IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

EASTERN ZONAL BENCH: KOLKATA

Excise Appeal No. 409/2009

(Arising out of Order-in-Appeal No. 45/JSR/2009 dated- 29.04.2009 passed by the Commissioner (Appeals), Central Excise & Service Tax, Ranchi)

Commr. of Central Excise, JSR

Applicant (s)/Appellant (s)

Vs.

M/s. H.V. Axles Ltd.

Respondent (s)

Appearance:

Shri S. Mukhopadhyay, Supdt. (A.R.) for the Appellant (s)

Sri Ravi Raghavan, Advocate for the Respondent (s)

CORAM:

Hon'ble Shri P.K.Choudhary, Member (Judicial)
Hon'ble Shri Bijay Kumar, Member (Technical)

Date of Hearing/Decision:- 16.05.2018

ORDER NO. : F/O 76252/2018

Per Shri Bijay Kumar

Revenue has filed the present appeal against the Order-in-Appeal No. 45/JSR/2009 dated- 29.04.2009 passed by the Commissioner (Appeals), Central Excise & Service Tax, Ranchi, whereby the Commissioner (Appeal) set aside the order passed by the adjudicating authority and remanded the matter to the adjudicating authority to decide the issue afresh. The only contention of the Revenue is that as per amended provision of Section 35A of Central Excise Act, the power of remand by the Commissioner (Appeal) has been withdrawn w.e.f.

11/05/2001. Therefore, Commissioner (Appeal) has no power to remand. The Revenue also relied upon the decision of the Hon'ble Supreme Court in case of M/s. MIL India Ltd. Vs. Commr. of Central Excise, Noida [2007 (210) ELT 188 (S.C.) and the decision of Punjab and Haryana High Court in case of Enkay India [2007-TIOL-152-HC-P&H-CUS) and Dhillon Kool Drinks and Beverages Ltd. [2007-TIOL-524-HC- P&H-CX & 2007-TIOL-672-HC- P&H-CX and that the issue was no longer res integra and the power of remand earlier available with the Commissioner (Appeal) has been expressly taken away by the Finance Act. The Revenue also has questioned the case being remanded by Commissioner (Appeal), on the ground that Hon'ble CESTAT, vide order No. A-65/KOL/2009 dated-26/02/2009, dismissed the Department's appeal and thus upheld the power of remand exercised by the Commissioner (Appeal). It is stated that Department has filed appeal before Hon'ble High Court of Jharkhand, Ranchi against the said order of CESTAT dated 26.02.2009 which is pending and therefore, this order has not attained its finality.

2. The Ld. Advocate supported the order passed by the Commissioner (Appeal).

3. The issue involved in the present case is regarding the remand power of Commissioner after amendment of Section 35A (3) of the Central Excise Act. We have considered the various judgements produced before us. After perusal of these judgements, it is evident that there are conflicting decisions regarding the power of remand by the Commissioner (Appeal) after amendment of Section 35A (3) of the Central Excise Act by Finance Act, 2001. The contention of the Revenue is that in view of Supreme Court decision, MIL India case supported by the two decisions of Punjab & Haryana High Court, herein referred above, the

Commissioner (Appeal) does not have the power to remand the case back to adjudicating authority after 11.5.2001. However, Gujrat High Court has taken a contrary view and held that such power do exist with the Commissioner (Appeal) in their following judgement of Commr. of Central Excise, Ahmedabad-I Vs. Medico Labs.[2004 (173) ELT 117 (Guj.).

4. Further, it is also the fact that this Tribunal, vide its order dated 26/02/2009 in case of Commr. of Central Excise, JSR Vs. Tata Steel , JSR (order No. A-65/KOL/2009 dated-26/02/2009) has held that Commissioner (Appeal) has power to remand the matter to the Adjudicating authority following the Gujrat High Court judgement in case of Medico Labs. (supra) even after amendment. This order was passed by the then Hon'ble Vice President Shri S.S. Kang. The Department has preferred the appeal against this order as per the appeal memorandum.

5. Ld. D.R. has brought to our attention to the judgement of Hon'ble Shri S.S. Kang, the then Vice President, yet in another case of Commissioner of Service Tax, Kolkata Vs. Kishore & Company [2011 (274) E.L.T. 466 (Tri.-Kolkata)], wherein it has been held that Commissioner (Appeal) has no power to remand the case to the adjudicating authority after 11/05/2001 in terms of amended Section 35A of Central Excise Act, 1944. In para 2 & 3 of the judgment it is extracted as under:

> ***"...2.*** *The only contention of the Revenue is that as per the amended provision to Section 35A of the Central Excise Act, the power of remand has been withdrawn w.e.f. 11-5-2001. Therefore, the Commissioner (Appeals) has no power to remand. The Revenue also relied upon the decision of the Hon'ble Supreme Court in the case of M/s. MIL India Ltd. reported in 2007 (210) E.L.T. 188 and the decision of the Hon'ble Punjab & Haryana High Court in the case of CC, Amritsar v. Enkay (India) Rubber Co. Pvt. Ltd. reported in 2008 (224) E.L.T. 393.*

> ***3.*** *In view of the above mentioned decisions, I find merit in the contention of the Revenue that the Commissioner (Appeals) has no power to remand. Hence, the impugned order remanding the matter to the adjudicating authority is set aside."*

Ld. D.R. also relied upon the decision of Commissioner of Central Excise, Jalandhar Vs. B.C. Kataria [2008 (221) E.L.T. 508 (P&H) wherein it has been held that the Commissioner (Appeal) has no power of remand after 11-5-2001 under Section 35A of Central Excise Act, 1944 by amendment made in Finance Act, 2001. We find that this issue has been finally decided after considering the conflicting judgements on the issue by the Larger Bench in case of Commissioner of Central Excise , Bhubaneswar Vs. Oripol Industries [2003 (155) ELT 278 (LB)] wherein in para 12 it is held that:

> ***"……12.****In the light of the above, we are inclined to agree with the view taken by the West Regional Bench in Vipor Chemicals Ltd. v. Commissioner of Customs, Mumbai - 2002 (144) E.L.T. 385 and disagree with the view taken by the East Regional Bench in CCE & Customs, Bhubaneshwar v. Indian Aluminium Co. - 2002 (144) E.L.T. 97 (T) = 2002 (50) RLT 92. The question referred is answered as above and the appeals are sent to original Bench for appropriate orders."*

In Indian Aluminium case [2002 (144) ELT 97 (Tri-Kol), it has been held that Commissioner (Appeal) has power to remand the matter to Lower Adjudicating Authorities afresh for decision on the disputed issue. In case of Viper Chemicals [2002 (144) ELT 385 (Tri-Mumbai)], it has been held that Commissioner (Appeal) is not empowered to remand the case to Adjudicating Authority in view of amendment carried out in the Section 128 (3) of the Customs Act, 1962; the Section 128 (3) is pari materia with Section 35A (3) of Central Excise Act, 1944 after amendment carried out vide Finance Act, 2001.

6. Accordingly, following Larger Bench decision referred (supra), we set aside the order passed by the Commissioner (Appeal) and allow the Revenue's appeal. The case is remanded back to Commissioner (Appeal) for taking appropriate action as per law following the principle of natural justice.

(Operative part of the order already pronounced in the Court)

Sd/- 14/6/18	Sd/- 14/6/18
(P.K.Choudhary) **MEMBER(JUDICIAL)**	**(Bijay Kumar)** **MEMBER(TECHNICAL)**

k.b/-