IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH AT MUMBAI

Applications No. C/EH/85678/2018 & E/EH/85680/2018
C/MISC/85679/2018 & E/MISC/85681/2018
Appeal No. C/86868/2018 & E/86870/2018

(Arising out of Communication No. V/ADJ/CGST/Palghar/ responsive/10/2017/39/Mumbai dated 03.05.2018 of the Asst. Commissioner (Adjn.), CGST & Central Excise, Palghar)

Responsive Industries Ltd. **Appellant**
Vs.

Commissioner of CGST & CE **Respondent**
Mumbai

Appearance:

Shri Vishal Agrawal, Advocate with for appellant
Shri Ramnath Prabhu, Advocate
Shri S.R. Nair, E.O with for respondent
Shri M.R. Melvin, Supdt. (AR)

CORAM:

Hon'ble Mr. S.K. Mohanty, Member (Judicial)

Date of Hearing & Decision : 11.07.2018

FINAL ORDER NO. **A/87430-87431/2018**

Per: S.K. Mohanty

Appellant has filed these miscellaneous applications, seeking for early hearing of appeals and for stay of operation of the impugned order/communication of the Asst. Commissioner (Adj), Central GST & Central Excise, Palghar.

2. When the matter was called, learned D.R. appearing for Revenue, at the outset, submits that the appeals against the decision of Asst. Commissioner dated 3rd May, 2018 is not maintainable before the Tribunal in terms of Section 129A of the Customs Act, 1962 / Section 35B of the Central Excise Act, 1944. To support his claim, learned D.R. has relied on the decision of the Tribunal in the case of *Delta Overseas v. CCE & ST – 2016 (333) ELT 126 (Tri. Del)* and *Ramesh Govindbhai Patel v. CC (Airport), Mumbai – 2007 (213) ELT 675 (Tri. Mum)*. Thus, he prays for dismissing the appeals on the ground of non-maintainability.

3. On the other hand, learned Advocate appearing for the applicant submits that since the decision of not granting cross-examination of the witnesses was taken by the Commissioner, in the capacity of adjudicating authority, the letter dated 3.05.2011 of the Asst. Commissioner, merely communicating such decision should be considered as the order / decision by the competent authority for entertaining the appeal before the Tribunal. To strengthen his argument, the learned Advocate has relied on the judgment dated 01.08.2014 of the Hon'ble Delhi High Court (in Customs Appeal No. 1/2014) in the case of Amit Electronics v. Commissioner of Customs (Prev.).

4. Heard both sides and examined the records.

5. The Assistant Commissioner (Adj.) in his letter dated 03.05.2018 had conveyed that he had been directed by the adjudicating authority for communicating to the appellant for not granting cross examination of the witnesses. The said communication of the Asst. Commissioner cannot be considered as an order / decision by the Commissioner of Customs, as an adjudicating authority inasmuch as such letter is silent about the mode of direction being given by the adjudicating authority and also there is no available record to show that some order was passed or decision taken by the Commissioner and the same was merely communicated/ conveyed by the Assistant Commissioner. Since sub-section (1) of Sections 129A / Section 35B of the Act recognizes the decision or order passed by the Commissioner of Customs / Central Excise as adjudicating authority alone, for entertaining the appeal by the appellate Tribunal, the letter 03.05.2018 of the Assistant Commissioner cannot be considered as an appealable order for filing of appeal before the Tribunal, as per the mandates of statutory provision referred supra. I find that in an identical set of facts, this Tribunal in the case of *Delta Overseas (supra)* has held that the letter of Assistant Commissioner (Adj.) cannot be considered as an appealable order for filing the appeal before the Tribunal. I also find that similar view has also been expressed by the Tribunal in the case of *Ramesh Govindbhai Patel (supra)*. On a query from the Bench, as to whether, operation of those two orders of this

Tribunal have been stayed or over-ruled by the higher judicial forums, both sides replied in negative. Thus, in view of the co-ordinate bench decision of this Tribunal, appeal filed against the letter of Assistant Commissioner, in this case, cannot be considered as an appellate order for filing appeal before the Tribunal. The judgment of Hon'ble Delhi High Court in the case of *Amit Electronics* (supra) relied upon by the learned Advocate for the appellant is distinguishable from the facts and circumstances of the present case inasmuch as in such cited case, there was an order dated 03.05.2013, passed by the Commissioner of Customs (Prev.), which was merely communicated by the Asst. Commissioner. Since in the case of *Amit Electronics* (supra), the order was passed by the competent authority as contemplated under Section 129A of the Act, such order will be considered as appealable order and the Hon'ble High Court has held that appeal is maintainable against such order passed by the Commissioner of Customs (Preventive).

6. In view of foregoing discussion and analysis, I do not find any merits in the applications filed by the appellant, and accordingly, the same are dismissed. Since, the appeals stand in narrow compass regarding determination of their maintainability before Tribunal, which have already been held in the previous paragraphs that the same are not maintainable, the appeals filed by the appellants are also dismissed.

7. In the result, both the Misc. applications as well as the appeals filed by the appellant are dismissed.

(Order dictated in Court)

(S.K. Mohanty)
Member (Judicial)

nsk