IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO. 232 OF 2016

M. K. Trading Co.	**}**	**Appellant**
versus		
Union of India and Ors.	**}**	**Respondents**

Mr.H.G.Dharmadhikari for the appellant.

Mr. Jitendra B. Mishra for the respondents.

CORAM :- S. C. DHARMADHIKARI &
SMT. BHARATI H. DANGRE, JJ.

DATE :- JANUARY 22, 2018

P.C. :-

1. On perusal of the two orders passed by the tribunal, one dated 15th June, 2015 and another dated 11th September, 2015, we are of the opinion that this appeal raises substantial questions of law. It is admitted on the following substantial questions of law:-

> "(a) Whether respondent no. 2 i.e. the tribunal has erred in rejecting the appeal at the stage of final disposal of appeal without taking into consideration the fact that the appeal has already been admitted after compliance of part payment of duty amounting to Rs.25,544/- as per the stay order no. S/56/12/SMB/C-IV dated 1st May, 2012.
>
> (b) Whether the tribunal has erred in exercising its powers to reject the appeal under the proviso to section 35B on monetary limits which in fact is not available in case of the appeal of the appellant involving the amount of duty along with interest thereon and penalty which in total exceeds threshold limit of Rs.50,000/- which *inter-alia* is

applicable only is available in case of issue involving only duty or only penalty not exceeding Rs.50,000/-?"

2. We have heard Mr. Dharmadhikari appearing in support of this appeal and Mr. Mishra for the Revenue/Respondents. We have perused the orders under appeal.

3. The tribunal has proceeded on the footing that the provisions of law would enable it to dismiss an appeal challenging the order passed by the Commissioner of Central Excise, Mumbai simply because, by that order of the Commissioner, the duty, fine or penalty demanded does not exceed Rs.50,000/- (before 6th August, 2014). The order of the Commissioner is dated 23rd January, 2012.

4. The statutory provision, which has been referred is section 35B of the Central Excise Act, 1944. That section reads thus:-

> "**35-B. 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 Principal Commissioner of Central Excise or Commissioner of Central Excise as an adjudicating authority;
>
> (b) an order passed by the commissioner (Appeals) under section 35-A;
>
> (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 Principal Commissioner of Central Excise or Commissioner of Central Excise, either before or after the appointed day, under section 35-A, 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.

(1-A) Every appeal against any order of the nature referred to in the first proviso to sub-section (1), which is pending immediately before the commencement of section 47 of the Finance Act, 1984 (21 of 1984), before the Appellate Tribunal and any matter arising out of, or connected with, such appeal and which is so pending shall stand transferred on such commencement to the Central Government, and the Central Government shall deal with such appeal or matter under section 35-EE as if such appeal or matter were an application or a matter arising out of an application made to it under that section.

(1-B) (i) The Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) may, by notification in the Official Gazette, constitute such Committees as may be necessary for the purposes of this Act.

(ii) Every Committee constituted under clause (I) shall consist of two Chief Commissioners of Central Excise or two Commissioners of Central Excise, as the case may be.

(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 35-A, 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.

(3) Every appeal under this section shall be filed within three months from the date on which the order sought to be appealed against is communicated to the Commissioner of Central Excise, or, as the case may be, the other party preferring the appeal.

(4) On receipt of notice that an appeal has been preferred under this section, the party against whom the appeal has been preferred may, notwithstanding that he may not have appealed against such order or any part thereof, file, within forty-five days of the receipt of the notice, a memorandum of cross-objections verified in the prescribed manner against any part of the order appealed against and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in sub-section (3).

(5) The Appellate Tribunal may admit an appeal or permit the filing of a memorandum of cross-objections after the expiry of the relevant period referred to in sub-section (3) or sub-section (4), if it is satisfied that there was sufficient cause for not presenting it within that period.

(6) An appeal to the Appellate Tribunal shall be in the prescribed form and shall be verified in the prescribed manner and shall, irrespective of the date of demand of duty and interest or of levy of penalty in relation to which the appeal is made, be accompanied by a fee of,-

(a) where the amount of duty and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is five lakh rupees or less, one thousand rupees;

(b) where the amount of duty and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is more than five lakh rupees but not exceeding fifty lakh rupees, five thousand rupees;

(c) where the amount of duty and interest demanded and penalty levied by an Central Excise Officer in the case to which the appeal relates is more than fifty lakh rupees, ten thousand rupees:

Provided that no such fee shall be payable in the case of an appeal referred to in sub-section (2) or a memorandum of cross-objections referred to in sub-section (4).

(7) Every application made before the Appellate Tribunal,-

(a) in an appeal for grant of stay or for rectification of mistake or for any other purpose; or

(b) for restoration of an appeal or an application,

shall be accompanied by a fee of five hundred rupees:

Provided that no such fee shall be payable in the case of an application filed by or on behalf of the Commissioner of Central Excise under this sub-section."

5. The tribunal has taken a view on a perusal of this provision that any person aggrieved by any of the orders, which are enumerated in the provision may appeal to the appellate tribunal against the same. It is not in dispute that the order under challenge before the tribunal was otherwise appealable. All that the tribunal took assistance of is a provisio, which says 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) of sub-section (1) of section 35-B, where, 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 the purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved or the amount of fine or penalty determined by such order, does not exceed Rs.50,000/- (prior to 6th August, 2014).

6. In the present case, the assessee pointed out that the appeal was already admitted. The proviso could not have been invoked in this case post admission. Therefore, the appeal could not have been dismissed on the ground on which it has been dismissed, namely, without adjudication on merits.

7. It is surprising that at the final hearing of the appeal, which was filed in the year 2012, the tribunal perused the records only for the purpose of exercising this discretion and passed an order initially running into four pages. Then, on an application for rectification of this mistake, namely, dismissal of the appeal which was already admitted, by invoking a proviso, the tribunal devoted its attention to this issue and passed an order running into five pages. The time which the tribunal devoted for all this could have very well and fruitfully been devoted to the adjudication on merits of the appeal. It is improper to throw out a litigant on such a technical ground after the appeal is entertained and kept pending. Once the appeal was admitted in this case and kept pending, then, no useful purpose is served by dismissing it at the final hearing on the ground of maintainability. Ultimately, it is a discretion vesting in the tribunal, which it must exercise judiciously and not capriciously. We find that refusal to decide the appeal on merits was vitiated by an error of law apparent on the face of the record.

8. Hence, we have no alternative but to set aside the order under appeal, which would include the order on rectification of mistake application. Both orders are thus set aside. The appeal is restored to the tribunal's file for adjudication on merits in accordance with law. The tribunal shall not throw out the appeal on the ground of the amount involved.

9. With the aforesaid directions, the appeal is disposed of. There would be no order as to costs.

(SMT. BHARATI H. DANGRE, J.) **(S.C.DHARMADHIKARI, J.)**