

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA**

Appeal No. ST/221/2010

(Arising out of Order-in-Appeal No. 08/Slg/2010 dated 16.03.2010 passed by the Commissioner (Appeal-IV) of Central Excise, Kolkata).

Commr. Of C. Ex. & S. Tax-Siliguri

Appellant (s)

Vs.

M/s. Evergrowing Iron & Fnvst Ltd.

Respondent (S)

Appearance:

Shri A. K. Biswas, Suptd. (A. R.) for the Revenue

None for the Respondent (s)

CORAM:

HON'BLE SHRI P.K.CHOUDHARY, MEMBER (JUDICIAL)

HON'BLE SHRI BIJAY KUMAR, MEMBER (TECHNICAL)

Date of Hearing: -15.06.2018

Order No. FO/76560/2018

PER CORAM

When the matter was called, none appeared on behalf of the respondent assessee. Since the matter is an old one, pertaining to the year 2010 and the matter lies in a narrow compass, the same is taken up for disposal with consent of the Ld. DR appearing on behalf of the Appellant Revenue.

2. Revenue has filed this appeal against the Order-in-Appeal No. 08/Slg/2010 dated 16/03/2010 in terms of which the Order-in-Original No. 03/JC/ST/SLG/09-10 dated 17/08/2009 was set aside and the case was remitted to the primary Adjudicating Authority for decision a fresh. The order portion of the Impugned Order in appeal is reproduced below:-

"I have examined the impugned order and submissions.

Verification means, verification by the Central Excise authorities. The Postal Department is not conducting any verification for the Central Excise department. The return of a letter by the Postal authorities with endorsement "Not known" cannot be equated with a verification done by a Central Excise Officer.

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The Appellant has filed Affidavits and permits from the Motor Vehicles Department to prove that the service providers are genuine. The Appeal is disposed off by directing the Appellant to file copies of the Affidavits/Motor Vehicle Permits before the Lower Authority within 30 days of the date of receipt of this order. The Lower Authority shall cause suitable verification by the Central Excise officer to determine the genuineness of the service providers and thereafter decide the matter as per law. Impugned order set aside and Appeal allowed by way of remand."

3. The only ground in the Revenue's appeal is that the Commissioner (Appeals) has no power of remand as the said power was taken away by amending Section 35 (A) of the Central Excise Act, 1944 with effect from 11/05/2001.
4. Revenue has cited several judgments including judgment of the Hon'ble Supreme Court to the effect that the power of remand has been taken away by virtue of amendment to Section 35 (A) of Central Excise Act, 1944 with effect from 11/05/2001.
5. Heard both sides and perused the appeal records.
6. We find that Section 35 A (3) of the Central Excise Act, 1944 as amended with effect from 11/05/2001 reads as under:-

"(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."

Thus, it has been rightly contended by the Revenue that the Commissioner (Appeals) had the power only to confirm, modify or annul the decision or order appealed against and did not have the power to remand the case to the primary adjudicating authority as the words "*or may refer the case back to the adjudicating authority with such direction he may think fit for fresh decision or as the case may be after taking additional evidence*"

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if necessary" which existed in Section 35A(3) prior to 11-5-2001 were deleted w. e. f. 11-5-2001.

But as per Section 85(4) of the Finance Act, 1994 the "*Commissioner of Central Excise (Appeals) shall hear and determine the appeal and subject to the provisions of this chapter pass such order as he thinks fit and such orders may include an order enhancing the service tax interest or penalty*". Thus it is seen that the language of Section 85(4) is not *pari materia* with the language of Section 35A (3) of the Central Excise Act, 1944. Indeed, Section 85(4) of the Finance Act, 1994 allows/authorises Commissioner (Appeals) to pass such order he thinks fit and therefore it cannot be argued that as per this Section [85(4)] the Commissioner (Appeals) cannot remand the case if he thinks fit to do so. It is seen that in the case of Commissioner *v. Goel International Pvt. Ltd.*, reported in 2015 (39) S.T.R 330 (Tribunal), has held that language used in Section 85(4) has wider connotation and power to pass such order as he thinks fit includes the power of remand.

7. In the light of the foregoing, we do not find any merit in the appeal and the same is accordingly, dismissed.

(Operative part of the order was pronounced in the open court.)

Sd/-
(Bijay Kumar)
Member (Technical)

Sd/-
(P.K. Choudhary)
Member (Judicial)

Pooja