

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT NO. 2**

APPEAL No.E/51/2008.

(Arising out of Order-in-Appeal No.SRK/384/M-II/2007 dated 10/10/2007 passed by the Commissioner of Central Excise (Appeals), Mumbai)

Hindustan Aegis LPG Ltd., : **Appellant**

VS

Commissioner of Excise, Mumbai-II : **Respondent**

Appearance

Shri.Vipin Kumar Jain, Advocate for Appellant
Shri.Anil Choudhary, Asst. Comm.(AR) for respondent

CORAM:

Hon'ble Mrs. Archana Wadhwa, Member (Judicial)
Hon'ble Shri Sanjiv Srivastava, Member (Technical)

Date of hearing : 12/10/2018
Date of decision : 12/10/2018

INTERIM ORDER NO. IO/67/2018

Per : Shri Sanjiv Srivastava

1. This appeal is filed against the order-in-appeal No.SRK/384/M-II/2007 dated 10/10/2007 passed by the Commissioner of Central Excise (Appeals), Mumbai.

2. The case is with reference to the refund claim filed by the appellants claiming refund of the MODVAT Credit balance available in their account on the date of surrender of the registration. They had also claimed the refund of PLA balance. The refund claims have been considered by the lower authorities and the Assistant Commissioner

rejected the refund claim on the basis of time bar. In appeal, the Commissioner (Appeals) considered the submissions and rejected the refund claims for merits as well as on limitation. In fact, he upheld the order of the Assistant Commissioner.

3. We have heard Shri. Vipin Kumar Jain, learned Counsel on behalf of the appellants and Shri. Anil Choudhary, learned Assistant Commissioner (AR), on behalf of the Revenue.

3.1 Arguing on behalf of Appellant learned counsel submitted that:

- i. the appellants are challenging the order of the Commissioner (Appeals) both on merits and limitation. Both the authorities have failed to appreciate they were deprived from filing the refund claim immediately after the surrender of the registration. When they surrendered their registration, the range officer advised them that their surrender will be accepted only after closure of proceedings.
- ii. Since they filed the refund claims immediately after closure of all proceedings their claim should not be hit by limitation.
- iii. On merits Assistant Commissioner has not recorded any findings on contrary he records that concerned range officer has in his verification report found the claim in order. The Commissioner (Appeals) has rejected the refund claim on merits and has thus traversed beyond the order of Adjudicating Authority. Such approach of Commissioner

(Appeals) is not permissible in law, as the order of Assistant Commissioner do not record his view on the merit of the case.

- iv. On merits of the case they have submitted that this larger bench Tribunal has in the case of Gauri Plasticulture (P) Ltd., taken a view that such refund claim of MODVAT balance is not admissible. This order of tribunal has been appealed before the High Court. The matter has been referred to Larger Bench taking into account the conflicting decisions on the issue.

3.2 Arguing for the revenue learned AR submits that:

(i) refund claim is not admissible to the appellant vis-à-vis the Modvat balance lying in balance on the date of surrender. This view has been confirmed by the Larger Bench of this Tribunal.

(ii) there is nothing on record to show that the appellants were prevented from filing the refund claim immediately on surrender of their registration. The only correspondence produced shows that surrender was taken on record and the appellant were advised to settle all the arrears and pending dues. Since there was no barring from the side of department, appellant could have filed their claim when so ever they desired. Even otherwise appellants were the best judge to decide on filling the refund claim. Law of limitation do not permit, such failures and any remedy sought and admissible should have been claimed within the prescribed period of limitation. Since refund claim has been filed much beyond the prescribed period of limitation the same

needs to be rejected on this account. Thus Assistant Commissioner has rightly rejected the refund claim on limitation. The order of Commissioner (Appeal) upholding such rejection on limitation cannot be faulted with.

4. We have considered the averments made in the appeal and during the course of arguments.

5. The issues which need to be considered by us are as follows:

a) Whether the refund claim was bar by limitation.

b) Whether the Commissioner (Appeals) was right in rejecting the refund claim on merits also when the Assistant Commissioner has not done so.

5.1 On the issue of refund of balance MODVAT credit at the time of surrender of registration, the larger bench of tribunal has settled the law holding against the appellants in the case of Gauri Pisciculture [2006 (202) ELT 199 (T-LB)]. In the said decision tribunal larger bench has held as follows:

“8. Detailed reading of the above judgments, leads in to the fact that wherever the assessee was unable to utilize the credit on account of objection raised by the Department or actions taken by them by way of initiation of proceedings or paid duty out of modvat account at the Department’s insistence, and for that reason, he had to pay duty in cash or out of the PLA, they would be entitled to refund of that credit in cash, on the dispute being ultimately settled in their favour. In the decisions holding that such refund in cash is not possible, it has been observed that there is no provision allowing refund of such credit in cash. However, we are not in agreement with the above proposition for the simple reason that there is also express no bar in the modvat Rules

to that extent. We have to keep in mind that it is not the refund of unutilized credit, but the credit which has been used for payment of duty at the insistence of the revenue or has been reversed because the Department was of the view that the same is not available for utilization. This is a simple and basic principle of equity, justice and good conscience. Had the Department not prevented the assessee from utilizing the credit otherwise available to him, they would have been in a position to use the same towards payment of duty on their final product, which obligation they had to discharge from their PLA account. As such, on the success of their claim subsequently, if the assessee is maintaining Modvat credit and is in a position to use the same for future clearances, it should be normally be credited back in the same account from where it was debited i.e. RG-23A Part II account. However, if an assessee is not able to use the credit on account of any reasons, whatsoever (which may be closure of his factory or final products being exempted, etc.) the refund becomes admissible in cash or by way of credit entry in PLA to the extent duty paid in cash or out of PLA during the relevant period.

9. On the same basic principles of equity, justice and good conscience, if such refund in cash makes the assessee enrich because during the period when the dispute was pending, they had not paid any duty in cash and as such, the debit entry in Modvat account would have made no difference, as the credit would have been lying unutilized only in the account, such credit, cannot be refunded in cash.

10. In view of the foregoing discussions, we hold that if denial of credit has compelled an assessee to pay duty out of PLA, the refund of the same would be admissible in cash to the extent of payment of duty in cash during that period. However, if no cash payments towards duty were made through PLA and the credit would have remained unutilized in the account books, such credit cannot be allowed by way of cash.

11. By applying the above ratio of law as arrived at by this Bench to the fact of the instant case, we find that the debit entry in credit account was made by the appellants on 23-11-2000, the Central Excise registration was surrendered by

them in September 2000, i.e. before making of debit entry in RG-23 account. As such, even if the amounts towards duty would not have been debited by them in the said account, the same would have been remained unutilized. As such, on the success of their appeal before the Commissioner (Appeals), they cannot claim the refund of the same in cash, inasmuch as on account of such debit entry, they have not discharged any duty out of PLA. If the said refund is granted to the appellants by way of cash, the same would amount to making him unjustifiable enrich. It is well settled principles of law that what cannot be done directly should not be allowed to be done indirectly. On surrendering of their licence, the appellants was not allowed to claim the refund of the unutilized credit in the Modvat account, the same would have lapsed. As such, utilization of the same towards payment of disputed demand of duty, after surrendering of their registration, has not led to a situation where the assessee was compelled not to use the credit for regular clearances and had to make payment from PLA. As such, in this case we find that the refund in cash is not to be allowed.”

5.2 It is not the case of the appellant that they were at any time barred by the revenue from utilizing the MODVAT Credit balance available in their MODVAT account on the date of surrender of registration. Thus by applying the logic laid down by the larger bench we do not find any merit in the refund claim filed by the appellants claiming refund of the balance in their MODVAT account.

5.3 It is a settled law that MODVAT Credit, has been allowed as procedural requirement for payment of duty on the finished products manufactured and cleared by the appellants. In no case it is refund of the duty paid on inputs for any other purpose other than payment of duty on finished products manufactured and cleared by the assessee.

Only exception that has been allowed is only in case where the refund could have been allowed in case when the finished goods are exported under bond or letter of undertaking. This exception has been carved out in rules itself. At the relevant time there was no provision under which such a claim for refund of MODVAT Credit of the balance lying on the date of surrender of registration could have been made.

5.4 Appellants have contended that by rejecting the refund claim on merits Commissioner (Appeal) has gone beyond the orders of the Assistant Commissioner, which is not permissible in law.

6. We find that the appellants have filed the appeals before the Commissioner (Appeals) in a matter of refund claim filed by them under Section 11B. Section 11B of the Central Excise Act, in contradistinction to Section 11A provides for the claimant to file the claim seeking the refund of amounts due to him. While making such a claim, claimant needs to justify the admissibility of refund claimed by him on all accounts i.e. merits, limitation and unjust enrichment. On the basis of claim made, Assistant Commissioner allows the refund claim or rejects the same while recording the reasons for such a rejection. The refund claim could have been rejected on any one or more than one ground, but once rejected the same is rejected and it is deemed that Assistant Commissioner has applied his mind to all the aspects of the refund claim.

6.1 In the appeal to appellate authority appellant challenging the order of the Assistant Commissioner rejecting the refund claim

challenges the order of rejection and not the ground of rejection. He has to establish before the Appellate authority that his claim is admissible to him on all the three grounds for which he has filed this refund claim. Thus the boundaries for the processing of refund claim has to be drawn by the claimant and not the authority deciding the refund claim.

6.2 In case of Section 11A, the first documents, whereby proceedings are initiated is the show cause notice. In this manner department/investigating authority states its the ground for said proceedings. Thus in all the proceedings after the issuance of show cause notice department is bound within the four boundaries laid down by the show cause notice. Thus distinction make the proceedings undertaken in terms of section 11B different from the proceedings under Section 11A.

6.3 While rejecting or admitting the refund claim by any authority all the three grounds forming the basis of refund claim have to be considered by the Assistant Commissioner and if the refund claim has been rejected on time bar even without mentioning a merits, the refund claim has been rejected in which merits and all other things have been considered. Thus in appeal appellant challenges the order of the Assistant Commissioner will have to satisfy the Appellate Authority with regards to admissibility of the refund claim.

6.4 Appellate Authority while deciding on the appeal will be required to apply his mind to the all the grounds leading to such refund claim

and then decide upon the appeal. He cannot adjudicate such an appeal and allow the refund just by setting aside the order of the Assistant Commissioner which may have rejected the refund claim on one of the grounds. This is more crucial as the power to remand the matters was specifically withdrawn from the Commissioner (Appeal) and in Section 35A (3) of the Central Excise Act, 1944 specifically provided:

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:

Provided that an order enhancing any penalty or fine in lieu of confiscation or confiscating goods of greater value or reducing the amount of refund shall not be passed unless the appellant has been given a reasonable opportunity of showing cause against the proposed order.

Provided further that where the Commissioner (Appeals) is of opinion that any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, no order requiring the appellant to pay any duty not levied or paid, short-levied or short-paid or erroneously refunded shall be passed unless the appellant is given notice within the time-limit specified in Section 11A to show cause against the proposed order."

6.5 The Commissioner (Appeals) was authorized to make any further inquiries in an appeal filed before him and then passed an order either. Modifying the order confirmed or annulling the order of the earlier authorities. If on making such an inquiry, the Commissioner (Appeals) is satisfied that refund claim is not admissible on merits. Thus, his order cannot be questioned in view of specific provisions in Section 35A (3). In case of MIL India [2007 (188) ELT 210 (SC)], Hon'ble Supreme Court has specifically held.

"4.....In fact, the power of remand by the Commissioner (A) 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 (A) to remand matters back to the adjudicating authority for fresh consideration. Therefore, the Commissioner (A) continues to exercise the powers of the adjudicating authority in the matters of assessment. Under Section 35B any person aggrieved by the order of the Commissioner as an adjudicating authority is entitled to move the Tribunal in appeal. Section 35B indicates that the decision of order passed by the Commissioner (A) shall be treated as an order of an adjudicating authority. In the circumstances the High Court had erred in holding that the assessee was not entitled to agitate the question of dutiability in appeal before the Tribunal. ”

6.6 To support their arguments on limitation, appellants have shown certain correspondences/ letters written by the range officer to them when they surrendered the registration certificate. On the basis of the said letter they claim that they were not allowed to file the refund claim. 9.2 They have enclosed a copy of the surrender letter available at page 26 of the paper book. By the said letter they have stated the manufacturing activities undertaken by them at the said registered premises shall come to close with effect from 21st December 1999. In the said letter they have also disclosed the credits available in their MODVAT and PLA account. The said para of their letter is reproduced below:

“The credit of duty lying unutilized in the RG23A Pt-II Register after reversing MODVAT on above stock is Rs 1,52,45,465/- in RG23C Part II Register is Rs 8004/- and the balance in PLA Register is Rs 15,224/-. This is for your information and necessary action.”

While the said letter is disclosing the balances available in various account it do not show any intention of filing the refund claim in respect of them. Even otherwise the refund claims are to be filed with the office of Assistant Commissioner and not the range officer.

7. On page 29 is the letter of range officer stating that "The registration certificate surrendered by you has been kept on the records of this office. You are requested to note that registration certificate held by you for manufacturing activities will not be treated as "cancelled", since Government dues are outstanding against you. Further you are also requested to note that if there is any other Government dues arises in future, you will be liable to pay the same to the Government." The said letter nowhere advises or bars the appellant from filing a refund claim filed if they deem fit. The said letter only arises that this surrender letter would have been accepted your registration would be cancelled only after all the dues against the appellants are settled.

7.1 Next letter available on page 79, is the letter forwarding the refund claim to the Assistant Commissioner on 9th November 2006. The said letter has been received in the office of Assistant Commissioner on 13th November 2006 is clearly after seven years from the date of closure of manufacturing activities and surrender of registration. It is also the first claim for the refund filed for the amounts mentioned in the said claim. Letter on page 26 do not refer to the claim any refund. Secondly no refund was being claimed thereafter. That be so, appellants have filed the refund claim which is after seven years of surrender of registration is clearly barred by limitation. Even if it is admitted without accepting that the letter on page 29, did not allow the appellants from proceeding to file the refund claim then also refund claim will be hit by limitation, because it is for the claimant to make the refund claim within time and not the

department to ensure or advice the claimant when to file the refund claim.

7.2 Since the appellants have themselves chosen to file the refund claim in time and manner most appropriate they are responsible for the consequences and cannot shift the burden of their negligence to anyone else. For this argument reference is made to para 22 of the Supreme Court decision in case of Mafatlal Industries [1997 (89) ELT 247 (SC)]-

“22. There is as yet a third and an equally important category. It is this : a manufacturer (let us call him “X”) pays duty either without protest or after registering his protest. It may also be a case where he disputes the levy and fights it out up to first Appellate or second Appellate/Revisional level and gives up the fight, being unsuccessful therein. It may also be a case where he approaches the High Court too, remains unsuccessful and gives up the fight. He pays the duty demanded or it is recovered from him, as the case may be. In other words, so far as ‘X’ is concerned, the levy of duty becomes final and his claim that the duty is not leviable is finally rejected. But it so happens that sometime later - may be one year, five years, ten years, twenty years or even fifty years - the Supreme Court holds, in the case of some other manufacturer that the levy of that kind is not exigible in law. (We must reiterate - we are not speaking of a case where a provision of the Act whereunder the duty is struck down as unconstitutional. We are speaking of a case involving interpretation of the provisions of the Act, Rules and Notification.) The question is whether ‘X’ can claim refund of the duty paid by him on the ground that he has discovered the mistake of law when the Supreme Court has declared the law in the case of another manufacturer and whether he can say that he will be entitled to file a suit or a writ petition for refund of the duty paid by him within three years of such discovery of mistake? Instances of this nature can be multiplied. It may not be a decision of the Supreme Court that lead ‘X’ to discover his mistake; it may be a decision of

the High Court. It may also be a case where 'X' fights up to first appellate or second appellate stage, gives up the fight, pays the tax and then pleads that he has discovered the mistake of law when the High Court has declared the law. The fact is that such claims have been entertained both in writ petitions and suits until now, purporting to follow the law declared in Kanhaiyalal, and are being allowed and decreed, sometimes even with interest. The Union of India says that this can never be. It says, a manufacturer must fight his own battle and only if he succeeds therein, can he claim refund. He cannot take advantage of success of another manufacturer and that no suit or writ is maintainable by him for refund on the ground of alleged discovery of mistake of law on the declaration of law by this Court or a High Court (or a Tribunal or any other authority under the Act) in the case of another person. The Union of India denies that such a person can plead payment of duty under a mistake of law within the meaning of Section 72 of the Contract Act. It also denies that such a writ petition or a suit can be filed within three years of such "discovery of mistake of law".

7.3 In result the refund claim in respect of the refund of unutilized MODVAT Credit should fail on the ground of limitation.

8. Another issue with regards to refund of certain amount from PLA. Since the amount lying in balance in PLA is the money available with the appellant, it cannot be said to be hit by limitation because it was the money available in the hands of the appellants itself and they could have claimed the refund of the same at any time. Accordingly, in respect of refund for the balance lying in PLA, the order of the lower authorities to be upheld.

9. In view of the above discussion and relying on the decision, the Larger Bench of Tribunal in the case of *Gauri Plasticulture (P) Ltd., reported in 2006 (202) ELT 199 (Tri-LB)*, the order of the lower authority is upheld except for the refund of PLA amount. The appeal is disposed of in above terms.

(Pronounced and dictated in Court)

(Archana Wadhwa)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

PJ

Per : Mrs. Archana Wadhwa

10. While agreeing with the findings of the learned Brother as regards the refund of PLA amount of Rs.15,224/-, I have different views as regards the refund of unutilised Cenvat Credit lying in the assessee's accounts at the time of closing of their manufacturing unit. Though my learned Brother has detailed the facts in his order, but to elaborate further factual position, which is required to be taken into consideration, I would like to refer to some of the further facts.

11. The appellants, who are engaged in the manufacture of petroleum gases were availing the benefit of Cenvat Credit of duty paid on various inputs, which were being utilised by them in the manufacture of their final products and the credit so earned was being utilised for payment of duties. The appellant filed a letter dated 21/12/1999 to their jurisdictional Range Superintendent of Central Excise surrendering their Central Excise registration on the ground that the management has decided to discontinue the activities of their manufacture at the registered premises. They also gave the details of RG-1 register as also the RG-23A Part II. The said letter was responded by their Range Superintendent on 22/12/1999 itself. It was intimated to the assessee that registration certificate surrendered by them has been kept in the records and they are requested to note that the registration certificate held by them for manufacturing activities will not be treated as cancelled, since the Government dues are outstanding against them. Further request was made to the appellants that if there is any other Government dues assigning in future, they will be liable to pay to the Government. Thereafter, as various

adjudications were going on against the assessee and in fact even after the surrender date of the registration, additional proceedings by way of issuance of various show-cause notices were initiated against the assessee, it is only in 2006, that according to the appellants, all the adjudications were settled when they again approached the Revenue by way of letter dated 09/11/2006. For better appreciation, I reproduce the contents of the said letter.

"We are enclosing herewith Form-R along with copies of PLA account and RG 23A (Part-II) Account for refund of Rs.1,52,60,692/- as unutilised balance lying in our credit. We are enclosing herewith our letter dated 21/12/1999 intimating discontinuation of manufacturing in the registered premises under Central Excise Registration No.MF2901300095.

Sir, since there was show-cause notice issues on status of manufacture pending adjudication followed by prolonged process with CESTAT and again a fresh issues Modvat reversal adjudication with Mumbai Collectorate, our application for refund of Excise Duty has been kept pending till the matters are resolved. Now all the matters relating to these issues have been completely resolved and there are no issues pending adjudication at any time, we have preferred this application for refund of Excise Duty, which is due to us.

Unutilized credit balance in RG 23A (Part-II) pertains to actual payments made by us in the form of CVD and all the credits have been verified as can be seen from the attached copy of RG 23A (Part-II).

We request your honour to kindly pass our refund application and order for refund of unutilized balance in PLA as well as RG 23A (Part II) at your very earliest. In case you need any other documents to be produced in this communication or attend any personal hearing may kindly be communicated to us and oblige."

12. As is clear from the above letter, there is a reference to the earlier correspondence clarifying that since their surrendering of registration application was not accepted by the Government on the ground of continuation of certain disputes against them, which

disputes now stand settled, the deregistration may be accepted vide the same letter, they filed a refund of the pending unutilised Cenvat Credit.

13. It is seen that against the said refund application filed by the appellant no show-cause notice was issued to the appellants proposing to deny the same specifying the grounds on which Revenue intends to deny the refund. The refund application was taken up directly by the Assistant Commissioner for adjudication. No doubt a personal hearing was granted to the appellant before rejection, during which the appellant relied upon the Hon'ble High Court decision in the case of *UOI Vs. Slovak India Trading Co. Pvt. Ltd., reported in 2006 (201) ELT 559 (Kar)*.

14. However, the Assistant Commissioner vide his order dated 04/04/2007 rejected the refund claim by observing as under:

"I find that the assessee had surrendered their Registration Certificate on 21/12/99 to Range Superintendent, in charge of the factory and informed that they have stopped manufacturing activity w.e.f 21/12/99. As per the then existing Central Excise Rules, 1944 they had reversed the modvat credit on the inputs lying in balance. The instant refund is in respect of unutilized balance of Modvat Credit and balance in PLA, filed by the assessee as per the Case Law –UOI Vs. Slovak India Trading Co. Pvt. Ltd. – 2006 (201) ELT 559 (Kar). A reference was made to the Assistant Commissioner Central Excise (Legal & Review) Bangalore-II Commissionerate vide this of letter of even number dated 23/01/2007, to ascertain whether the said case law is accepted or otherwise. In reply it was communicated vide letter No.IV/16/02/2007 legal-B-II/887 dated 28/02/07 that the Hon'ble Supreme Court has dismissed the petition filed by the department in Special Leave to Appeal (Civil) CC No.467/2007 dated 25/01/2007. On going through the order it is seen that the said SLP is dismissed on the ground of delay in filing SLP.

However, it is observed that the assessee had surrendered their registration in Dec 99 consequent upon closing down the

manufacturing activity which is confirmed vide their letter dated 21/12/99. As per the provisions of Section 11B of Central Excise Act, 1944, the said refund should have been filed within one year from the date of surrendering registration/intimation of closing down the manufacturing activity which is the relevant date in this case and hence the above said case law is not applicable in the instant refund filed by the assessee.

In view of the above, I pass the following order.

I reject the refund of Rs.1,52,60,692/- (RG 23A Part-II balance of Rs.1,52,45,468/- + PLA balance of Rs.15,224/-) since it is not filed within a period of one year from the date of surrendering the registration as required under the provisions of Section 11B of the Central Excise Act, 1944."

15. A reading of the above order of the Assistant Commissioner leads to an inevitable conclusion that the refund claim stands rejected by him only on the point of limitation, without giving any findings on the merits of the case, though a reference stands made by him to the Hon'ble Karnataka High Court in the case of Slovak India Trading Co. Pvt. Ltd. (supra). However, the merits did not stand discussed by him and his views on the merits are not available.

16. The first issue, which arises is as to whether in such a scenario, was it open to the Commissioner (Appeals) to frame an issue on the merits of the case. The appellate authority has gone to the merits of the case and has rejected the appeal on merits as also on limitation.

17. In my views when the original authority has not expressed any opinion on the merits of the case, it is not even clear as to whether he has agreed with the assessee on merits or not. We have also seen the appeal filed by the assessee before the Commissioner (Appeals) wherein the rejection of refund claim has not been challenged on merits. Obviously, when there is no rejection on merits, it is neither

possible nor practicable for the assessee to challenge the order on merits. In such a scenario, it was not open for the Commissioner (Appeals) to go to the merits of the case and to reject the refund claim on merits. To further clarify my views, it is observed that when the Assistant Commissioner is rejecting the appeal on limitation it may be that he has agreed on merits of the case. Further, the original adjudicating authority has also observed that the verification of the claim made by the assessee, by the Superintendent has been found to be in order. In fact the Assistant Commissioner also seeks a clarification as to whether the Karnataka High Court decision have been accepted by the Revenue or not, it was found that the Hon'ble Supreme Court has dismissed the petition filed by the department for Special Leave Petition moved before the Hon'ble Supreme Court. The original adjudicating authority stops there and does not go ahead on the merits of the case, thus, leaving a vacuum for the higher authorities to find out as to whether the merits have been accepted by him or not. In the absence of such a vacuum left by the original adjudicating authority, I really fail to understand as to how the Commissioner (Appeals) would presume that refund claim has been rejected on merits also and thus would proceed ahead with the same. With due respect to my learned Brother, I do not agree with the findings arrived at by him that rejection of refund claim on limitation would be deemed to have been a rejection on all counts including the merits and unjust enrichment angle. There is no deeming clause/provisions in adjudication.

18. I may refer to the Hon'ble Supreme Court's decision in the case of Smithkline Beecham Co. Health C. Ltd., reported in 2003 (157) ELT 497 (SC) laying down that wherever an issue had not been decided by the lower authorities, higher appellate forum should not decide the undecided issue. In my view, when the original adjudicating authority has not expressed any views on the merits of the case, It was not open to the Commissioner (Appeals) or to us to go ahead to discuss the merits. What is to be done with the merits of the case, would be again referred to in the succeeding paragraphs once the issue of limitation is decided by me.

19. As regards limitation, it is seen that there is no dispute on the facts of the case. The appellant filed an application surrendering their licence in December 1999. Such surrendering was not accepted by the Revenue. There is no further communication accepting such surrendering by the proper officer. As such in terms of the first letter written by the Range Superintendent intimating the appellants that their surrender application would not be accepted and registration would not be considered as cancelled at all till the clearances of all the proceedings pending against them relatable to excise or customs. As per the appellants, such proceedings were over by 2006 only.

20. In such a scenario, the appellant could not have filed refund claim at all inasmuch as the refund would arise only when their surrender application is accepted by the Revenue. As such, with due respect, the findings of my Ld. Brother that the said letter of December, 1999 written by the Superintendent has not debarred the

assessee to file the refund claim are being differed by him inasmuch as the cause of action would arise only when the assessee becomes a non-excisable unit. In the absence of acceptance of their registration certificate surrendered, the assessee unit continued to remain an excisable units and it is beyond imagination that an excisable unit would file a refund claim relatable to unutilised Cenvat Credit. According to me, the refund of unutilised excess credit would arise only when the appellant's registration certificate gets surrendered with due acceptance of the same by the Central Excise authorities inasmuch as the refund is of unutilized accumulated Cenvat Credit at the time of surrender of licence and stopping of their manufacturing activity. As such, I am of the view that the limitation aspect is not to be considered by treating the date of filing of application for surrender of the licence as the relevant date. In my view it needs to be reconsidered as to when the appellant's registration surrender application was accepted by the Revenue either directly or by referring to the completion of the adjudication proceedings against them. As such, I am of the view that the matter needs to be remanded to the original adjudicating authority for consideration of the limitation aspects.

21. As regards the merits of the case, I have already observed that in the absence of any findings to the contrary by the original adjudication authority rejecting the refund claim on merits, the Commissioner (Appeals) was not having any jurisdiction to reject the claim on merits. If he was of the view that the claim is not admissible on merits he should have remanded the matter to the original

adjudicating authority. On the same logic, I am of the view that it is not open to us to discuss the merits of the case and reject the appeal on that ground. The matter needs to be remanded on the said count also.

22. Ld. Advocate has been very fair to bring it to our notice that there are decisions of the Tribunal expressing, divergent views as regards the refund of the credit by way of cash. We are also aware that there is Larger Bench decisions of the Tribunal has held that such credit cannot be returned to a manufacturer, in cash on closure of his factory. However, it stands brought to our notice that the issues stands referred to by the Hon'ble Bombay High Court to the Larger Bench of the High Court in the case of *Gauri Plasticulture Pvt. Ltd., reported in 2018 (360) ELT 967 (Bom)*. It stands observed in the said decision that the earlier identical matter was dismissed by the Hon'ble Supreme Court by way of dismissal of SLP and legal issues were not concluded. As such, the Court observed that they cannot take a different view from the view taken by a co-ordinate bench and the questions are required to be decided by the Larger Bench of the court. As such, the matter stands referred to the Larger Bench.

23. Inasmuch as I have observed that the matter needs to be remanded to the original adjudicating authority for decision on limitation as also on merits, the adjudicating authority is expected to take into consideration the entire development on the said legal issue by way of various decisions of the Tribunal as also the fact that the matter stands referred to Larger Bench and it would be in the interest

of justice that the Larger Bench of the Bombay High Court decision in the above referred case may be awaited till the final decision is taken.

24. In view of my forgoing discussion, I deem it fit to set aside the impugned order and remand the matter to the adjudicating authority for fresh decision on limitation as also on merits, in the light of the observations made as above, instead of rejecting the appeal on both the issues.

(Pronounced and dictated in Court)

(Archana Wadhwa)
Member (Judicial)

PJ

DIFFERENCE OF OPINION

Whether the appeal has to be rejected in toto as held by the learned Member (Technical) or the matter has to be remanded to the original adjudicating authority for fresh decision as observed by the learned Member (Judicial).

(Dictated in Court)

(Sanjiv Srivastava)
Member (Technical)

(Archana Wadhwa)
Member (Judicial)

PJ

ORDER ON DIFFERENCE OF OPINION**INTERIM ORDER NO. 5/2021**

DATE OF HEARING: 19/03/2021
DATE OF DECISION: 16/07/2021

PER: C J MATHEW

25. This reference assigned by Hon'ble President, in exercise of power conferred under section 129C(5) of Customs Act, 1962 read with section 35D of Central Excise Act, 1944, is occasioned by difference of opinion that hampered final disposal of appeal filed by M/s Hindustan Aegis LPG Ltd impugning the order of Commissioner of Central Excise (Appeals), Mumbai-II by which disallowance of the claim for refund by the competent authority was upheld.

26. From the separate orders of Hon'ble Member (Technical) and Hon'ble (Judicial) and the submissions made in the instant proceedings, it may be seen that the difference of opinion, viz,

'Whether the appeal has to be rejected in toto as held by the learned Member (Technical) or the matter has to be remanded to the original adjudicating authority for fresh decision as observed by the learned Member (Judicial).'

as enunciated by the Division Bench, can be resolved with findings on

the extent to which it is permissible for an appellate authority to determine aspects that, allegedly, were not considered in the order impugned before it and on the extent of compliance thereof by the first appellate authority in the order now before the Tribunal. Having heard the rival contentions, it must be acknowledged that the submissions made by Learned Counsel for the appellant and Learned Authorized Representative have been of tremendous assistance in disposing off the reference and, in particular, for affording the assurance that the materials and submission, both oral as well as recorded and written, before the Division Bench suffice as resources for completion of this proceeding. An elaboration of the factual matrix within which the dispute is situated is available in the contrary opinions and those do not bear repetition save such as is relevant for response to this reference.

27. Appellant intended to shut down their manufacturing operations in pursuance of which intimation was furnished to the jurisdictional central excise authority on 22nd December 1999 along with balances, aggregating Rs. 1,52,60,692, in account current and duty credit account maintained by them. Having been intimated that de-registering could be taken up only upon outcome of proceedings pending for recovery of duties, the application for refund preferred on 9th November 2006, on conclusion thereof, was, nevertheless, disallowed by the competent sanctioning authority for not having been sought within the period

from the 'relevant date' stipulated in section 11B of Central Excise Act, 1944. On challenge mounted by the claimant against the rejection, the first appellate authority reiterated the disallowance as ineligible on merit too even as he concurred with the original authority that claim failed to overcome the bar of limitation at the threshold of the process. That the impugned order has decided on limitation and, despite absence of finding thereon in the order of the original authority, on eligibility is not a point of divergence. Likewise, of the two strands of refund, the entitlement to reimbursement of balance in account current is also not a point of divergence. However, the final decision falters beyond this consensus.

28. Hon'ble Member (Judicial) is of the opinion that the 'relevant date' adopted by the two lower authorities warrants a fresh ascertainment in the light of the circumstances in which the intimation of closure was kept pending by the jurisdictional authorities in apposition to the view of Hon'ble Member (Technical) that pendency of de-registration did not preclude adherence to the stipulation in section 11B of Central Excise Act, 1944 by filing claim for refund within the deadline from the date of intimation. Furthermore, it was opined by Hon'ble Member (Judicial), while nullifying determination of ineligibility by the first appellate authority for having exceeded jurisdiction in rendering a finding on which the original authority was decidedly silent, that merit of the claim should also be reconsidered by

the original authority at the same time and, particularly so, as this aspect, of entitlement for claiming balance in the credit account, could be dealt with by the Tribunal too only upon the judgement of a Larger Bench of the Hon'ble High Court of Bombay which was seized of the matter. Hence her view that the application for refund should be restored to the original authority for a fresh decision which, however, did not commend itself to Hon'ble Member (Technical).

29. The contrary viewpoint, approving the correctness of the 'relevant date' adopted by the two lower authorities, on limitation also encompassed the jurisdictional competence with the proposition that the three elements which conflate for disbursal of refund to an assessee - ascertaining of adherence to time limit, establishing of duty having been collected in excess of due and overcoming of the bar of unjust enrichment - are to be presumed as having been determined in the decision to reject a refund claim even if such rejection is founded on any one of them. This, according to the Hon'ble Member (Technical), is implied in the withdrawal of power that was vested in the first appellate authority to remand any dispute back to original authorities. Therefore, it was concluded that the determination, of failure at the threshold as well as of ineligibility for refund, was within jurisdiction and that the conclusions thereon being without fault, the appeal should be dismissed.

30. Considering that the reference to be answered is on the appropriateness of remand, and the Tribunal having decided on the scope of such option, in *Commissioner of Central Excise, Meerut-II v. Honda Siel Power Products Ltd* [2013 (287) ELT 353 (Tri-Del)], thus

‘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.’

it would be appropriate to resolve the jurisdictional competence first as Hon’ble Member (J) and Hon’ble Member (T) are in agreement that the original authority had not decided on the merit of eligibility for refund. Furthermore, should the legality and propriety of that determination be validated by majority, re-consideration of ‘relevant date’ by the original authority would be obviated. On proceeding

accordingly, three material facts may be identified as relevant at this stage.

31. First, the rejection of the claim for refund had not been preceded by notice enumerating the grounds for proposed disallowance. Learned Authorized Representative did make reference to the decision of the Tribunal in *Oil & Natural Gas Corporation Ltd v. Commissioner of Service Tax, Mumbai [2011(24) STR 212 (Tri-Mumbai)]* that offer insight into absence of taint arising therefrom; as neither side chose to press the relevance, or otherwise, of this lack, its bearing on further proceedings may be ignored. Second, the controversy in the claim for refund is now restricted to the credit taken by the appellant; this represents the duty liability that was statutorily to be discharged by the manufacturer of the products procured by the appellant and permitted to be taken on the strength of inclusion in the invoice raised by the supplier upon effecting the sale. The legality and propriety of that levy in the hands of the supplier is, and never has been, in question. Neither has the appellant sought this refund as person who, as buyer of goods, had borne incidence of duty in excess of that authorised by law. The claim is for encashing of the credit, representing tax lawfully collected, that lay unutilized owing to termination of the manufacturing venture. The appellant, as recipient of excisable goods, was entitled, under MODVAT credit scheme, to take credit of such duties in their books as was borne by them on

procurement of supplies from other manufacturers for deployment in their process for production of excisable goods. The MODVAT credit, and its successor, scheme were not legislated into the Central Excise Act, 1944 but notified under the general rule-making power vested in the Central Government with intent to give effect to levy on the 'taxable event' by bridging section 3 of Central Excise Act, 1944 and section 4 of Central Excise Act, 1944, drawing authority from the power conferred on the Central Government to prescribe the manner of payment of duty, and inherently assuring distinguishment of the final consumer from the intermediate manufacturer for eligibility of credit. The balance in the account, thus, either represented unutilised inputs or signified inefficiencies of production or is attributable to transactions beyond the 'value added chain' and none of these, by equity or by law, legitimize monetisation. Whether this conceptual image of the scheme may have had the effect of affording clarity on application of the judicial decisions referred to in the opinions of Division Bench is a matter of conjecture. Third, refund of accumulated credit has had a controversial backdrop with some decisions of the Tribunal, drawing upon the judgement of the Hon'ble High Court of Karnataka in *Union of India v. Slovak Trading Company* [2006 (201) ELT 559 (Kar)], allowing disbursement while others, holding otherwise, prompted references to Larger Benches of the Tribunal culminating in *Gauri Plasticulture Pvt Ltd* [2006 (202)

ELT 199 (Tri-LB)] and in Steel Strips Ltd v. Commissioner of Central Excise, Ludhiana [2011 (269) ELT 257 (Tri-LB)] disapproving of such refunds in general and the legality of one of these viewpoints has since been decided by a Larger Bench of the Hon'ble High Court of Bombay in order dated 14th June 2019 in Gauri Plasticulture P Ltd and ors v. Commissioner of Central Excise, Indore and ors [2019-TIOL-1248-HC-MUM-CX-LB]. The consequence to this proceeding, and outcome of this appeal, ceases to be a matter of conjecture.

32. It is on this canvas and the statutory remedy in

‘SECTION 35. Appeals to Commissioner (Appeals). — (1) *Any person aggrieved by any decision or order passed under this Act by a Central Excise Officer, lower in rank than a Principal Commissioner of Central Excise or Commissioner of Central Excise, may appeal to the Commissioner of Central Excise (Appeals) hereafter in this Chapter referred to as the Commissioner (Appeals) within sixty days from the date of the communication to him of such decision or order:*

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SECTION 35A. Procedure in appeal. — (1) *The Commissioner (Appeals) shall give an opportunity to the appellant to be heard, if he so desires.*

(2) The Commissioner (Appeals) may, at the hearing of an appeal, allow an appellant to go into any ground of appeal not specified in the grounds of appeal, if the Commissioner (Appeals) is satisfied that the omission of that ground from the grounds of appeal was not wilful or unreasonable.

(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:

Provided *that an order enhancing any penalty or fine in lieu of confiscation or confiscating goods of greater value or reducing the amount of refund shall not be passed unless the appellant has been given a reasonable opportunity of showing cause against the proposed order:*

Provided *further that where the Commissioner (Appeals) is of opinion that any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, no order requiring the appellant to pay any duty not levied or paid, short-levied or short-paid or erroneously refunded shall be passed unless the appellant is given notice within the time-limit specified in section 11A to show cause against the proposed order.*

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of Central Excise Act, 1944 that the jurisdictional competence of the first appellate authority to decide on eligibility for refund is to be located. That a taxing statute must encompass both the power to recover undischarged duty liability and an appellate mechanism for judicial redressal is axiomatic. The routine jurisdiction for collection of tax stems from cognizance of the 'taxable event' within the territorial limit over which the tax collector has exclusive authority. Adjudicatory jurisdiction is pressed into service by the tax collector, as 'cadet branch' so to speak, for recovering undischarged liability in

quasi-judicial proceedings that cannot encroach beyond the framework of show cause notice requiring the assessee to respond to allegation of short-payment or non-payment of duties. In *Commissioner of Central Excise, Nagpur v. Ballarpur Industries Ltd [2007 (215) ELT 489 (SC)]*, with the finding that

‘21..... However, it is made clear that Rule 7 of the Valuation Rules, 1975 will not be invoked and applied to the facts of this case as it has not been mentioned in the second and the third show cause notices. It is well settled that the show cause notice is the foundation in the matter of levy and recovery of duty, penalty and interest. If there is no invocation of Rule 7 of the Valuation Rules 1975 in the show cause notice, it would not be open to the Commissioner to invoke the said rule.’

the significance of show cause notice as the portal for adjudicatory, and appellate, proceedings has been unambiguously pronounced by the Hon’ble Supreme Court.

33. The issue of show cause notice, as an indispensable statutory pre-requisite for recovery either of duties or of amounts refunded in excess of entitlement and as a public declaration of intent, authorizes the assumption of jurisdiction by the empowered official. Not unnaturally, with appeal being an outcome of adjudication, the contents thereof limit the appellate hierarchy too unless superimposed by notice in exercise of such empowerment, as section 35A of Central Excise Act, 1944 does, on an appellate authority. The exercise of this

special power was held by Hon'ble Supreme Court, in *State of Kerala v. Vijaya Stores* [AIR 1979 SC 355], to be invoked only in circumstances of

'5. Considerable emphasis was laid by counsel for 'the appellant upon sub-s.(4) which indicates what things the Appellate Tribunal may do while disposing of an appeal and in particular it was pointed out that under 'sub-s.(4)(a)(i) the Appellate Tribunal has been given power 'to enhance the assessment" while disposing of an appeal against an order of assessment after giving the party a reasonable opportunity of being heard and it was urged that such power could be exercised even when the appeal against the Appellate Assistant Commissioner's assessment order had been preferred by the assessee and not by the Department. To place such a construction on sub-section (4)(a)(i) would amount to ignoring the scheme of s. 39. Sub-section. (1) provides for an appeal being preferred against an assessment order passed by the Appellate Assistant Commissioner under section 34(3) either by the assessee or by the Department through an officer empowered by the Government in that behalf. Further, sub-section. (2) provides for filling of cross-objections by a party, against whom an appeal has been preferred, notwithstanding that he has not himself appealed against the decision or any part thereof and such cross-objections are to be disposed of by Appellate Tribunal as if it were an appeal. Then comes sub-section (4) which enumerates the various powers conferred upon the Appellate Tribunal while disposing of such appeals (including cross-objections) and the power conferred upon the Appellate Tribunal under section 4(a)(i) is "to confirm, reduce, enhance or annul the assessment"; the power to enhance the

assessment must be appropriately read as relatable to an appeal or cross-objections filed by the Department. The normal rule that a party not appealing from a decision must be deemed to be satisfied with the decision, must be taken to have acquiesced therein and be bound by it. and, therefore, cannot seek relief against a rival party in an appeal preferred by the latter, has not been deviated from in sub-section (4)(a)(i) above. In other words, in the absence of an appeal or cross-objections by the Department against the Appellate Assistant Commissioner's order the Appellate Tribunal will have no jurisdiction or power to enhance the assessment. Further, to accept the construction placed by the counsel for the appellant on sub-section (4)(a)(i) would be really rendering sub-section (2) of section 39 otiose, for if in an appeal preferred by the assessee against the Appellate Assistant Commissioner's order the tribunal would have the power to enhance the assessment, a provision for cross-objections by the Department was really unnecessary. Having regard to the entire scheme of section 39, therefore, it is clear that on a true and proper construction of sub-section (4)(a)(i) of section 39 the Tribunal has no jurisdiction or power to enhance the assessment in the absence of an appeal or cross-objections by the Department.

6. *It is true that the two Bombay decisions reported in [1945] 13 ITR 272 (Bom) and [1957] 31 ITR 844 (Bom) (supra) on which the High Court has relied have been rendered in relation to section 33(4) of Indian Income Tax Act, 1922 but in our view the said provisions of Income Tax Act is in parimateria with the provision of section 39(4) of the Kerala General -Sales Tax Act, 1963. Moreover, the Bombay High Court has pointed out in those decisions that section 33(4) merely enacted what was the elementary principle to be found in Civil Procedure Code that the respondent who has*

neither preferred his own appeal nor filed cross-objections in the appeal preferred by the appellant, must be deemed to be satisfied with the decision of the lower authority and he will not be entitled to seek relief against a rival party in an appeal preferred by the latter. In the first mentioned case the elementary principle is stated at page 282 of the report thus:

"Apart from statute, it is elementary that if a party appeals, he is the party who comes before the Appellate Tribunal to redress a grievance alleged by him. If the other side has any grievance, he has a right to file a cross-appeal or cross-objections. But if no such thing is done, the other party, in law, is deemed to be satisfied with the decision. He is, of course, entitled to support the judgment of the first officer on any ground open to him, but he is not entitled to raise a ground so as to work adversely to the appellant and in his favour."

34. *In Servo Packaging Ltd v. CESTAT, Chennai [2016 (340) ELT*

6 (Mad)], it was held by the Hon'ble High Court of Madras that

'17. Admittedly, the department has not filed any appeal against the Order-in-Original No. 48 of 2011, dated 29-9-2011, by which, the original authority, has recorded a categorical finding that, "mere documentary evidence of 36 loose slips found in the security room is not enough to prove clandestine removal of raw materials from Unit-I to Unit-II." The original authority has also held that the allegation of clandestine removal is also not substantiated.

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19. *Though show cause notices have been issued by the original authority, for the shortage of raw materials noticed, which includes, allegation of clandestine removal of raw materials, the finding of the original authority against the revenue, on the latter, is clear. When the department has not chosen to challenge the finding of the original authority, on*

the allegation of clandestine removal of raw materials nor filed any cross-objection to the appeal filed by the assessee, we are of the view that the finding rendered, by the original authority, in favour of the assessee, has reached finality.

20. *In such circumstances, there cannot be any order, by the appellate authority, adversely affecting the interest of the assessee, in the appeal filed by the assessee. Thus, the directions of the appellate authority, in Appeal No. 23/2013(P), dated 3-12-2013, Paragraphs 14(iv) to (vi), are certainly beyond the scope of the appeal, and thus, as rightly contended by the learned counsel for the appellant that the appellate authority has exceeded in his jurisdiction, in exercise of powers, under Section 35A of the Central Excise Act, 1944.'*

In *TANSI Fabrication Works v. Joint Commissioner of CGST & Central Excise, Tirunelveli* [2018 (17) GSTL 429 (Chennai)], it was held that

'12. There is yet another point in favour of the writ petitioner, as rightly pointed out by the Learned Counsel for the petitioner, namely, the point of limitation. The petitioner is a Government undertaking. It is not in dispute that as and when the petitioner crossed the exemption limit in a given year, it began to pay excise duties. All these transactions have been periodically cleared and are well known to the Authorities. It can be nobody's case that the petitioner had suppressed any material transaction. Therefore, in the very nature of things, the Commissioner of Central Excise, Tirunelveli, could not have sought recovery of duties beyond the period of one year from the relevant date. In this case, show cause notice was issued only on 29-3-2006. Therefore,

what transpired beyond 29-3-2005 cannot be touched. Since this Court agrees with the contention of the Learned Counsel for the petitioner that the demand was unsustainable, there is no need to go into the correctness of imposing penalty equivalent to the amount demanded. But still it would be in order to make a remark or two. Admittedly, the Authority originally levied only a penalty of Rs. 50,000/-. The matter was taken on appeal. The Department did not prefer any cross appeal contending that the penalty amount was inadequately levied. The appeal Authority allowed the writ petitioner's appeal and remanded the matter. But after remand, the penalty was enhanced from Rs. 50,000/- to a sum equivalent to the amount demanded. As rightly pointed out by the petitioner's Counsel, the petitioner cannot be put in a worse position, merely, for having filed an appeal. In this regard, he drew the attention of this Court to the decision reported in 2016 (340) ELT 6 (Mad.) (Servo Packaging Ltd. v. CESTAT, Chennai). In paragraph No. 25 of the said judgment, the Hon'ble Division Bench has observed as under:-

“25. In the absence of any appeal filed by the department on the finding, relating to alleged clandestine removal of raw materials, the appellant cannot be put in a worse position, in their own appeal, and in such circumstances, the principle of “no reformation in peius” would come into play, which means that a person should not be placed in a worse position, as a result of filing an appeal. It is a latin phrase, expressing the principle of procedure, according to which, using the remedy at law, should not aggravate the situation of the one who exercises it.”

35. The conspectus of these judicial exposition is that, besides limiting the recovery process in its entirety to the show cause notice, the appellate process, triggered by grievance against orders emanating

from the lower tier in the adjudicatory/appellate hierarchy, is even further limited to the grievance that is sought to redressed. Thus, it may be essayed that appellate jurisdiction is that which is conferred by the appellant as elaborated by the Hon'ble High Court of Madras in *Rajaram Johra v. Commissioner of Customs, Chennai* [2019 (365) ELT 424 (Mad.)] thus

'9. A reading of Section 129B(1) would show that the Tribunal has to give the parties to an appeal an opportunity of being heard and after affording the same, pass orders as it thinks fit affirming, modifying and annulling the decision or order appealed against. What has to be borne in mind is that the appeal, which was heard by the Tribunal, was an appeal filed by the appellant herein and not an appeal of the Department nor a cross-objection of the Department in terms of sub-section (4) of Section 129A. Therefore, in an appeal filed by the assessee, the Tribunal could have passed an order as it thinks fit, affirming, modifying or annulling the decision or order appealed against and the order appealed against in the instance case is the order passed by the Commissioner (Appeals) dated 29-4-2009 and not the Order-in-Original dated 11-1-1994.

10. More or less a similar question came up for consideration in the case of Servo Packaging Ltd. v. CESTAT, 2016 (340) ELT 6 (MAD.) and one of the questions which was framed for consideration was whether the Appellate Tribunal and the Appellate Authority have jurisdiction to interfere with the part of the order of the Adjudicating Authority, which does not form the subject matter of appeal before the First Appellant Authority and whether the Tribunal is justified in enlarging the remand order of the First Appellate Authority,

wherein, the First Appellate Authority has no power to remand the matter, since the provision of Section 35(A) of the Central Exercise Act, 1944 used the word “affirming” or “modifying” or “annulling” the decision or order and there is no mention of remand.

11. The Court held that had the assessee not filed an appeal, they would not be placed in a situation of inviting an adverse order on the aspect of clandestine removal. A party, who files an appeal, expects that the appellate authority would only address the grounds of appeal made against the order impugned and the appellant does not expect the appellate authority to go beyond the scope of the appeal and pass an order adverse to his interest, in which event, it certainly creates a worse situation for the appellant/assessee in his own appeal than the order under challenge. Further, it was pointed out that the principal of “no reformation in peius” would come into play, which means that a person should not be placed in a worse position, as a result of filing an appeal. It is a Latin maxim expressing the principle of procedure, according to which, using the remedy at law, should not aggravate the situation of the one who exercises it.

12. As pointed out earlier, the power of the appellate Tribunal is exercisable under Section 129B(1) only against the decision or order appealed against and in doing so, it may pass such orders as it thinks fit affirming, modifying and annulling the decision or order appealed against. Admittedly, the Department did not file an appeal against the order of the Commissioner (Appeals) permitting the redemption of the seized gold. In such circumstances, the Revenue should not be said to be aggrieved by such a direction granting redemption and the Tribunal clearly erred in dismissing the appellant's appeal and restoring the order passed by the original

authority.'

36. Despite the contrary opinions emanating from the Division Bench on the determination of eligibility, the difference is solely on the contents of the order impugned before the first appellate authority – with Hon'ble Member (Judicial) acknowledging only the explicit finding and Hon'ble Member (Technical) reading down implied findings and there is, owing to congruity in their concurrence with Learned Counsel about lack of finding on merit in the order of original authority, underlying agreement that the appellate authority is confined to the determination by the original authority. Before weighing in with one or the other of these viewpoints, perusal of the order of the original authority and the proceedings before the first appellate authority may throw light on the adherence thereto.

37. It is not that the authority competent to dispose that claim for refund has commenced and concluded its findings at the threshold on limitation; the order records that the eligibility on merit was initially taken up and it would appear that, having noted the decision of the Hon'ble High Court of Karnataka in *re Slovak Trading Company*, the determination veered off on another path that, possibly, was more amenable to rejection of the claim with least controversy but leaving unarticulated the conclusion on eligibility. Hon'ble Member (Technical) was not entirely off the mark in adverting to an implied finding that offered scope for appellate determination. It is seen from

the appeal preferred before the first appellate authority that the eligibility for refund on merit has not only been reiterated but that implications of the trajectory of reference to the decision in *re Slovak Trading Company* has also been asserted unequivocally. The impugned order has also recorded that the grounds of appeal were reiterated during the personal hearing. It is, therefore, not open to the appellant to now contend that eligibility on merit was not one of the grievances placed before the first appellate authority; to seek to curtail the jurisdiction with such a prayer is contrary to facts. Determination of eligibility on merit was, thus, within the jurisdiction conferred by the appellant on the first appellate authority. Therefore, without appraisal of the proposition of deemed simultaneous disposal of all three processes involved in dealing with claims for refund of Hon'ble Member (Technical) without reference to legal provisions or judicial rulings, the finding that the first appellate authority did not exceed jurisdiction is concurred with.

38. On the finding in the impugned order of ineligibility for encashment of credit in balance, which has relied upon decisions available then, the opinion of Hon'ble Member (J) that the Tribunal, or any of the lower authorities, are bound to defer decision is no longer applicable as the Larger Bench of the Hon'ble High Court of Bombay, in *re Gauri Plasticulture P Ltd*, has confirmed the ineligibility to claim refund of unutilised credit which places the final

outcome beyond the pale of uncertainty and, additionally, relegates the threshold issue to that of mere academic interest with no claim for adjudicatory re-determination. Concurring with Hon'ble Member (T), I hold that the finding on ineligibility for monetising of credit balance has been correctly determined and remand is not warranted. Registry is accordingly, directed to place the records herein before the designated Division Bench for the majority decision to be pronounced.

(Order pronounced in the open court on 16/07/2021)

(C J Mathew)
Member (Technical)

**/as*

Date of Decision: **05 August, 2021**

FINAL ORDER NO. A/86650 / 2021

MAJORITY ORDER

In view of majority view, the appeal is rejected and dismissed.

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

Prasad