Sharayu Khot.

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

CUSTOM APPEAL NO. 39 OF 2017

The Commissioner of Customs (NS-III) ...Appellant

Versus

Rakesh Javerimal Shah ...Respondent

Mr. Vijay Kantharia a/w Ram Ochani, for the Appellant.

Mr. Prakash Shah a/w Mr. Jas Sanghavi, Mr. Sangeeth Narayanan i/by HKS Legal, for the Respondent.

CORAM : M.S. SANKLECHA &
RIYAZ I. CHAGLA, JJ.

DATE : 3 October 2018

ORDER :

1. On 19th September 2018, we passed the following order:-

1. *This Appeal under Section 130 of the Customs Act, 1962 challenges the order dated 5th December 2016 passed by the Customs, Excise and Service Tax Appellate Tribunal (for short "**the Tribunal**").*

2. The Revenue has urged the following question of law for our consideration:-

> *Whether in the facts and circumstances of the case and in law was the Tribunal right to hold that since the order of not granting cross-examination goes to route of the matter, this Tribunal sets aside the letter No. S/10-30/2016-17/CAC/NS-III/Comm/JNCH dated 06.10.2016 with a direction to adjudicating authority to grant cross-examination as sought by the assessee and decide the matter after following principles of natural justice without appreciating various authorities decisions?*

3. This Appeal was on board earlier. At that point of time, Shri. Shah, appearing for the Respondent pointed out that the entire Appeal is infructuous. This as the impugned order of the Tribunal has worked itself out. This for the reason that *the Tribunal had remanded the issue to the Adjudicating Authority i.e. Commissioner of Customs (NS-III) to decide the dispute. The Adjudicating Authority (Commissioner of Customs (NS-III)) on 2nd February 2017 disposed of the show cause notice. The above order dated 2nd February 2017 of the Adjudicating Authority (Commissioner of Customs (NS-III)) has confirmed the show cause notice against the Respondent. We noted that this Appeal has been filed on 14th July 2017 by the very Adjudicating Authority (Commissioner of Customs (NS-III)) and yet it finds no mention of passing of the order dated 2nd February 2017 in the Appeal memo. At that time, the Revenue was represented by Shri. Dwivedi and time was granted to enable the Revenue to explain its conduct. As at the hearing the Counsel for the Revenue was not updated on the above facts by the officer of the Revenue instructing him.*

4. Prima facie filing of such Appeals from the impugned order of the Tribunal which has worked itself out to the knowledge of the Appellant i.e. the Commissioner of Customs (NS-III) inasmuch as he has given effect to the impugned order of the Tribunal by passing the order dated 2nd February 2017. In the *absence of the above facts being pointed out in the Appeal memo and indicating the reason for filing this Appeal, it appears that it has been filed to harass an Assessee. Further, it is to be noted at the time of admission of Appeals, we do not insist on the Respondent being represented. We decide on the issue of admission after hearing the Appellant. This on the basis that facts would be correctly informed to us. More particularly, facts which have taken place after passing of the impugned order. In the absence of Shri. Shah, for the Respondent pointing out the above facts, it is likely that this Appeal would have been admitted, even though in these facts, it has become infructuous.*

5. Today, there is a change of the Counsel representing the Revenue.

6. Therefore, at the request of Shri. Kantharia, the new Counsel representing the Revenue, as the matter of last chance, the Appeal is adjourned to 26th September 2018 to enable the Revenue to explain/justify its conduct as indicated above.

2. Today, Shri. Kantharia, the learned Counsel in support of the Appeal has tendered an Affidavit of Shri. Subhash

Agrawal, Commissioner of Customs (NS-III)-the Appellant before us. Shri. Kantharia inform us that Shri. Subhash Agrawal is the very Commissioner who has signed and verified the Appeal memo.

3. The Affidavit seeks to address our concerns by stating that it is a mistake and tendering an apology. However, it gives no particulars of how the mistake occurred and whether there is any standard operating procedure in place to consider the order of the Tribunal, before challenging it before a higher forums. We specifically asked Shri. Kantharia as to how the decisions to file Appeals from the orders of the Tribunal are taken and he mentioned that it is taken by the Commissioner concerned. There seems to be no standard operating procedure or criteria laid down which have to be met before filing of Appeals to a higher forums.

4. The reason for the Appeal having been filed before us according to the Affidavit is that the impugned order of the

Tribunal may have far reaching impact as it ordered a cross-examination of all persons whose statements are relied upon. As it may now be construed that in all cases the Adjudicating Authority would necessarily have to allow cross-examination. This according to Affidavit, was the reason for having filed an Appeal, even though the order of the Tribunal was implemented. It is stated that the non-mentioning of the fact that an order giving effect to the impugned order has been passed was a mistake, for which he tenders an unconditional apology. The Affidavit further states that filing of this Appeal raises only academic issues and seeks to withdraw this Appeal.

5. We would expect the Respondent to file Appeal after considering all aspects and not file Appeals as a matter of ritual and withdraw it when it comes up for hearing before the Court. This indicates the most casual manner in which the Revenue is filing Appeals from the orders of the Tribunal to this Court. This non filtering of orders which need to be challenged, leads to numerous appeals being filed which are without merit.

6. Shri. Kantharia on instructions informs us that the decision to file appeal or not is taken by the Commissioner concerned. This unfettered and/or unguided discretion can lead to filing of futile Appeals which only result in harassment of the Assessee, besides waste of scarce judicial time in the face of large number of Customs and Excise Appeals awaiting disposal.

7. In the present facts, we would have expected the Commissioner to have been more careful before having filed this Appeal. However, we give him the benefit of doubt, that filing of this Appeal was a bonafide mistake and accept his unconditional apology. We hope that he and the other Commissioners of Customs would apply their minds, to the orders of the Tribunal before filing Appeals to higher forums.

8. In the above view, we feel it would be appropriate that the Central Board and Indirect Taxes and Customs (CBIC) set up a standard operating procedure to ensure that Appeals are filed only after due consideration at the hands of the

Commissioner/Committee of Commissioners who examine the orders passed by the Tribunal, before directing an Appeal to be filed from the orders of the Tribunal. This is a procedure in Direct Tax matters and it could be gainfully employed in Indirect Tax cases also. In our experience we have come across Appeals filed by the Revenue on routine basis, when a little consideration of the order being challenged, may show filing of Appeal is unwarranted.

9. This Appeal is allowed to be withdrawn as sought by Shri Kantharia.

10. The Counsel for the Revenue is directed to bring this order to the notice of all the Commissioners of Customs, Service Tax, Excise and CGST functioning within the jurisdiction of this Court.

11. The Registry is also directed to serve a copy of

this order upon the Chairman, Central Board of Indirect Taxes and Customs.

[RIYAZ I. CHAGLA J.] **[M.S. SANKLECHA, J.]**