand the matter was taken away. The Commissioner (Appeals) has no jurisdiction to remand the matter back for adjudication to the concerned adjudicating authority.

3. Ld. Sh. Nagesh Pathak, 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. Pathak 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. Pathak, 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. In support of his contention appellant has relied upon judgement of the Supreme Court in the matter of **MIL India Ltd. vs. CCE, Noida reported in 2007 (210) ELT 188 (SC).**

4. We have considered the submission of ld. AR 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 Section 35A (3) of the Excise Act respectively deals with the powers of the Commissioner (Appeals). Both the sections deal with 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".

6. Interpretation of above provision came up before the Supreme court in the matter of **UOI vs. Umesh Dhaimode 1998 (98) ELT 584 (SC)** 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 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 basis of 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 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 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 produce evidence in support of his case then while

setting aside the order-in-original only just and fair order would be to remand the matter back for fresh adjudication 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 appeals filed by the department.

12. Appeals are, therefore dismissed.

(Justice Ajit Bharihoke)
President

(Rakesh Kumar)
Member (Technical)

Pant