

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,  
EAST REGIONAL BENCH : KOLKATA**

**MA(COD)-76834/18 & CO-77270/18  
& Ex.Appeal No.78122/18**

Arising out of O/A No.634/HWH/CE/2017-18 dated 12.03.2018 passed by  
CGST & Excise (Appeals), Howrah

CGST & Excise, Howrah

...APPELLANT(S)

VERSUS

M/s Ballyfab International Ltd.

RESPONDENT (S)

APPEARANCE

Shri A. K. Biswas, Supdt. (A.R.) for the Revenue  
Shri Shyamal Dey, Adv. for the Respondent (s)

**CORAM:**

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

DATE OF HEARING & PRONOUNCEMENT : 28.12.2018

ORDER NO...MO/76059/2018 & FO/A/77159/2018

**Per Shri P. K. Choudhary :**

The present Miscellaneous Application has been filed by the Appellant seeking condonation of delay of 8 days in filing the instant appeal before this Tribunal.

2. In view of the submissions advanced by the Id.D.R. for the Revenue and the reasons explained in the Misc.Application, the delay in filing the appeal before this Tribunal, is condoned. The Miscellaneous Application (COD) is allowed.

3. With the consent of both sides, the present appeal filed by the Revenue is being taken up for final disposal.

4. This appeal is directed against the Order-in-Appeal No.634/HWH/CE/2017-18 dated 12.03.2018, whereby the Commissioner (Appeals) has set aside the Order-in-Original and remanded the matter back to the lower authority for adjudication afresh.

5. The Respondent-Assessee has also filed Cross Objection in terms of sub-section (4) of Section 35B of the Central Excise Act, 1944.

6. The only ground of the Appellant Revenue is that after amendment of Section 35A (3) of the Central Excise Act, 1944, by the Finance Act, 2001, the power of Commissioner (Appeals) to remand the matter back for afresh adjudication, has been taken away w.e.f.11.05.2001. As such, the Commissioner (Appeals) had no justification to remand the matter back.

7. The Id.D.R. for the Revenue, submitted that as per pre-amended Section as well as amended Section 35A (3) of the Central Excise Act, 1944, the comparison of those two provisions would show that power to remand has been specifically dropped by way of the amendment. Accordingly, he prayed that the impugned order should be set aside. In support of his submission, he relies on the decision of the Hon'ble Supreme Court in the case of MIL India Ltd. as reported in 2007 (210) ELT 188 (S.C.).

8. On the contrary, the Id.Advocate, has supported the impugned order. In support of his contention, he referred to the decision of the Hon'ble High Court of Gujarat in the case of CCEx., Ahmedabad I Vs. Medico Labs as reported in 2004 (173) ELT 117 (Guj.), wherein the

Hon'ble High Court has held that even after the amendment of Section 35A (3), the Commissioner (Appeals) continues to have the power of remand. Accordingly, the Id.Advocate argued for dismissal of appeal.

9. Heard both sides and perused the appeal records.

10. I find that the issue is no more *res-integra* in view of the various decisions of the Hon'ble Supreme Court, Hon'ble High Courts and Tribunal. The similar issue on interpretation of the above provision, came up before the Hon'ble Supreme Court in the case of Union of India Vs. Umesh Dhaimode reported as 1998 (98) ELT 584 (S.C.), wherein the Hon'ble 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. Relevant observations of the Hon'ble Supreme Court is 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."*

As regards the judgment in the case of MIL India Ltd. (supra) relied upon the Id.D.R. for the Revenue, I find that the issue before the Hon'ble Supreme Court in deciding the matter, was entirely different.

However, while dealing with the said matter, the Hon'ble Supreme Court 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".*

I also find that similar view has been held by the Tribunal in the case of Commissioner of Central Excise, Meerut II Vs. Honda Seil Power Products Ltd. reported in 2013 (287) ELT 353 (Tri.-Del.). The relevant paragraphs are reproduced below :

**"8.** *The aforesaid observation of the Supreme Court in the matter of MIL India Ltd. (supra) are in the nature of passing remarks on the scope of powers of Commissioner (Appeals) hearing an appeal under Section 35A(3). Therefore, aforesaid observation of the Supreme Court in our view cannot take precedence over the finding of the Supreme Court in the matter of Union of India v. Umesh Dhaimode (supra) based on the analysis of the provision itself.*

**9.** *The Gujarat High Court in the case of CCE, Ahmedabad v. Medico Labs reported in [2004 \(173\) E.L.T. 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 annul the order-in-original and also to pass just and proper order. There may be circumstances where only just and proper order could be remand of 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 adduce evidence in support of his case then only order-in-appeal by the Commissioner (Appeals) could be to set aside the impugned order on the ground of failure of justice. This would create an anomaly and cause 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, only just and proper order in such a case would be the order of remand to adjudicate the matter de novo 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. In view of the above decisions, 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). Accordingly, I do not find any merit in the appeal filed by the Revenue. The appeal is, therefore, dismissed. Cross Objection also stands disposed off.

(Dictated and pronounced in the open Court)

Sd/

**(P. K. CHOUDHARY)**  
**MEMBER (JUDICIAL)**

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