

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.07.2017

CORAM:

THE HON'BLE MR.JUSTICE **T.S.SIVAGNANAM**

W.P.Nos. 4289, 4292 and 4301 of 2017 and
W.M.P.Nos.4487,4491 and 4498 of 2017

1.M/s.A.S.Babu Sah Designs,
Rep. by Partner Mr.A.B.Subramania Sah,
Old No. 83-84, New No.36,
Sheikpet Nadu Street,
Kancheepuram - 631 501.

... Petitioner in
W.P.4289 of 2017

2. M/s. Sovereign Finance Corporation,
Rep by Managing Partner K.T.Prakash Sah
Silk & Sarees Building,
Old.NO.87, New.No.135, Gandhi Road,
Kancheepuram-631 501.

... Petitioner in
W.P.4292 of 2017

3. M/s.Babu Silks & Sarees
Rep by Partner A.B.Subramania Sah,
Old No.83B, New No.36,
Sheikpet Nadu Street,
Kancheepuram- 631 501.

... Petitioner in
W.P.4301 of 2017

Vs.

1.Commissioner of Central Excise (Appeals-1),
Office of the Commissioner of Central Excise,
26/1, Mahatma Gandhi Marg,
Nungambakkam, Chennai-600 034.

2. Joint Commissioner of Central Excise,
Office of the Commissioner of Central Excise,
Chennai III Commissionerate,
26/1, Mahatma Gandhi Marg, Nungambakkam,
Chennai 600 034.

3. Additional Commissioner of Central Excise,
Office of the Commissioner of Central Excise,
Chennai III Commissionerate,
26/1, Mahatma Gandhi Marg,
Nungambakkam, Chennai 600 034.

4. Commissioner of Service Tax
Office of the Commissioner of Service Tax,
Newry Towers, No.2054-I II Avenue,
12th Main Road, Anna Nagar,
Chennai 600 004.

...Respondents in all the WPs

Prayer: Writ petitions filed under Article 226 of the Constitution of India, praying for issuance of a Writ of Certiorari, calling for the records on the file the 1st respondent in proceedings Order in Appeal No.37/2016 (CXA-1) dated 18.02.2016, Appeal No.20/2016 (CXA-1) dated 29.01.2016, Appeal No.56/ 2016 (CXA-1) dated 07.03.2016 respectively and quash the same.

For Petitioners : Mr. Joseph Prabakar

For Respondents : Mrs. R. Hemalatha
Senior Standing Counsel

COMMON ORDER

With the consent on either side, the Writ Petitions themselves are taken up for final disposal.

2. The order impugned in all the three writ petitions are orders in appeal passed by the Commissioner of Central Excise (Appeals) under Section 85 of the Finance Act 1994. The Commissioner (Appeals) has confirmed the demand of tax, interest and penalty as made by the second respondent, viz., the Joint Commissioner of Central Excise and remanded the matter to the second respondent for the limited purpose of examining the threshold limit and grant appropriate relief and directing the petitioner to pay duty and penalty on the revised amount of total tax payable for the relevant assessment year, after re-quantifying the amount for the said year.

3. Admittedly, the petitioner has an effective alternative remedy of appeal before the Customs Excise and Service Tax Appellate Tribunal (for short "CESTAT") as prescribed in the Finance Act, 1994. This remedy is sought to be bypassed by the petitioner by contending that the first respondent has no power to remand the matter to the adjudicating authority, in the light of the amendment to Section 35-A

of the Central Excise Act, which was amended by Finance Act 2001 dated 11.05.2001. Therefore, it is submitted that the petitioner would be put to great prejudice, if he has to go before the second respondent-Assessing officer, for a portion of the assessment and agitate the remaining portion of the assessment before the Tribunal.

4. The learned counsel for the petitioner further contended that on facts, the entire tax has been paid, as the amount has been credited through his account after the order passed by the High Court of Kerala in W.P.(C) No.8924 of 2008 filed by M/s.Joy Alukkas Traders India Pvt Ltd.

5. This Court at the very inception of the hearing made it clear that the merits of the case cannot be gone into in a writ petition under Article 226 of the Constitution of India, and if the petitioner seeks to canvass the merits of the matter, the petitioner has to necessarily approach the Tribunal/CESTAT. Thus, the Court has taken up for consideration only one issue, viz., whether the impugned order is bad on the ground that the first respondent has remanded a portion of assessment to the second respondent for re-consideration and whether such order suffers from the vice of lack of jurisdiction.

6. The learned counsel for the petitioner submitted that Section 85 of the Finance Act 1994 deals with appeals to the Commissioner of Central Excise (Appeals) and Sub-sections (4) and (5) of Section 85 would be very relevant to the facts and circumstances of the case. By referring to Sub-section (4) of Section 85, it is submitted that the Commissioner of Central Excise (Appeals) shall hear and determine the appeal and, subject to the provisions of Chapter V of the Finance Act, pass orders as he thinks fit and such order would include an order enhancing the Service tax, interest or penalty.

7. Further, by referring to Sub-section (5) of Section 85 of the Finance Act, it is submitted that the Commissioner of Central Excise (Appeals) shall exercise the same powers and follow the same procedure as he exercises and follows in hearing the appeals and making orders under the Central Excise Act, 1944. Therefore, the procedure to be followed by the Commissioner while hearing the appeals is in terms of the Section 35 (A) of the Central Excise Act, as it stood at the relevant time.

8. The learned counsel for the petitioner, first has drawn the

attention of this Court to Section 35 (A) of the Central Excise Act, as it

stood prior to 11.05.2001 and pointed out that Sub-section (3) to Section 35-A of the Central Excise Act, provided for a power to remand the matter to the adjudicating authority and this power has been specifically deleted when Sub-section (3) was substituted by Finance Act 2001. To buttress the submissions, the learned counsel placed reliance on the decision of the Hon'ble Supreme Court in **MIL India Limited v. Commissioner of C.Ex., Noida [2007 (210) ELT.188 (SC)]**.

9. Further, the learned counsel for the petitioner referred to the circular issued by the CBEC dated 25.07.2008, i.e., after the decision in **MIL India Limited** (supra), and submitted that the circular specifically refers to Section 85 of the Finance Act, in more than one place and therefore, the Board having directed the authorities to take note of the decision of the Hon'ble Supreme Court, the first respondent could not have remanded the matter to the second respondent - Assessing officer. Reliance was also placed on the circular dated 18.02.2010, which reiterates the circular dated 25.07.2008.

10. The learned Counsel further submitted that the concept of the under lying principle, as canvassed by the petitioner is well demonstrated if the Court peruses Section 86 (7) of the Finance Act,

which states that subject to the provisions of Chapter V of the Finance Act, in hearing the appeals and making orders under Section 86, the Appellate Tribunal shall exercise the same powers and follow the same procedure as it exercises and follows in hearing the appeals and making orders under the Central Excise Act. Thus, on a combined reading of Section 86 (7) of the Finance Act with Section 35 (C) (i) of the Central Excise Act, it is abundantly clear, that the Central Excise Act having not provided for the power of remand to the Commissioner, the impugned orders are liable to be set aside.

11. Mrs.R.Hemalatha, learned Senior Standing Counsel for the respondents, submitted that the Hon'ble Supreme Court in the case of ***Union of India Vs. Umesh Dhaimode, 1998 volume (98) ELT 584 (SC)***, considered the effect of Section 128 (2) of the Customs Act, and held that the said provisions vested the Appellate Authority with powers to pass such orders as it deemed fit confirming, modifying or annulling the decision appealed against and an order of remand necessarily annuls the decision, which is under appeal before the Appellate authority and the Appellate authority is also vested with power to pass such order as it deems fit and when both these provisions are read together, it necessarily implies that the Appellate authority has the power to set aside the decision which is under appeal

before it and to remand the matter to the authority below for fresh decision.

12. The learned Senior Standing Counsel also referred to Black's Law Dictionary for the meaning of the word "Annul" and submitted that the order remanding the matter to the original authority would fall within the power of annulling the order of the original authority.

13. The learned Senior Standing Counsel also placed reliance on the decision of the Gujarat High Court in the case ***Commissioner of Central Excise, Ahmedabad-I Vs. Medico Labs, 2004 (173) ELT.117 (GUJ.)***

14. In reply, the learned counsel for the petitioner would contend that the decision rendered in ***Medico Labs*** (supra), was much prior to the decision of the Hon'ble Supreme Court in ***MIL India***, (Supra) and much prior to the amendment to the Central Excise Act, which was brought about by Finance Act 2001, dated 11.05.2001.

15. Heard Mr. Joseph Prabhakar, learned counsel for the petitioners and Mrs. R. Hemalatha, learned senior standing counsel for the respondents, and perused the materials placed on record.

16. Before I examine the contentions raised by both the learned counsel, it would be necessary to refer the following provisions of the Finance Act, namely, Sections 85 and 86, which reads as follows:

85. Appeals to the Commissioner of Central Excise (Appeals):

1[(1) Any person aggrieved by any decision or order passed by an adjudicating authority subordinate to the Commissioner of Central Excise may appeal to the Commissioner of Central Excise (Appeals).]

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

(3) An appeal shall be presented within three months from the date of receipt of the decision or order of the such adjudicating authority, relating to service tax, interest or penalty under this Chapter, made before the date on which the Finance Bill, 2012 receives the assent of the President:

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

(3A) An appeal shall be presented within two months from the date of receipt of the decision or order of such adjudicating authority, made on and after the Finance Bill, 2012 receives the assent of the President, relating to service tax, interest or penalty under this Chapter:

Provided that the Commissioner of Central Excise (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal

within the aforesaid period of two months, allow it to be presented within a further period of one month.

(4) The Commissioner of Central Excise (Appeals) shall hear and determine the appeal and, subject to the provisions of this Chapter, pass such orders as he thinks fit and such orders may include an order enhancing the service tax, interest or penalty:

Provided that an order enhancing the service tax, interest or penalty shall not be made unless the person affected thereby has been given a reasonable opportunity of showing cause against such enhancement.

(5) Subject to the provisions of this Chapter, in hearing the appeals and making order under this section, the Commissioner of Central Excise (Appeals) shall exercise the same powers and follow the same procedure as he exercises and follows in hearing the appeals and making orders under the Central Excise Act, 1944 (1 of 1944).

86. Appeals to Appellate Tribunal.

(1) [Save as otherwise provided herein, an assessee] aggrieved by an order passed by a Commissioner of Central Excise under [section 73 or section 83A or] [****], or an order passed by a Commissioner of Central Excise (Appeals) under section 85, may appeal to the Appellate Tribunal against such order [within three months of the date of receipt of the order].

[Provided] that where an order, relating to a service which is exported, has been passed under section 85 and the matter relates to grant of rebate of service tax on input services, or rebate of duty paid on inputs, used in providing such service, such order shall be dealt with in accordance with the provisions of section 35EE of the Central Excise Act, 1944.

....."

17. The relevant provisions of the Central Excise Act are Sections 35-A and Section 35-C, which reads thus:

35-A. 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.

(4-A) 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.

(5) 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 Commissioner of Central Excise .

35 C. Orders of Appellate Tribunal. — (1) The Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against or may refer the case back to the authority which passed such decision or order with such directions as the Appellate Tribunal may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary.

(1-A) The Appellate Tribunal 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 a party during hearing of the appeal.

(2) The Appellate Tribunal may, at any time within [six months from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under subsection (1) and shall make such amendments if the mistake is brought to its notice by the [Commissioner of Central Excise or the other party to the appeal:

Provided that an amendment which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the other party, shall not be made under this subsection, unless the Appellate Tribunal has given

notice to him of its intention to do so and has allowed him a reasonable opportunity of being heard.

(2A) The Appellate Tribunal shall, where it is possible to do so, hear and decide every appeal within a period of three years from the date on which such appeal is filed:

Provided that where an order of stay is made in any proceedings relating to an appeal filed under sub-section (1) of section 35B, the Appellate Tribunal shall dispose of the appeal within a period of one hundred and eighty days from the date of such order:

Provided further that if such appeal is not disposed of within the period specified in the first proviso, the stay order shall, on the expiry of that period, stand vacated.

(3) The Appellate Tribunal shall send a copy of every order passed under this section to the Commissioner of Central Excise and the other party to the appeal.

(4) Save as provided in section 35G or (4) section 35L, orders passed by the Appellate Tribunal on appeal shall be final.

18. The argument of the learned counsel for the petitioner is that prior to 2001, Section 35-A(3) specifically provided that the Commissioner (Appeals) may pass such order as he thinks fit confirming, modifying or annulling the decision or order appealed against, or may refer the case back to the adjudicating authority for such directions for a fresh adjudication or decision and those power was taken away when Section 35-A(3) was substituted by Finance Act, dated 11.05.2001 and since Sub-section (5) of 85 of the Finance Act directs the Commissioner of Central Excise (Appeals) to follow the

procedures under the Central Excise Act and on the date when the impugned order was passed, the Central Excise Act did not confer the power to remand the matter to the adjudicating authority and therefore, the impugned orders are bad in law.

19. By referring to the decision of the Hon'ble Supreme Court in **MIL India Limited** (supra), it is submitted that the Hon'ble Supreme Court noted that this power of remand by the Commissioner (Appeals) has been taken away by amending Section 35-A and therefore, there is no power for the first respondent to remand the matter to the second respondent.

20. Though at the first blush, the arguments advanced by the learned counsel for the petitioner appears to be impressive, but, on a closer observation, it proves otherwise. In my considered view, Sub-section (5) does not specifically state the provisions of Section 35-A of the Central Excise Act, has to be read into the provisions of the Finance Act. In fact, Section 83 of the Finance Act, enumerates the Sections, under the Central Excise Act 1944, which would apply to the matters relating to the Service Tax and it does not include Section 35-A of the Central Excise Act. This is a clear indication that the said provision cannot be superimposed into Section 85 of the Finance Act.

21. Assuming for the sake of argument that the contentions advanced by the learned counsel for the petitioner is sustainable, Sub-section (5) of Section 85 only speaks about the procedure to be followed while hearing the appeal and making orders and the procedures to be followed under the Central excise Act. Thus, Sub-section (3) of Section 35-A of the Central Excise Act cannot be superimposed into Sub-section (5) of Section 85 of the Finance Act. What is crucial to note is that Sub-section (4) of Section 85 provides the manner in which the Commissioner (Appeals) shall hear and determine an appeal and it only states that he can pass orders as he thinks deem fit. This provision is in paramateria to section 128 (2) of the Customs Act, which was considered by the Hon'ble Supreme Court in ***Union of India Vs. Umesh Dhaimode*** (Supra) and it was held that the said provisions would include the power to remand. Therefore, the argument advanced by the learned counsel for the petitioner by reading into Sub-section (5) of Section 85, the provisions of Section 35- A(3) is an incorrect interpretation.

22. Further, in the case of **Medico Labs**, the Division Bench of the Gujarat High Court, while considering the said provision has pointed out that the power to annul a decision, necessarily, includes remand

and even after the amendment to Section 85-A of the Central Excise Act, the appellate Authority has power to set aside the decision. Though, this decision was rendered prior to the decision of the Hon'ble Supreme Court in **MIL India Limited**, in the preceding paragraph, I have assigned reasons as to why the contention advanced by the petitioner would not be applicable to the case arising under Section 85 of the Finance Act.

23. In view of the above reasons, I have no hesitation to hold that the first respondent while exercising powers under Section 85 (4) of the Finance Act has powers to pass orders as he thinks fit and such orders will also include an order of remand and amendment to Section 35-A (3) with effect from 11.05.2001 does not in any manner impact the power of the Commissioner of Central Excise (Appeals) while dealing with an order passed under the Finance Act. Hence, the contention raised by the petitioners has to necessarily fail and the same stands rejected. As pointed out earlier, with regard to the merits of the assessment, the petitioner has to prefer an appeal to the Tribunal.

24. In the result, the writ petitions are dismissed, however, it is left open to the petitioners to file an appeal before the Tribunal as against the impugned orders raising all contentions. The CESTAT/

Tribunal while computing limitation, shall exclude the period during which the writ petitions were pending before this Court from 20.02.2017 till the date of receipt of a certified copy of this Order. No costs. Consequently, connected miscellaneous petitions are closed.

25.07.2017

Speaking/Non-speaking order

Index: Yes/No

Internet: Yes

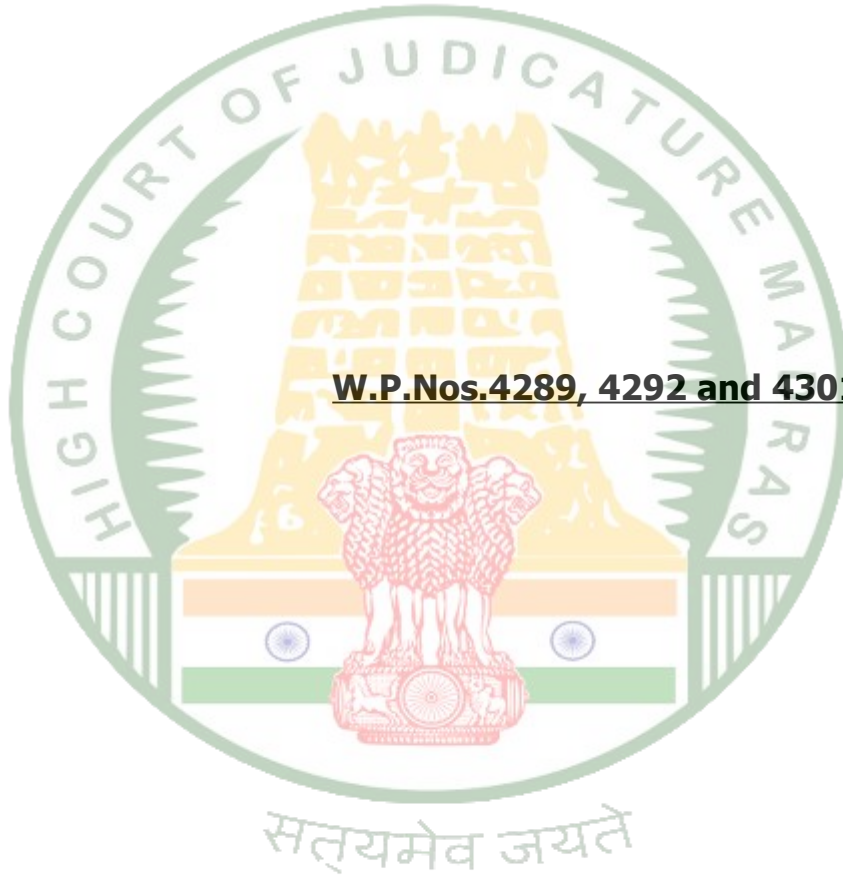
Note : Registry is directed to return the original impugned order to the learned counsel for the petitioner

To

1. Commissioner of Central Excise (Appeals-1),
Office of the Commissioner of Central Excise,
26/1, Mahatma Gandhi Marg,
Nungambakkam, Chennai-600 034.
2. Joint Commissioner of Central Excise,
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T.S.SIVAGNANAM, J

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