[2016] 68 taxmann.com 190 (Orissa)

HIGH COURT OF ORISSA

Commissioner, Central Excise, Customs & Service Tax, Bhubaneswar-I Commissionerate

v.

Ballarpur Industries Ltd.

I. MAHANTY AND DR. D.P. CHOUDHURY, JJ.
OTAPL NO. 8 OF 2012
MARCH 4, 2016

CASE REVIEW

Order dated 25-4-2012 passed by CESTAT, Kolkata in Excise Appeal No. 674 of 2006 *affirmed.*

Montreal Street Railway Co. v. *Normandin* 1917 AC 170 (para 16); *L. Hazari Mal Kuthiala* v. *ITO* AIR 1961 SC 200 (para 17) and *Bhavnagar University* v. *Palitana Mill (P.) Ltd.* AIR 2003 SC 511 (para 17) *relied on.*

CASES REFERRED TO

Montreal Street Railway Co. v. *Normandin* 1917 AC 170 (para 7), *L. Hazari Mal Kuthiala* v. *ITO* AIR 1961 SC 200 (para 7) and *Bhavnagar University* v. *Palitana Mill (P.) Ltd.* AIR 2003 SC 511 (para 7).

Bismay Anand Prusty, Junior Standing Counsel *for the Petitioner.* **S.C. Mohanty**, **P. Rath** and **J. Mohanty** *for the Respondent.*

ORDER

Dr. D.P. Choudhury, J. - The captioned writ appeal is preferred challenging the order dated 25.4.2012 passed by learned Customs, Excise & Service Tax Appellate Tribunal(hereinafter called CESTAT), Eastern Zonal Bench, Kolkata in Excise Appeal No. 674 of 2006 in dismissing the appeal being infructuous.

Facts of the case :

2. The factual matrix of the case of the appellant is that respondent-assessee is manufacturer of paper and board products, classified under Chapter No.48 of Central Excise Tariff Act, 1985. The officers of the appellant-Department visited the premises of the unit of the respondent from 18.10.1997 to 22.10.1997 and conducted joint stock verification of its finished products and MODVATABLE inputs, vis-à-vis the stocks recorded in its statutory prescribed record and found a shortage of 6.607 metric ton

in the NSS ML and 0.788 metric ton in SS ML variety of paper. It is also stated that a quantity of 204 Kg. of SS ML was found excess and the same was seized under a panchnama. There are also some deficiencies detected by the officers of the appellant. It was noticed by the officers of the appellant that sludge had been removed without reversing of his price in scrap arising out of MODVATABLE capital goods without payment of central excise duty. They found 62.314 metric tons of paper in excess without having been accounted for in its RG -1 and the same was seized. Show-cause notice dated 15.4.2008 was issued to the appellant and its Manager(Commercial) and Executive (Central Excise) as to why :—

I. duty of Rs.21,398/- for clearance of capital goods should not be recovered from them under Rule 57U of the Central Excise Rule, 1944 (hereinafter called "the Rule");

II. duty of Rs.98,462/-(B.D.) and Rs.531(Cess) for clearance of different varieties of papers;

III. duty of Rs.2,14,049/- for clearance of packing material on MODVAT inputs;

IV. duty of Rs.3,17,960/- for clearance of capital goods on which MODVAT duty was availed;

V. duty of Rs.6,68,173/- on the MODVAT inputs unutilized in the manufacture of finished goods; and

VI. an amount Rs.4,740/- reversible on the clearance of exempted goods which are not paid by the party at the time of clearance of these goods but paid by them later, should not be confirmed under section (1) of section 11A of the Central Excise Act, 1944 (hereinafter called 'the Act') and relevant rules of the Rule.

3. Notice to show-cause was also issued as to why the penalty should not be imposed on the assessee under section 11A of the Act and relevant Rules made thereunder for suppression of the facts and in contravention of the aforesaid Rules with intent to evade payment of duty. It is also stated that a notice was also issued to show-cause as to why interest should not be paid under section 11AB of the Act and Rules made thereunder for the said reasons, as to why a quantity of 62.314 metric ton valued at Rs.15,40,135/- seized for not having accounted for in the RG-1 should not be confiscated under relevant Rule of the Rule and penalty should not be imposed under Rule 173Q of the Rules for the same; and the Manager (Commercial) and Executive (Central Excise) of the assessee-company will not be penalised under Rule 209A of the Rule. The said notice was adjudicated by the Joint Commissioner (ADJN), CESTAT, Bhubaneswar-I by order dated 30.6.2005. In the said adjudication, the concerned authority confirmed the demand of central excise duties for (i) Rs.21,398/- on capital goods, (ii) Rs.98,462/- and Rs.531/- (Cess) on clearance of different varieties of paper, and (iii) Rs.3,17,960/- on the clearance of capital goods on which MODVAT credits had been availed, (iv) Rs.6,68,173/- on MODVATABLE inputs unutilized in the manufacture of finished goods and (v) rs.4,740/- on exempt goods (sludge), and recovery of further interest under section 11AB and a penalty of Rs.11,00,000/- imposed thereon. The said adjudication authority confirmed the central excise duty as demanded by

the Department on capital goods, cess and other infraction as pointed out by the Department in the show-cause. That apart the concerned adjudication authority confiscated a quantity of 62,314 metric ton of paper and imposed penalty of Rs.1,00,000/- on the assessee besides imposition of additional penalty of Rs.1,00,000/- on its Manager(Commercial) and Executive (Central Excise).

4. Challenging the said order-in-original, the assessee along with its officers preferred appeal before the Commissioner (Appeals), Central Excise, CESTAT, Bhubaneswar but the order of the concerned authority was upheld in appeal vide order dated 20.1.2006 in respect of NSS Map Litho paper but set aside the balance portion of the adjudication order including the personal penalty imposed on the Manager (Commercial) and Executive (Central Excise) of the respondent company.

5. Challenging the said order dated 20.1.2006 passed by the Commissioner (Appeals), Central Excise, CESTAT, Bhubaneswar, the present appellant filed three separate appeals along with stay petition before the learned CESTAT which are registered as Excise Appeal No. 674 of 2006-against the appellant, Excise Appeal No. 250 of 2007-against the Manager(Commercial) and Excise Appeal No. 251 of 2007-against the Executive (Central Excise) of respondent-company. Be it stated that vide common order dated 13.5.2008 learned CESTAT dismissed the Excise Appeal Nos. 250 and 251 of 2007 with observation that the appeal filed pursuant to the authorization from the Commissioner, Bhubaneswar-I instead of filing appeal petition by the present appellants along with valid authorization, signed by the Committee of Commissioners, the same, is not maintainable and rejected. On 25.4.2012 learned CESTAT also dismissed the Excise Appeal No. 674 of 2006 as infructuous by referring to the orders passed by the Tribunal in the above two appeals. Challenging the said order dated 25.4.2012 passed learned CESTAT in Excise Appeal No. 674 of 2006, the present appeal has been filed with the following three substantial questions of law :

(1) Whether, in the facts and circumstances of the case, the Ld. CESTAT is correct in dismissing the appeal preferred by the Appellant/Department, on mere technical ground of lack of proper authorization by the Committee of Commissioners in term of Sub Sec.2 of Sec. 35B of the Act, though a plain reading of Sec.35-B and more specifically presence of word "may", in its Sub Sec.2, gives a very clear and unambiguous inference that, such an authorization by the Committee of Commissioners is a mandatory requirement for the Appellant/Department to maintain an Appeal before the Ld. CESTAT?

(2) Whether, in the facts and circumstances of the case, the Ld. CESTAT is correct in dismissing the appeal preferred by the Appellant/Department, on mere technical ground of lack of proper authorization by the Committee of Commissioners in term of Sub Sec. 2 of Sec. 35 B of the Act, though the very Sec.35-B(1)(b) of the Act, gives right to any person, which very much includes the Appellant/Department to prefer an appeal before the Appellate Tribunal, if aggrieved by the any order passed by the Commissioner (Appeals) under Sec.35-A?

(3) Whether, in the facts and circumstances of the case, the Ld. CESTAT is correct in

dismissing the appeal preferred by the Appellant/Department, on mere technical ground of lack of proper authorization by the Committee of Commissioners in term of Sub Sec. 2 of Sec. 35 B of the Act, though it is well settled principle of law that, on mere technical grounds, substantial justice should not be vitiated and the very same authorization by the Committee of Commissioners was very much present in the records of the Ld. CESTAT below, in other connected appeals ?

Submissions

6. Learned counsel for the appellant-Department strenuously argued that the impugned order passed by the learned CESTAT is erred in law by not accepting settled principle of law. He further submitted that the learned CESTAT has failed to apply judicial mind to the facts of the case and landed in a wrong conclusion. Learned CESTAT has erred in law to appreciate that presence of authorisation by Commissioner of Central Excise in the record itself and at the same time dismissed the appeal without going through the same. The authorization as appearing in sub-section (2) of Section 35B of the Act is more directory one but not mandatory and learned CESTAT has failed to appreciate this principle of law.

7. Relying upon the decisions in *Montreal Street Railway Co.* v. *Normandin* 1917 AC 170, *L. Hazari Mal Kuthiala* v. *ITO* AIR 1961 SC 200 and *Bhavnagar University* v. *Palitana Mill (P.) Ltd.* AIR 2003 SC 511 learned counsel for the appellant-Department submits that provision of sub-Section (2) of Section 35B of the Act being directory, have not been properly appreciated by CESTAT.

8. It is the bone of contention that the grant of authorization of the Committee of Commissioners in terms of sub-section(2) of Section 35B of the Act is completely an intra-departmental administration decision making procedure and there is no scope of advancing pleadings and deciding any lis between the parties for which non-compliance of the said administrative flaw, cannot be fatal to the quasi-judicial proceeding initiated. He also strenuously argued that the dismissal order passed by the learned CESTAT only on the ground of lack of authorization by the Committee of Commissioners is completely without jurisdiction. In the present case, Committee of Commissioners in terms of sub-section (2) of section 35 of the Act was constituted by the Commissioner of Central Excise, Customs and Service Tax, Bhubaneswar-I under Commissionerate and Commissionerate of Central Excise, Customs and Service Tax, Bhubaneswar-II, but at the time of filing of Excise Appeal No. 674 of 2006 before the learned Tribunal, the Commissioner of Central Excise, Customs and Service Tax, Bhubaneswar-I under Commissionerate being in charge of Bhubaneswar-II Commissioner, made authorisation in due capacity and has to be treated as valid authorization in this appeal. It is also submitted by the learned counsel for the appellant-department that common authorization dated 24.6.2008 of all the three appeals including the present appeal against the respondent was signed by both the Commissioners of Bhubaneswar-I & II Commissionerate and the same are also available on records of the connected Excise Appeal Nos.250 & 251 of 2007 but without taking cognizance of the same, the order was passed in the Excise Appeal No. 674 of 2006 with a finding that the same is infructuous which is nothing but non-application of mind by the learned CESTAT. So he submitted to allow the appeal in deciding the substantial questions of law as proposed by the appellant and remit

the matter back to the learned CESTAT for fresh adjudication on merit.

9. Learned counsel for the respondent submitted that no authorization by the Committee of Commissioners as required under sub-section (2) of Section 35B of the Act was filed while the appeal was preferred by the learned CESTAT for which the order passed by learned CESTAT can neither be said that it is without application of mind nor it is without jurisdiction. It is further submitted by learned counsel for the respondent that the compliance of sub-section (2) of Section 35B of the Act in preferring appeal is mandatory and at no stretch of imagination, it is directory. Since the mandatory provision has not been followed by the appellant/Department, rightly learned CESTAT has passed the impugned order observing that it is infructuous and subsequent rectification of such defect cannot cure the mandatory provision as required under law. He submitted that decision of the Hon'ble Apex Court cannot be pressed into service in the present facts and circumstances inasmuch as the said decisions were rendered on different facts and circumstances but not identical issues raised in this case. According to him after amendment of concerned provision of the Central Excise Act, 2005, the Committee of Commissioners have been entrusted the task of authorization of either Commissioner or any Officer to file the appeal and the purpose of such authorization is not merely authorization of Officer but also take decision to file appeal after deliberating on the facts and law involved in the particular case. So mere observance of the provision of law cannot be said to be empty formality but it is to be taken as a mandatory provision to be complied. So, he submitted to confirm the order of the learned CESTAT and dismiss the appeal.

Points for Discussion

10. At the time of admission, the matter is taken up to find out the question of law raised in this case, but in a preliminary hearing, on consent of parties, we decided to find out whether there is compliance of sub-section (2) of Section 35B of the Act.

Discussion

11. It is admitted by both the parties that the Commissioner of Appeals disposed of the appeal filed by the respondent-company and his two officials for which the Commissioner of Appeals disposed of the Excise Appeal No. 674 of 2006 by the Commissioner on 25.6.2012 against respondent- company whereas the learned Tribunal disposed of the Excise Appeal Nos.250 & 251 of 2007 preferred by two officers of the company respectively on 13.5.2008. It is not disputed that in the impugned order dated 25.4.2012, against which present appeal arises, has been been decided in the following manner :

> "Per Shri S.K. Gaule:
>
> Heard both sides. The Revenue filed this appeal against the O/A No.8-10/B-1/06 dated 20.01.06. At the outset, the ld. Advocate for the respondent has brought to our notice that the appeal field against this Order-in-Appeal has already been decided against the Department Vide Tribunal's Final Order No.S-369-370/A-557- 558/Kol/08 dated 13.05.2008.
>
> 2. The ld. A.R. appearing for the Department, reiterated the grounds of appeal.

3. We find that the appeal against the O/A No.8-1-/B-I/06 dated 20.1.06, has already been decided Vide Tribunal's Final Order No.S-369- 370/A-557-558/Kol/08 dated 13.5.2008. In these circumstances, the present appeal is infructuous and the same is accordingly, dismissed.

Dictated and pronounced in the open Court.

Sd/-	Sd/-
26.4.2012	26.4.2012
(DR. D.M.MISRA)	(S.K.GAULE)
JUDICIAL MEMBER	TECHNICAL MEMBER"

12. It is also not disputed that in the order dated 13.5.2008 passed in the Excise Appeal Nos.250 & 251 of 2007 has been decided in the following manner :—

"Per Dr. Chittaranjan Satapathy:

Heard the ld. SDR for the appellant Revenue. The respondents are not represented. Instead of required authorization from the Committee of Commissioners, an authorization from the Commissioner, BBSR I, has been filed. As such, the appeal filed pursuant to such an authorization, is not maintainable. Accordingly, the appeals along with the stay petitions are dismissed as not maintainable.

(Dictated and pronounced in the open Court.)

Sd/-	Sd/-
16.5.2008	16.5.2008
(DR. D.M.MISRA)	(Dr. Chittaranjan Satapathy)
JUDICIAL MEMBER	TECHNICAL MEMBER"

13. From the foregoing orders, it appears that the impugned order in this appeal has been passed on 25.4.2012 relying upon the order dated 13.5.2008 passed in Excise Appeal Nos.250 & 251 of 2007. Both the orders only indicate that no proper authorization has been filed by the appellant-Department to file the appeal, resulting in disposal of the appeals. It is the contention of the learned counsel for the appellant that they have filed the authorization dated 24.6.2008 vide Annexure-3 with the affidavit by the appellant in CESTAT on 29.1.2013. On going through the said authorization, it appears that the same was purportedly made to file appeal against the order dated 20.1.2006 passed by the learned Commissioner of Appeals before the CESTAT on the ground specified in another document and authorized the Additional Commissioner of Central Excise, Bhubaneswar-I to file appeals before the CESTAT, Kolkata. On going through the order dated 13.5.2008 passed in Excise Appeal Nos.250 & 251 of 2007, it appears it was passed much before the authorisation was made. The impugned order shows that relying on the order dated 13.5.2008 passed in Excise Appeal Nos.250 & 251 of 2007, the impugned order has been passed dismissing the appeal in 2012. The impugned order does not disclose whether cognizance of the authorisation dated 24.6.2008 has been taken by the learned CESTAT, if it is filed. In absence of any indication of filing the same in the impugned order, it cannot be said that the said authorisation has been filed in the impugned appeal while appeal was preferred. Thus, on

materials on record, authorization neither finds place in the impugned order nor in the order passed in other two appeals.

14. Now let us discuss the provisions of law to find out whether the same is mandatory or directory. Sub-sections (1) & (2) of Section 35B of the Act is reproduced herein below :—

'THE CENTRAL EXCISE ACT 1944

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 Commissioner of Central Excise 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 Commissioner of Central Excise 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 thereunder 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; or

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

(2) The Committee of Commissioners of Central Excise may, if it is of opinion that an order passed by the Appellate Commissioner of Central Excise under section 35, as it stood immediately before the appointed day, or the Commissioner (Appeals) under section 35A, is not legal or proper, direct any Central Excise Officer authorised by him in this behalf (hereafter in this Chapter referred to as the authorised officer) to appeal on its behalf to the Appellate Tribunal against such order.

Provided that where the Committee of Commissioners of Central Excise differs in its opinion regarding the appeal against the order of the Commissioner (Appeals), it shall state the point or points on which it differs and make a reference to the jurisdictional Chief Commissioner of Central Excise who shall, after considering the facts of the order, if is of the opinion that the order passed by the Commissioner (Appeals) is not legal or proper, direct any Central Excise Officer to appeal to the Appellate Tribunal against such order.

Explanation - For the purposes of this sub-section, "jurisdictional Chief Commissioner" means the Chief Commissioner of Central Excise having jurisdiction over the adjudicating authority in the matter.'

15. In terms of the aforesaid provisions, appeals against the decision or order passed by the Commissioner, Central Excise (Appeals) can be preferred to CESTAT. Opinions under sub-section (2) of Section 35B of the Act is a condition precedent for filing appeal inasmuch as only after the opinion, by the Committee of Commissioners of Central Excise, the appeal can be filed against the impugned order besides authorization given by the Committee of Commissioners Commissioner of Excise to any officer to file appeal on behalf of the Department. Sub-section (2) of section 35B of the Act has been substituted in 2005 by amending the said provision. Before 2005, the Commissioner of Central Excise alone was given power to decide whether the appeal would be filed against the order of the Commissioner of Excise Appeals passed under section 35A of the Act ? So the present amendment has made the task more onerous by delicating the power for opinion to file appeal by cluster of Commissioners. The said provision has been made for the reason that opinion of single officer may not be enough for the Department to decide as it is said that two opinions are better than one. Also there is reason to bring the amendment to reduce number of filing of appeals on justifiable grounds instead of filing frivolous appeals. So the amendment brought in sub-section (2) of section 35B of the Act cannot be said an empty formality. Since the litigations have been multiplied on various quarters, the noble idea of bringing such amendment in sub-section (2) of section 35B of the Act cannot be made to be fraustrated by arraying the same as directory provision. When the group of Commissioners apply their mind to the order in appeal passed under section 35A of the Act, there may be difference of opinions and accordingly the grounds for appeal will be examined on the proper question of fact and

law.

16. It is reported in the decision of Privy Council in *Montreal Street Railway Co.* (*supra*) where Their Lordships have observed :—

> ".....The question whether provisions in a statute are directory or imperative has very frequently arisen in this country., but it has been said that no general rule can be laid down, and that in every case the object of the statute must be looked at. The cases on the subject will be found collected in *Maxwell on Statutes*, 5th Edn., p. 596 and the following pages. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done."

17. The aforesaid observation has also been followed by the Hon'ble Supreme Court in *L. Hazari Mal Kuthiala* (*supra*). In *Bhavnagar University* (*supra*). Their Lordships have observed :—

> "23.It is the basic principle of construction of statute that the same should be read as a whole, then chapter by chapter, section by section and words by words. Recourse to construction or interpretation of statute is necessary when there is ambiguity, obscurity, or inconsistency therein and not otherwise. An effort must be made to give effect to all parts of the statute and unless absolutely necessary, no part thereof shall be rendered surplusage or redundant."

18. With due respect to the above decisions, it is made clear that when the statute has entrusted the performances of public duty upon the public officer having great importance and the dereliction of such purpose will cause serious inconvenience to the general public and State exchequer. Such statutory provision cannot be said to be mere directory but it is mandatory. Moreover, for interpretation or the construction of statute, it should be read as whole to find out the purposive interpretation as observed by the Hon'ble Supreme Court.

19. The word "may", appearing in sub-section (2) of section 35B of the Act should not be misconceived as submitted by learned counsel for the appellant. The proviso to sub-section (2) of section 35B of the Act also postulates that in the case of difference of opinion between the Commissioner of Central Excise, they will make reference to the Chief Commissioner of Central Excise who after considering the facts, if found that the order of the Commissioner of Central Excise (Appeals) is not legal and proper, direct the Central Excise Officer to appeal before the Tribunal of such order. On the other hand, the Central Excise Officer will be always authorized either on concurrent view of Committee of Commissioners of Central Excise or difference of opinion is given to file appeal, but the fact remains, authorization is a must under sub-section (2) of Section 35B of the Act to prefer appeal. It is needless to say that application of judicial mind to the facts and law of the case by the concerned Committee of Commissioners of Central Excise is a condition precedent for filing appeal. Any non-application of mind

in rendering opinion to file appeal may cause serious impact on the public exchequer or on the economic growth of the country. Since the authorization would be to one of the Central Excise Officers, the word "may" as appearing in sub-section (2) of Section 35B of the Act cannot be said to be discretionary or directory but it is a mandatory provision and should be read as "shall". We do not find force with the submission of learned counsel for the appellant-Department to the effect that such word "may" is a directory one and as such the contention is jettissioned. Since it is a fiscal statute, it requires strict interpretation, no word can be construed otherwise and purposive interpretation is the call of the day.

Conclusion

20. Now adverting to the facts of the case and points of law as discussed by us, we are of the view that the authorisation made in Annexure-3 of the affidavit filed by the appellant to prefer appeal without same being filed along with appeal is surely an incurable defect and the same cannot be rectified by filing an authorization later on in the appeal Nos. 250 & 251 of 2007 as stated by the learned counsel for the appellant. Similarly as the authorization by the Committee of Commissioners of Central Excise is not found in the impugned order, it must be observed that the impugned order passed by the CESTAT is correct, legal and proper. Hence we are of the considered view that the impugned order passed by the learned CESTAT being valid, legal and proper, cannot be interfered with.

Accordingly the OTAPL is dismissed being devoid of merit.