IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT NO.

Appeal No. C/171/2009

(Arising out of Order-in-Original No. 184/AC/GR-III/PCR/2008 dt. 18.07.2008 passed by the Commissioner of Customs, Mumbai)

Commissioner of Customs (Import)Mumbai : **Appellant**

VS

M/s. Shree Paras Exports : **Respondent**

Appearance

Shri S.R. Nair, EO(A.R.) for Appellant

Shri J.C. Patel, Advocate for respondent

CORAM:

Hon'ble Shri Ramesh Nair, Member (Judicial)
Hon'ble Shri Raju, Member (Technical)

Date of hearing : 30/01/2018
Date of pronouncement : 30/05/2018

ORDER NO. A/86494/2018

Per : Ramesh Nair

This appeal has been filed by the revenue against the Order-in-appeal dt. 29.01.2009 passed by the Commissioner (Appeals), Mumbai – I. Brief facts of the case are that the Respondents had imported "Polyster Fabrics" and filed BE No. 380402 dt. 11.08.2003 for clearance under CTH 54076900. Based on report of Textile Committee that the goods were made up of "Non Texture Polyster yarn", the same were assessed to duty @ 25% advalorem in terms of Sr. No. 51 of Notfn. No. 36/2003 – Cus with CVD as applicable. On the basis of intelligence received that some of the parties are importing polyster fabrics by mis-declaring its technical characteristics; that fabrics made out of Texturised Polyster yarn had been imported by mis-declaring the same as fabrics made out of non-texturised polyster yarn. The revenue later got the remnants of the samples tested from in house test laboratory of CRCL, New Delhi for retesting. The fabrics were found to be dyed woven fabrics containing 85% or more by weight of Texturised Synthetic filament yarn chargeable to duty @25% or Rs. 24 per sq. meters, vide serial no. 93 of Notf. No. 27/2003 – Cus. Hence less charge notice was issued to respondent. The demand was confirmed by order dt. 30.06.2006. The Respondent approached the Commissioner (Appeals) who remanded case back to the adjudicating authority as the principles of natural justice was not followed. The Respondent in proceedings before the adjudicating authority asked to provide test report of Textile committee, certain letter and also sought cross examination of Deputy Chief Chemist. They also contended that the demand notice should have been issued by the proper officer. The adjudicating authority after hearing the Appellant confirmed the demand against Respondent. The Respondent filed appeal before Commissioner (Appeals) on the ground that the adjudication order was passed without challenging the assessment under Section 129D of the Act, the department should have provided the copy of test report relied upon and the relied upon documents. The non supply of same amounts to violation of principles of natural justice. Agreeing with the above submission the Commissioner (Appeals) remanded the matter back to adjudicating authority to consider the issue afresh in the light of Appellant's submission. The revenue has filed present appeal against the remand order passed on the ground that the Commissioner (Appeals) does not have remand power after 11.05.2001 in view of amendment of Section 128A (3). The revenue has relied upon the order of Hon'ble Supreme Court in case of MIL India Ltd. 2007 (210) ELT 188 (SC) and High Court order in case of Emkay India Rubber Co. 2008 (224) ELT 393 (P & H).

2. Heard Shri S.R. Nair, Ld. AR of the revenue and Shri J.C. Patel for the Respondent.

3. We find that after amendment in Section 35A(3) of the Central Excise Act, 1944, the Commissioner (Appeals) has not been vested with the powers of remanding the case to adjudicating authority. The Hon'ble Supreme Court in its judgment dated 1-3-2007 in Civil Appeal No. 6988/2005 in the case of *MIL India Ltd.* - 2007 (210) E.L.T. 188 (S.C.) has observed that, "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 power of the Commissioner (Appeals) to remand matter back to the adjudicating authority for fresh consideration." The Central Board of Excise & Customs vide F.No. 275/34/2006-CX.8A, dated 18-2-2010 has also clarified provisions of said section.

4. We find that the Ld. Commissioner (Appeals) remanded the matter to the adjudicating authority on the ground that there is violation of principles of natural justice. In our view even if the Ld.

Commissioner (Appeals) has no power to remand but if there is violation of principles of natural justice, there is no option except the matter to be reconsidered by the adjudicating authority by providing the personal hearing to the assessee. Therefore in any case the adjudicating authority has to relook in the entire matter. Therefore we excercising the power can remand the matter to the adjudicating authority.

5. We thus set aside the impugned order and sent the matter back to the adjudicating authority to decide the issue on merits by observing the principles of natural justice. The Appeal is disposed of by way of remand to the adjudicating authority in above terms.

(Pronounced in court)

(Raju)
Member (Technical)

(Ramesh Nair)
Member (Judicial)

SM.