

**\* THE HON'BLE SRI JUSTICE L.NARASIMHA REDDY**

**AND**

**THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM**

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**+ C.E.R.C.No.8 of 2003**

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%Date: 14.10.2014

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#The Commissioner of Customs and Central Excise, Guntur.  
...appellant.

and

\$ M/s. Balaji Steel Corporation Limited, Nellore.

...Respondent

! Counsel for appellant: Sri Gopala Krishna Gokhale

^ Counsel for Respondent : None

< GIST:

> HEAD NOTE:

? Cases referred

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**ORDER:** (Per the Hon'ble Sri Justice L.Narasimha Reddy)

This reference case under Section 35(H)(1) of the Central Excise Act, 1944 (for short 'the Act') is filed by the Commissioner of Customs and Central Excise, Guntur, with a prayer to call for the records pertaining to Appeal No.E/176/98 under order No.1042/2002, dated 06.08.2002, passed by the Customs, Excise and Gold (Control) Appellate Tribunal, Bangalore (CEGAT) and to quash the same.

Briefly stated the facts are as under:

The respondent is a manufacturer of iron and non-alloy steel and the product is subject to payment of excise duty. The Commissioner of Central Excise caused audit of the records of the respondent in the year 1994. It was observed that the records disclosed that 26968.312 Metric Tonnes (MTs) of re-rolled products have been cleared on payment of excise duty for the year 1993-94, whereas the balance sheet for the corresponding period has revealed the transaction in relation to 29049.747 MTs. of re-rolled steel. On that basis, a show cause notice, dated 10.10.1994, was issued. The respondent filed a reply, on 15.12.1994. It was stated that the difference of the material i.e. 2283.435 MTs. was purchased from outside, and was traded, and in that view of the matter, it cannot be treated as a product manufactured by them. The explanation was found satisfactory and the Commissioner passed an order, dated 23.03.1995, dropping the proceedings.

The Committee of Board of Customs and Central Excise (for short 'the Board') verified the order, dated 23.03.1995, in exercise of

power under Section 35E of the Act. After verification of the record, it passed an order requiring the Commissioner to prefer an appeal against the order, dated 23.03.1995. Accordingly, an appeal was preferred before the CEGAT. After hearing both the parties, it dismissed the appeal through order, dated 09.08.2002.

Sri Gopala Krishna Gokhaley, learned Standing Counsel for the Central Excise, submits that the Board has examined the records in detail and found that the explanation offered by the respondent in respect of the differential quantity of the steel, was not acceptable, but the CEGAT has simply brushed aside the observation. He contends that the Tribunal ought to have required the respondent to justify the inclusion of 29049.747 MTs., in the balance sheet, and since no such justification was forthcoming, the tax ought to have been levied as proposed in the show cause notice issued by the Commissioner.

None appears for the respondent.

The power conferred upon the Board under Section 35H of the Act is somewhat typical. Normally, the taxing statutes do not provide for any appeal by the Department, against the order passed by the original or assessing authority. It is only the prerogative of the assessee to prefer an appeal against the order of assessment. Thereafter, if the Department suffers any order to its detriment in appeal, it can certainly carry the matter in further appeal to the CEGAT, or such authority as may be prescribed.

The second aspect is that wherever a departmental authority is conferred with the power to reopen, or review the proceedings, under the Act to satisfy itself, it has either to confirm or modify or set aside the orders, under its consideration. Under Section 35E of the Act, the order passed in the first instance has to satisfy itself about

the correctness thereof. However, if it finds that the order under its consideration is not correct, the only course left open to it, is to require an authority under the Act to prefer an appeal before the Board against such an order. Beyond that, it cannot express any view on merits.

In the instant case, the original authority did issue a show cause notice to the respondent, and on consideration of the explanation submitted by the latter, passed an order, dated 23.03.1995, dropping the proceedings. It was almost a case of arithmetics and an ordinary verification. The exercise did not involve in any process of interpretation and application of provision of law.

After the appeal was preferred, the respondent placed before the CEGAT the relevant material. The Chartered Accountant certified that while the quantity of 26968.312 MTs. is the one representing the product manufactured in the factory of the respondent, the differential quantity is the one that was just traded. This is not a case where the traded quantity was also included in the register pertaining to the manufacture. On the other hand, it was just reflected in the balance sheet, obviously for the purpose of income tax or other commercial purposes. That does not by itself give rise to an inference that the quantity that was stated by the respondent was also manufactured by it.

Across the Bar, it is argued that the respondent was not supposed to trade in the same product, which it is manufacturing. If such an activity is contrary to any provision of law, necessary steps as provided for under the relevant law, need to be taken. It was not even the case of the Department that the differential quantity was physically found in the premises of the factory of the respondent. In the memorandum of grounds, the following questions are framed:

- (i) “Whether the Tribunal was correct in merely dismissing the appeal without having taken the Board’s Review order into consideration.
- (ii) Whether the Tribunal was correct in giving Final Order having taken only the adjudication order passed by the Commissioner of Central Excise, Guntur, into consideration.”

Even on close verification of those grounds, hardly there exists any element of law in them. The entire case is depending on the facts, and we do not find any basis to answer those questions.

The reference is accordingly rejected.

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**L.NARASIMHA REDDY, J.**

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**CHALLA KODANDA RAM, J.**

Date:14.10.2014  
L.R. copy to be marked.  
GJ