

**2014 (4) ECS (22) (HC - Bom)**

In The High Court of Judicature at Bombay  
Civil Appellate Jurisdiction

**C.C.E., RAIGAD**

V/s

**M/s. COMBITIC GLOBAL CAPLET PVT. LTD.**

**Date of decision: 26.08.2014**

Writ Petition No. 9997 of 2013

Appearance:

Mr Pradeep S. Jetly with Mr. J.B. Mishra  
Mr. Anil Balani

For the Appellant  
For the Respondent

**CORAM:**

Hon'ble Shri S.C. Dharmadhikari &  
Hon'ble Shri A.K. Menon, JJ.

**"Any person aggrieved by any decision or order by a Central Excise Officer, lower in rank than a C.C.E, may file an appeal to the C.C.E (Appeals) within GO days from the date of communication to him of such decision or order. Thereafter, section 35A sets out the procedure in appeal. The further provision of section 35B, no doubt confers a right in any person aggrieved by the orders mentioned in the said section to prefer an appeal to the Appellate Tribunal and one of the orders against which the appeal can be preferred is the order passed by the Commissioner (Appeals) under section 35A." (para 5)**

**"A bare perusal of sub-section (1) of section 35EE shows that the Central Government may, on the application of any person aggrieved by any order passed under section 35A where the order is of the nature referred to in first proviso to sub-section (1) of section 35B, annul or modify such order." (para 6)**

**"The revisional authority while upholding the objection lost sight of sub-section (1a) of section 35EE and that empowers the Commissioner of Central Excise to prefer an application to the Central Government for revision of the order passed under section 35A. Sub-section (1) of section 35EE has been brought in the statute book with effect from 11th May, 1999. That does not proceed to indicate that a specific order under section 35A could only be revised and not otherwise. Section 35EE(1a) permits invocation of the revisional power of the Central Government, in case the order is passed by the Commissioner (Appeals) and on the satisfaction or opinion of the Commissioner of Central Excise that the said order is not legal or appropriate." (para 7)**

**P.C:**

1. The Joint Secretary, Government of India has passed the order purporting to be under section 35EE of the Central Excise Act rejecting the Revision Application which was filed by the Petitioner before us. The impugned order dated 3rd April, 2013 was made on the revision application challenging the order--in-original that was passed by the C.C.E (Appeals) Mumbai II on 31st January, 2012. The Petitioner before us is the C.C.E, Raigad. The appellate order dated 17th May, 2012 of the C.C.E; (Appeals) Mumbai-II confirms the order of the Deputy Commissioner (Rebate), Central Excise, Raigad dated 31st January, 2012 stated to be the order-in-original.
2. The revision application was placed before the authority but by the impugned order, the revisional authority has arrived at the conclusion that the said revision was not maintainable. All that the revisional authority has held is that if the order-in-appeal relates to rebate of duty of excise on goods exported or on excisable material used in the manufacture of goods which are exported, then a revisions application lies before the Central Government in terms of section 35EE, However, the respondents' objection to the maintain ability of the revision application has been upheld by further observing that the Government of India notes that there is no dispute with regard to export of goods and, compliance of provisions of Rule 18 of Central Excise Rules, 2002. After having held so what the revisional authority feels is that major issue involved in this case is dote determination of value of excisable goods exported which does not fall within the jurisdiction of the authority and hence the issue is required to be agitated before proper legal forum, namely, the tribunal and not the revisional authority.
3. Thus, the Government has held that it has no jurisdiction to pass any order on the revision application and in respect of order-in-appeal.
4. Mr. Jetly appearing in support of this petition submits that this conclusion is erroneous and in the face of clear language of section 35EE of the Central Excise Act, 1944, Mr. Jetly submits that if the order passed by the Commissioner (Appeals) is under section 35A of the Central Excise Act, 1991, then, the Petitioner Commissioner before this Court was embowered to direct the appropriate officer to make an application on his behalf to the Central Government for revision of such order. In such circumstances, the nature of dispute and contents of the order-in-appeal should not have influenced the conclusion on jurisdiction and maintainability of the revision application.
5. Mr. Balani appearing on behalf of the respondents on the other hand submits that once the revisional authority has recorded the findings

which are to be found in paragraphs 11 to 14 of the order, then, it is not a case for interference in the writ jurisdiction because the view taken is in accordance with law. Further, from the developments which are not placed on record by the Petitioner, the writ jurisdiction is invoked in relation to the impugned order but without informing the Court that in furtherance of the order-in-original and order in appeal, the department has taken consequential steps and to implement the original order. Once the order has been implemented then the present petition is rendered infructuous. The issue raised is purely academic. In that regard our attention is invited to the order passed by the Deputy C.C.E., Raigad on 13<sup>th</sup> November, 2013. Mr. Balani submits that the Respondent has challenged this order before the Appellate Authority and the appeal is pending. He therefore, submits that the writ petition be dismissed.

6. The three sections which we have to note are section 35, 35A and 35B of the Central Excise Act, 1944. That sections provide for appeals to the Commissioner (Appeals) which read as under:

“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 C.C.E., may appeal to the C.C.E. (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:

Provided that the Commissioner (Appeals) may if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.

(1A) The Commissioner (Appeals) may, if sufficient cause is shown at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing:

Provided that no such adjournment shall be granted more than three times to party during hearing of the appeal.

(2) Every appeal under this section shall be in the prescribed form and shall be verified in the prescribed manner.

**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 willful 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.

(4) The order of the Commissioner (Appeals) disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon and the reasons for the decision.

(5) The Commissioner (Appeals) shall, where it is possible to do so, hear and decide every appeal within a period of six months from the date on which it is filed.

(6) On the disposal of the appeal, the Commissioner (Appeals) shall communicate the order passed by him to the appellant, the adjudicating authority, the Chief Commissioner of Central Excise and the C.C.E.

### **Section 35B. Appeals to the Appellate Tribunal.**

(1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order -

- (a) a decision or order passed by the C.C.E as an adjudicating authority;
- (b) an order passed by the Commissioner (Appeals) under section 35A;
- (c) an order passed by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) (hereafter in this Chapter referred to as the Board) or the Appellate C.C.E Under section 35, as it stood immediately before the appointed day;

- (d) an order passed by the Board or the Commissioner of Central Excise, either before or after the appointed day, under section 35A, as it stood immediately before that day :

**Provided** that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to, -

- (a) a case of loss of goods, where the loss occurs in transit from a factory. to a warehouse or to another factory or From one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse;
- (b) a rebate of duty of excise on goods exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India;
- (c) goods exported outside India (except to Nepal or Bhutan) without payment of duty ;
- (d) credit of any duty allowed to be utilised towards payment of excise duty on final products under the provisions of this Act or the rules made there under and such order is passed by the Commissioner (Appeals) on or after the date appointed under section 109 of the Finance (No. 2) Act, 1998:

**Provided** further that the Appellate Tribunal may, in its discretion, refuse to admit an appeal in respect of an order referred to in clause (b) or clause (c) or clause (d) where -

(i) in any disputed case, other than a case where the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; o

(ii) the amount of fine or penalty determined by Such order, does not exceed fifty thousand rupees.”

A bare perusal of the above sections would indicate that any person aggrieved by any decision or order by a Central Excise Officer, lower in rank than a C.C.E, may file an appeal to the C.C.E (Appeals) within 60 days from the date of communication to him of such decision or order. Thereafter, section 35A sets out the procedure in appeal. The further provision of section 35B, no doubt confers a right in any person aggrieved by the orders mentioned in the said section to prefer an appeal to the Appellate Tribunal

and one of the orders against which the appeal can be preferred is the order passed by the Commissioner (Appeals) under section 35A. However, what we note from section 35EE is that the same confers a power of revision in the Central Government. That reads as under:

**“Section 35EE Revision by Central Government.**

- (1) The Central Government may, on the application of any person aggrieved by any order passed under section 35A, where the order is of the nature referred to in the first proviso to sub-section (1) of section 35B, annul or modify such order :  
**Provided** that the Central Government may in its discretion, refuse to admit an application in respect of an order where the amount of duty or fine or penalty, determined by such order does not exceed five thousand rupees.
- (1A) The C.C.E may, if he is of the opinion that an order passed by the Commissioner (Appeals) under section 35A is not legal or proper, direct the proper officer to make an application on his behalf to the Central Government for revision of such order.
- (2) An application under sub-section (1) shall be made within three months from the date of the communication to the applicant of the order against which the application is being made:  
**Provided** that the Central Government may, if it is satisfied that the applicant was prevented by sufficient cause from presenting the application within the aforesaid period of three months, allow it to be presented within a further period of three months.
- (3) An application under sub-section (1) shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf and shall be accompanied by a fee of, -
  - (a) two hundred rupees, where the amount of duty and interest demanded, fine or penalty levied by any Central Excise officer in the case to which the application relates is one lakh rupees or less;
  - (b) one thousand rupees, where the amount of duty and interest demanded, fine or penalty levied by any Central Excise officer in the case to which the application relates is more than one lakh rupees :  
**Provided** that no such fee shall be payable in the case of an application referred to in sub-section (1A),
- (4) The Central Government may, of its own motion, annul or modify any order referred to in sub-section (1).

- (5) No order enhancing any penalty or fine in lieu of confiscation. or confiscating goods of greater value shall be passed under this section, -
  - (a) in any case in which an order passed under section 35A has enhanced any penalty or fine in lieu of confiscation or has confiscated goods of greater value; and
  - (b) in any other case, unless the person affected by the proposed order has been given notice to show cause against it within one year from the date of the order sought to be annulled or modified.
- (6) Where the Central Government is of opinion that any duty of excise has not been levied or has been short-levied, no order levying or enhancing the duty shall be made under this section unless the person affected by the proposed order is given notice to show cause against it within the time-limit specified in section 11A.”

A bare perusal of sub-section (1) of section 35EE shows that the Central Government may, on the application of any person aggrieved by any order passed under section 35A where the order is of the nature referred to in first proviso to sub-section (1) of section 35B, annul or modify such order. The argument before the revisional authority was that the Petitioner before us may be person aggrieved but since the order passed is in the nature stipulated by the proviso to sub-section (1) of section 35B, the revision application does not lie.

7. The revision application is held to be not maintainable. However, the revisional authority while upholding the objection lost sight of sub-section (1a) of section 35EE and that empowers the C.C.E to prefer an application to the Central Government for revision of the order passed under section 35A. Sub-section (1) of section 35EE has been brought in the statute book with effect from 11th May, 1999. That does not proceed to indicate that a specific order under section 35A could only be revised and not otherwise. Section 35EE(1a) permits invocation of the revisional power of the Central Government, in case the order is passed by the Commissioner (Appeals) and on the satisfaction or opinion of the C.C.E that the said order is not legal or appropriate. It is in these terms that the present application was filed. In these circumstances, the objection could not have been raised as to the maintainability of the revision application.
8. In the face of this clear language of the sections, we are of the opinion that the impugned order cannot be sustained. The revision application is maintainable and could not have been dismissed for want of jurisdiction in the Central Government. The impugned

order is therefore quashed and set aside and the revision application filed by the Petitioner is restored to the file and the same be decided afresh on merits and in accordance with law.

9. We clarify that we have not expressed any opinion on the rival contentions and each one of them are kept open including that subsequent proceedings, and the orders passed by the Deputy Commissioner on 13th December, 2013 would render the entire controversy infructuous.
10. The fresh order on the revision application shall be passed after hearing both sides and without being influenced by any observations and conclusions in the earlier order. The petition is disposed of in the above terms. No order as to the costs.

**(A.K. MENON, J.)**

**(S.C. DHARMADHIKARI, J.)**