

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.07.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE D.KRISHNA KUMAR

C.M.A.No.1160 of 2016
C.M.P.No.8765 of 2016

M/s.Servo Packaging Ltd.,
Unit I & II,
No.88/1, Cuddalore-Pondy Main Road,
Kattukuppam, Kirumampakkam,
Pondicherry 607 402. ... Appellant

versus

1. The Customs Excise and Service Tax
Appellate Tribunal,
No.26, Sashtri Bhavan Annex Building,
Haddows Road, Chennai 600 006.
2. The Commissioner of Central Excise,
Pondicherry. ... Respondent

Prayer: Civil Miscellaneous Appeals is filed under Section 35G of Central Excise Act, 1944, against the Final Order No.40315 of 2016 in Appeal No.E/42574/2013-SM, dated 04.02.2016.

For Appellant : Mr.K.Jayachandran
For 2nd Respondent : Mr.A.P.Srinivas,
Senior Standing Counsel
R1 : Tribunal

JUDGMENT

(Judgement of this Court was made by S.MANIKUMAR, J.)

Civil Miscellaneous Appeal is directed against the order of the Customs Excise and Service Tax Appellate Tribunal, Chennai, dated 04.02.2016, in Final Order No.40315 of 2016 in Appeal No.E/42574/2013-SM, of the assessee, by which, the Tribunal has

remanded the matter to the Adjudicating Authority, with certain observations and directions.

2. Facts deduced from the material on record are that on 15.07.2008, inspection of Unit No.1 of the appellant, was conducted by the Head Quarters preventive Unit, Puducherry Commissionerate. The officers recovered 36 numbers of loose slips and a note book containing the details of raw materials dispatched. Statements were obtained from the Vice President of the Company, Assistant Security Officer and also from the transporters. However, the said statements were retracted. Based on the inspection, a show cause notice, dated 02.09.2010, was issued to Unit I of the appellant, proposing to demand a sum of Rs.12,60,211/-, towards CENVAT Credit, on the allegation that in Unit I of the appellant has cleared credit availed raw materials, without proper invoices and attributed shortage of the stock, as recorded by the Inspecting Officer, to such removal.

3. Inspection was also done, in Unit II of the appellant on 16.07.2008 and shortage of raw materials was found. On 24.07.2008, statements were recorded from the Vice President of the appellant-Company. The appellant-Company sent a letter, dated 28.07.2008, to the department to return the records and documents, so as to enable them, to reconcile the shortage. For Unit II, a show cause notice, dated 23.06.2011, was issued, proposing to demand a sum of Rs.1,61,490/-, towards CENVAT Credit, on the allegation of shortage of stock.

4. In both the show cause notices, the department alleged that there was shortage of raw-materials and CENVAT credit was not reversed. Clandestine removal of raw materials was also alleged. The appellant filed their reply, dated 27.06.2011, denying the allegations. According to the appellant, stock was not properly taken. Half filled bags were not taken. There was no power supply from the night of 14.07.2008 and therefore, there was no production. The fact of power cut to the entire area was confirmed by the local Electricity Board officials, on the request made by the Inspecting Officials and that the said fact was also recorded in the Mahazar, dated 16.07.2008. In their reply, the appellant has also sought for cross-examination of the Officials, who carried out the stock verification in the Units I and II. The appellant has prayed for dropping the proceedings, on the basis of the evidence of retraction of the statements given by the persons, from whom, statements were recorded and for other reasons, stated in the reply.

5. The appellant has further submitted that the Additional Commissioner of Central Excise, Puducherry/adjudicating

authority, has passed an Order-in-Original No.48 of 2011, dated 29.09.2011, by which, he has categorically held that 36 loose slips, alone cannot be sufficient to prove clandestine removal of raw materials and therefore, restricted the demand only to the shortage noticed by the officers. Consequently, the adjudicating authority has passed an order to demand a sum of Rs.7,60,135/- from Unit I of the appellant and a further sum of Rs.1,61,490/- from Unit II. He has also imposed penalty and interest. Under protest, the appellant has paid the abovesaid amount.

6. Being aggrieved by the Order-in-Original No.48/2011, dated 29.09.2011, passed by the Additional Commissioner of Central Excise, Puducherry, the appellant has preferred an appeal in Appeal No.23/2013 (P), to the Commissioner of Central Excise (Appeals) and by order, dated 03.12.2013, the first appellate authority, while confirming the order of the adjudicating authority, has remanded the matter to the adjudicating authority, to reconsider dropping of demand, on the basis of the 36 slips and penalty imposed on the Directors.

7. Being aggrieved by the order of the appellate authority, the appellant has preferred a further appeal to the Customs Excise and Service Tax Appellate Tribunal, Chennai, contending inter alia that when the department did not make any appeal against the Order-in-Original No.48/2011, dated 29.09.2011, on the finding recorded, in favour of the appellant, on the alleged clandestine removal of raw materials and restricted the demand only to the shortage of raw materials, the first appellate authority had acted beyond the scope of the appeal and that therefore, the order of the appellate authority, required reversal. It is the case of the appellant that without appreciating the facts, the Tribunal, in Final Order No.40315 of 2016, dated 04.02.2016, remitted the matter, with further directions. As against the said order, the instant Civil Miscellaneous Appeal has been filed, on the following substantial questions of law,

“(1) Whether the Tribunal and the first 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 appellate authority?

(2) Whether the Tribunal can enlarge the scope of remand order, made by the first appellate authority which itself was not subject matter of appeal before him and contrary to Section 35A of the Central Excise Act, 1944?

(3) 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 a matter since, the provision Section 35A of the Act uses the words, "confirming or modifying or annulling the decision or order" and there is no mention about "remand"?

(4) Whether the Tribunal is justified in the facts, circumstances, evidences on record and the CBEC's own action of dropping proceedings, can remand the matter to check the position with regard to power-cut on the stock-verification dates (15.07.2008 and 16.07.2008) when this fact [recorded in the Mahazar drawn by the officers] is already on record?

(5) Whether the Tribunal is justified in giving step by step directions to adjudicating authority, to carry out the adjudication of all matters all over again, contrary to the recorded facts, which included matters which reached finality and which did not form the subject matter of appeal before the first respondent appellate authority?"

8. Mr.K.Jayachandran, learned counsel for the appellant submitted that the entire proceedings against the appellant were made on the basis of stock verification on 15.07.2008 and 16.07.2008, in Units I and II, respectively; the stock was not properly verified, and the re-reconciliation statement filed by the appellant was not at all considered. He further submitted that the first appellate authority and Tribunal, have acted beyond the scope of the appeal and exceeded in their jurisdiction, especially, when there was no appeal by the department, against the Order-in-Original No.48/2011, dated 29.09.2011.

9. Mr.K.Jayachandran, learned counsel for the appellant further submitted that the appellant cannot be put in a worse position, on their appeal, in the absence of any appeal or cross objection by the department. He further submitted that when the appellant has approached the appellate authority to redress his grievance, on the aspect of shortage of raw materials only, and not on the alleged clandestine removal of raw materials, which allegation has been found, as not substantiated, by the original authority, neither the first appellate nor the Tribunal has any jurisdiction or power to enhance the scope of assessment, adverse to the interest of the appellant, in the absence of any appeal or cross-objections, by the department, on the specific finding on the alleged clandestine removal.

10. He further submitted that when the adjudicating

authority himself had given a categorical finding that 36 slips relied on, in the notice alone, cannot vouch, for the alleged clandestine removal, neither the first appellate authority nor the Tribunal, has jurisdiction to test the correctness of the said finding, recorded on proper appreciation of fact, evidence and submissions of the appellant and if the department had any grievance against any finding, it ought to have reviewed the said order and filed an appeal, before the first appellate authority.

11. According to Mr. K. Jayachandran, learned counsel for the appellant, the Tribunal has failed to appreciate that consequent to the amendment to Section 35A of the Central Excise Act, the first appellate authority has no jurisdiction and authority to remand any matter and therefore, the Tribunal ought to have appreciated the said submission and consequently, ought to have held that the order of the first appellate authority, remanding the matter, on the aspect of alleged clandestine removal, was not called upon, by the department, and hence, without authority of law.

12. With reference to the above submission, learned counsel for the appellant also invited the attention of this Court to the relevant paragraphs, in the orders of the adjudicating/appellate authority, and that of the Tribunal. He further submitted that he has no objection for the remand, insofar as mere shortage of raw-materials is concerned, on stock verification, but, reiterated that neither the first appellate authority nor the Tribunal, has any jurisdiction to direct the original authority to once again, adjudge the aspect of alleged clandestine removal of raw-materials, in the absence of any separate appeal by the department, against the finding of the original authority.

13. Per contra, to sustain the orders of both the appellate authority and Tribunal, Mr. A. P. Srinivas, learned Senior Standing Counsel appearing for the 2nd respondent submitted that shortage of raw-materials was only due to clandestine removal of goods and therefore, the said aspect, forms part of the subject matter of the remand and therefore, there is no illegality in the impugned order, warranting interference. He further added that unless the aspect of clandestine removal, which resulted in shortage of raw-materials, is adjudged on the materials, as directed by the appellate authority and Tribunal, adjudication would not be conclusive.

Heard the learned counsel for the parties and perused the materials available on record.

14. On the above rival contentions, this Court frames the following substantial question of law,

"(1) Whether the appellate authority has exceeded in its jurisdiction, in acting beyond the scope of the appeal, filed by the assessee and thus, erred in remanding the matter to the adjudicating authority, on the aspect of alleged clandestine removal of raw-materials, in the absence of the department filing any appeal, against the finding recorded against the revenue or cross-objections, in the appeal, filed by the assessee?

(2) Whether the Tribunal has failed to advert to the erroneous exercise of jurisdiction by the appellate authority?"

15. Let us consider, as to how, the adjudicating authority has dealt with, on the aspect of allegation of clandestine removal of raw materials. After advertent to the oral and documentary evidence, the Additional Commissioner of Central Excise, Puducherry/adjudicating authority, vide order, dated 29.09.2011, made in Order-in-Original No.48 of 2011, dated 29.09.2011, at Paragraphs 46 and 47, has observed, as hereunder:

"46. It was stated that during the cross examination, the officer admitted to the follows:-

(1) That even though the indication of the vehicle number, name of consignee, quantity and material grade in the loose slips made the officers believe that the 36 loose slips could be documents used for clearance of materials from the factory, they admitted that not all the loose slips contained the vehicle number; (only 4 loose slips had vehicle numbers and the rest did not have);

(2) That neither the address of the consignee nor the value of the consignment was available in the loose slips;

(3) That even though the loose slips suggested the name of the consignees, one of which was Sandip Industries, follow-up action and stock verification carried out by officers at Sandip Industries, but no discrepancies were noticed.

47. It was stated that the above admissions clearly revealed the following:-

(a) That the 36 loose slips, in the background of the facts that there was no shortage or excess of raw materials ascertained on 15/16.07.2008, that the stocks of raw materials kept in loose-condition, ie., in half-filled bags and in hopper were not considered in stock verifications, could not have lead to presumption that these documents were for clearance of materials at all and more so, when the investigation,

particularly at Sandip Industries, revealed no adverse corroboration.

(b) That no documentation whatsoever was done for stock verification at Sandip Industries and no mention whatsoever made in the show cause notices in regard to such verification having been done at Sandip Industries, clearly indicate that the loose-slips made on Sandip Industries have no evidentiary value in the face of the admission that there were no discrepancies noticed at Sandip Industries.

(c) That no other investigation was undertaken by the officers later on with any of the "consignees" as per the loose slips, clearly confirm that there is absolutely no justification to draw conclusion to the effect that the said slips were used for clearance of cenvated inputs."

Ultimately, while recording the findings on the disputed facts, the adjudicating authority, at Paragraphs 14 to 18, held as follows:

"14. From the above findings, I find that there was no ambiguity in stock taking by the officers and the assesseees have not come out with any concrete evidence to prove that stock taking by the officers was not proper, i also find that the entire stock taking was done in the presence of the authorized signatory of the assesseees and the Mahazars were drawn in their presence. In view of the above, the shortage of 118329.8 kgs of raw material at Unit-I and 975.65 Kgs of raw materials' (granules), 25 Kgs. of Master Batch and 57600 Nos. of oven sacks and fabrics (all inputs) at Unit-II are proved beyond any doubt.

15. Regarding 36 loose slips seized from the security office room, I find that there is no clinching documentary evidences found during the course of investigation of the case to corroborate the clandestine removal of raw materials from SPL Unit-I to Unit II and to M/s. Sandeep Industries.

16. The statements obtained from the security personnel and drivers/ transporters do not have supporting documents like lorry receipts or consignment note to prove that the materials have been cleared to SPL-II or M/s. Sandip Industries.

17. Mere documentary evidence of 36 loose slips was not adequate enough to prove the clandestine removal of inputs.

The following case laws hold that to prove clandestine removal, more documentary evidences are required.

For sustaining an allegation of clandestine

removal evidence of unaccounted purchase of raw materials and evidence regarding the buyers of the. so called unaccounted goods is essential and necessary as held by The Hon'ble Tribunal in the case of Dalmia Vinyls (P) Ltd vs CCE reported in 2005 (192)ELT 606.

"It is well settled that the burden for proving the clandestine clearances is upon the Revenue and is required to be discharged by production of sufficient and affirmative evidence, which is lacking in the present case" as held by the Hon'ble Tribunal in the case of Utkal Galvanisers Ltd vs CCE reported in 2003 (158) ELT 42-T.

*Clandestine clearance and evasion of excise duty are serious offences. Such offence cannot be found without adequate evidence. We find that in a case of clandestine removal concrete and cogent evidence is essential" as held by the Hon'ble Tribunal in the case of Harika Resins Pvt Ltd versus CCE reported in -2010 (253)ELT 108-T.

The principles of judicial discipline require that the orders of the higher appellate authorities, should be followed unreservedly by the subordinate authorities as decreed by the Apex Court in UNION OF INDIA Versus KAMLAKSHI FINANCE CORPORATION LTD -reported in 1991(55) ELT 433(S.C).

18. Following the above decisions, I find that mere documentary evidence of 36 loose slips found in the security room is not enough to prove the clandestine removal of raw materials from Unit I to Unit II. Hence, the allegation of clandestine removal fails. Consequently, the demand is restricted to the shortage noticed by the officers.

18.1 It has been argued by the assesseees that the Board has dropped the proceedings initiated against them under Rule 12CC of the Central Excise Rules, 1944 on the basis of same set of records and hence this case also has to be dropped. I find that the assesseees contention in this regard is not sustainable because the decision taken by the Board is without prejudice to the action initiated under these Show Cause Notices and such action under the above Rule will, therefore, not vitiate the present proceedings."

Thus, on the aspect of alleged clandestine removal of raw materials, the adjudicating authority, vide order, dated 29.09.2011, has categorically held that the documents, stated supra, are not sufficient to prove clandestine removal of raw materials, from Unit I to Unit II of the appellant and therefore, the adjudicating authority has held that the allegation of clandestine removal fails.

16. When the appellant was aggrieved over the demand, on shortage of raw-materials and assailed the correctness of the Order-in-Original No.48 of 2011, dated 29.09.2011, on the grounds, stated in the memorandum of grounds of appeal, in Order-in-Appeal No.23 of 2013 (P), the appellate authority, vide order, dated 03.12.2013, while confirming the demand of duty of Rs.7,60,135/- on shortage of raw-materials, has passed further orders. Paragraphs 14 (iv) to (vi), in the appeal, which adversely affect the interest of the appellant, are extracted hereunder:

"(iv) The decision of dropping part of the demand without proper explanations to the physical shortage of goods lacks merit and hence, requires re-examination. The case is therefore required to be re-visited by the Department for the limited purpose of examining the aspect of the dropped portion of the demand and to arrive at a plausible explanation for the shortage of inputs as alleged in the show cause notice.

(v) The proposals of penalties made under Rule 26 of the Central Excise Rules, 2002, against the Directors of the Appellants have to be dealt with by the Department, while re-visiting the issue on the aspect of clandestine.

(vi) No doubt the Appellants shall be given a fair opportunity of being heard by the adjudicating authority before passing any Orders in terms of Points (iv) and (v) above."

17. Admittedly, the department has not filed any appeal against the Order-in-Original No.48 of 2011, dated 29.09.2011, 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.

18. Section 35-A of the Central Excise Act, 1944, sets out the procedure to be followed by the appellate authority. Sub-Section 3 of Section 35-A of the Act, states that,

"(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."

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 03.12.2013, 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 35-A of the Central Excise Act, 1944.

21. Now, let us consider, as to how, the Tribunal has considered the abovesaid aspect. At Paragraphs 7.1 to 7.3 of the Final Order No.40315 of 2016, dated 04.02.2016, impugned before us, the Tribunal has considered that there were three contributing factors for adjudication, and they are extracted hereunder:

"7.1. No doubt, there were three contributing factors to the adjudication. The first is the outcome of the inventory made in the course of search to both the premises on 15th and 16th July, 2008. There is a material on record to show that the appellant challenged inventory taken on that day, on the ground that was taken in darkness due to no power supply. There appears a communication dated 28.07.2008 of the appellant in that regard objecting to the act of search

party. That is on record. Therefore that deserves consideration. Causing enquiry with the Electricity Authority about power supply during that period, if the authority finds the plea of no power supply on the date of inventory is truthful and inventory was taken in dark, he shall examine whether the manner of inventory taken has suffered from any legal infirmity to redress grievance of the appellant on reconciliation of stock figure.

7.2. Secondly, the authority shall examine whether inventory data maintained in the computer is reliable and if so, that shall be reconciled with the physical inventory of stock figure. The discrepancy, if any, arising out of such reconciliation shall be explained by the appellant. On hearing the appellant on that count, the authority shall pass appropriate order."

22. From the order impugned before us, it is seen that when the assessee has questioned the very jurisdiction of the appellate authority and submitted that he had gone beyond the scope of the appeal, and issued directions, extracted supra, the Tribunal, without adverting to the said ground of challenge, has gone further and elaborated, as to how, the oral and documentary evidence, should be considered, in adjudicating the alleged clandestine removal of raw-materials. At Paragraphs 7.3 and 7.4, the Tribunal has ordered as hereunder:

"7.3. Thirdly, so far as the oral evidence and documentary evidences are concerned, those are certainly the evidence properly gathered in the course of search and can be utilised in the adjudication subject to opportunity of rebuttal. The notebook, which was discovered in the course of search if found to be relevant, the authority has power to make use of the contents thereof and considering defence plea shall adjudicate the matter.

7.4. The materials proposed to be utilised in readjudication proposed by this order, shall be confronted to the appellant for defence. The loose slips gathered in the cause of search should be examined and evidentiary value thereof evaluated for the purpose of use in the adjudication. Defence if any on that aspect shall also be considered by adjudicating Authority. The appellant is entitled to the confrontation of every material sought to be used against it during hearing and the defence led by the appellant shall be thoroughly examined to pass a reasoned and speaking order."

23. At Paragraph 8 of the impugned order, the Tribunal has directed that the outcome of the loose slips be examined in detail to arrive at the proper duty demand if any, to serve the interest of justice. The Tribunal has also directed the original authority to examine the contents of the notebook and to evaluate the evidence thereof, to arrive at the duty demand, if any. The Tribunal has further observed that, "It may so happen that all the materials and evidence may corroborate with each other. That aspect may be specifically dealt."

24. Even taking it for granted that the Commissioner of Appeals can exercise powers for passing a just and proper order, in exercise of powers, conferred on him, under the proviso, to sub-Section 3 of Section 35A of the Central Excise Act, 1944, yet the Section, mandates adherence to the principles of natural justice, by issuing a notice, to the assessee. Material on record does not disclose that the Commissioner of Central Excise (Appeals) has followed the mandate.

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 reformatio 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.

26. Had the assessee not filed an appeal, it 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 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.

27. As rightly contended by the learned counsel for the appellant, instead of addressing the issue, as to whether, the appellate authority had acted beyond the scope of the appeal, and exceeded in his jurisdiction, the Tribunal passed an order, impugned before us, elaborating, as to how, adjudication has to be done, with reference to the aspect of clandestine removal of raw materials, which in our considered opinion, is

jurisdictionally erroneous. On the facts and circumstances of the case, we hold that the directions issued by the appellate authority and that of the Tribunal, run contrary to the principle of "no reformatio in peius".

28. In the light of the discussion and decisions, we are of the view that the substantial questions of law, now framed by us, in exercise of powers under Section 35-G of the Central Excise Act, has to be answered, in favour of the assessee. We make it clear that while adjudicating the aspect of shortage of raw-materials, any observation or directions, issued by both the appellate authority and the Tribunal, on the aspect of clandestine removal, requires no adjudication by the original authority and that the adjudication ordered should be confined only to the directions contained in Paragraphs 7.1 and 7.2 of the order of the Tribunal. It is open to the adjudicating authority to deal with the physical inventory and computer record, for passing appropriate speaking orders, in accordance with law, after providing a reasonable opportunity to the appellant.

29. With the above directions, the Civil Miscellaneous Appeal is partly allowed, setting aside the directions, on the alleged clandestine removal of raw materials. No costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

skm

To

1. The Customs Excise and Service
Tax Appellate Tribunal, Chennai.
No.26, Sashtri Bhavan Annex Building,
Haddous Road, Chennai 6.

2. The Commissioner of Central Excise,
Pondicherry.

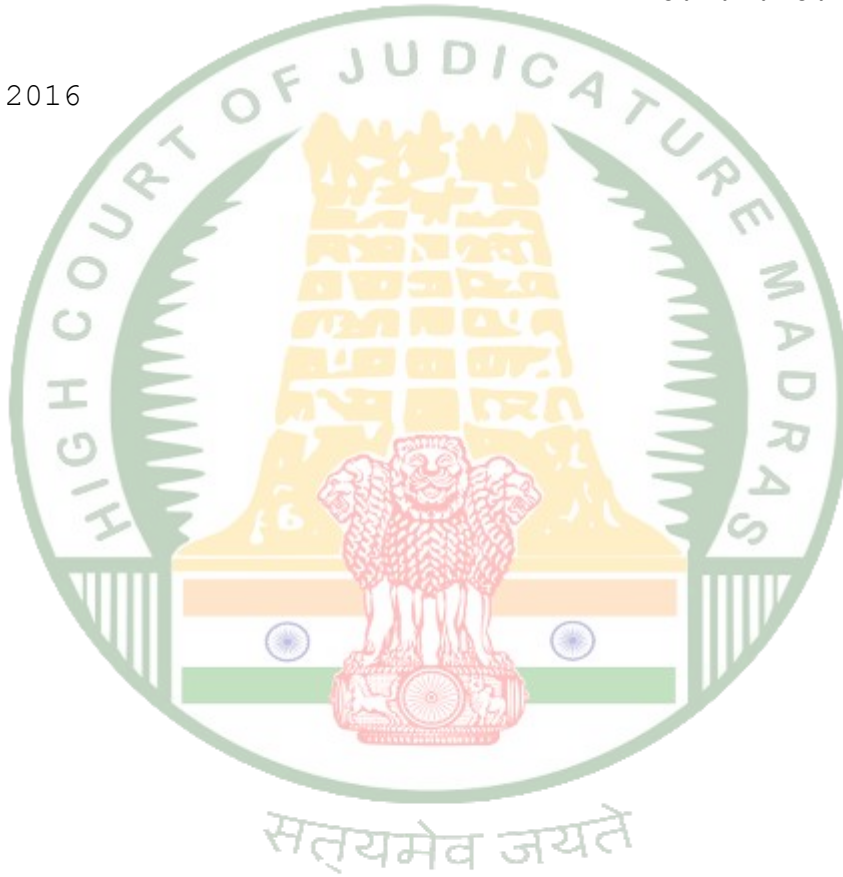
3. The Commissioner of Central Excise (Appeals),
26/1, Mahatma Gandhi Road,
Nungambakkam, Chennai 34.

Copy to:
The Section Officer,
VR Section, High Court, Madras.

2 ccs to Mr.A.P.Srinivas, Advocate, sr.40582, 39848
1 cc to Mr.K.Jayachandran, Advocate, 39825

C.M.A.No.1160 of 2016

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