

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Order reserved on 24.10.2018

Order delivered on 16.11.2018

CORAM

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

W.P.No.16968 of 2018

and

W.M.P.Nos.20211 & 28452 of 2018

Dr.Kamakshi Memorial Hospitals Private Limited
No.1, Radial Road, Pallakaranai,
Chennai - 600 100
rep. by its Chairman & Managing Director,
Dr.T.G.Govindarajan

..Petitioner

Vs.

1. The Additional Commissioner of
Central Excise,
Office of the Commissioner of Central Excise,
Chennai IV Commissionerate, MHU Complex,
Nandanam, Chennai - 600 035.
2. The Commissioner (Appeals II),
Office of the Commissioner of Central
Tax (Appeals -II)
CGST & Central Excise, Newry Towers,
3rd Floor, Plot No.2054, I Block, II Avenue,
Anna Nagar, Chennai - 600 040

..Respondents

सत्यमेव जयते

Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorari to call for the records pertaining to Order in Appeal No.179/2018(CTA-II) dated 27.04.2018 passed by the 2nd respondent herein and to quash the same, insofar as the said impugned order has been passed in total violation to the principles of natural justice, without jurisdiction and in excess of the authority conferred on the said 2nd respondent.

For Petitioner
For Respondents

: Mr.N.Viswanathan
: Mr.T.Pramod Kumar Chopda,
Senior Standing Counsel.

O R D E R

The petitioner is aggrieved against the order of the second respondent dated 27.04.2018.

2. The case of the petitioner is as follows:

The petitioner is a Multi-Specialty Hospital established for providing health care service to the needy patients. The petitioner has a dedicated cancer specialty ward, in which, the petitioner was exclusively providing preventive and curative treatment for cancer. With a view to provide radio drugs/pharmaceuticals at the door steps of the PET scan centres in Chennai, the petitioner imported a machine called "Cyclotron", which is an equipment primarily intended to develop/process radio pharmaceuticals. Since the said machine "Cyclotron" will be inducing radio activity in the course of developing and processing the FDG/F18, its establishment, functioning and processing are regulated by the Atomic Energy Commissioner of India. The petitioner accordingly, obtained necessary licence/permission from the Atomic Energy Regulation Board and commissioned the Cyclotron facility at their Hospital for the purpose of processing Fluorine-18. There are about 25 known types of radio pharmaceuticals and Fluorine-18 is one among them. The petitioner was licensed to develop/ synthesis the F-18- FDG. They had established a PET scan centre at the premises of Adayar Cancer Institute. During the period from April 2011 to March, 2013, they had been processing F-18/FDG in their facility at Pallikaranai and supplied it to various PET scan centres for use in PET scanners. However, due to compelling circumstances, they sold the cyclotron equipment to a company at Bangalore on 01.03.2013. Thereafter, no further production of FDG/F18 was carried out at the petitioner's hospital. While so, the Officers attached to the Chennai-IV Commissionerate, visited the petitioner's hospital premises on 19.03.2014 and conducted certain verification/ inquiry with regard to the production/processing of FDG/F18. At the time of such visit, admittedly, the machine was already sold and not available at the hospital. Thus, the Officer could neither see the machine nor the product FDG/F-18. The Officers however, verified certain documents maintained by the petitioner in connection with the production/processing of FDG/F-18. The Officers took the view that the said product namely FDG/F-18 is classifiable under CETH 28444000 of Central Excise Tariff Act. Accordingly, a show cause notice dated 03.05.2016 was issued, proposing to classify the impugned product FDG/F-18 under CETH 28444000 of Central Excise Tariff Act and to demand the duty of Rs.78,19,339/- with applicable interest from April 2011 to March 2013, by invoking the proviso to Section 11A(4) of the Central Excise Act, besides proposing to impose equal penalty under Section 11AC of the said Act. The petitioner sent a detailed reply on 26.08.2016 opposing

the proposals both on merits and on limitation. However, the first respondent passed an Order-in-Original dated 28.04.2017, wherein he admitted that the impugned goods are not classifiable under CETH 2844 4000 as originally proposed in the show cause notice. However, he held that the subject goods could be called as diagnostic reagent classifiable under CETH 3006 3000. Accordingly, the Adjudicating Authority confirmed the demand for differential duty of Rs.36,64,506/- with applicable interest and equal penalty. The Adjudicating Authority, thus, traversed beyond the scope of the show cause notice. The petitioner challenged the said order before the second respondent. Personal hearing was granted by the second respondent on 11.10.2017. However, after lapse of around 5 months, the petitioner received an intimation dated 06.03.2018 from the Superintendent, working under the second respondent, asking the petitioner to show cause as to why the subject matter goods should not be classified under CETH 28444000 in terms of the 2nd proviso appended to section 35 A(3) of the Central Excise Act. The petitioner, through letter dated 16.03.2018, raised objections on the course adopted by the 2nd respondent. The petitioner also questioned the jurisdiction of the 2nd respondent in reclassifying the subject matter goods. However, the 2nd respondent passed the impugned order dated 27.04.2018, not only rejecting the Appeal filed by the petitioner and also by modifying the order passed by the 1st respondent by reclassifying the subject goods from CETH 3006 3000 to CETH 2844 4000. Thus, the 2nd respondent also traversed beyond the scope of the appeal preferred before him. As the order passed by the 2nd respondent is without jurisdiction and any authority of law and in clear violation of principles of natural justice, the availability of alternate remedy of filing further appeal before the Tribunal does not stand in the way of the petitioner from challenging the said order of the 2nd respondent before this Court. Hence, the present writ petition.

3. A counter affidavit is filed on behalf of the respondents wherein it is stated as follows:

As per Section 35A (3) of Central Excise Act, 1944, the 2nd respondent Appellate Authority is empowered to issue notice to the petitioner and to pass an order as he thinks just and proper either confirming or modifying or annulling the decision or order appealed against, provided the Commissioner (Appeals) is of the opinion that any duty of excise has not been levied or paid or has been short paid or erroneously refunded. The 2nd respondent, after examining the materials on record and submission of the petitioner, found that the product manufactured by the petitioner would fall under classification 28444000 and not under 30063000. Therefore, the show cause notice / personal hearing intimation was issued to the petitioner to reclassify the subject goods. Such re-

classification of goods is within the scope of section 35A of the said Act. The jurisdiction of the second respondent under section 35A(3) read with section proviso is independent and not connected with the power of review of the jurisdictional Commissioner under section 35E(2) of the said Act. The second respondent has sufficient powers under the Act to examine by giving notice within the time limit specified under section 11-A to show cause against the proposed order. The impugned order was passed only after complying with the above provision of the Act. There is no bar under the Act to pass an adverse order against the petitioner and that the appeal has to be confined only with the appeal filed by the petitioner. The activity of feeding the basic raw materials like O-18 water, ABX Mx FDG kits including mannose triflate, Mx Cassettes for FEG, Mx accessory kits for F-cholin & FDG cassettes into the cyclotron machine and bombarding them to generate protons and further process of synthesis to generate the final product viz., FDG/F-18 amounts to manufacture. As a result of these processes, a new distinct commodity viz., FDG/F-18 classifiable under CETH 2844000 of Central Excise Tariff Act, 1985, is obtained. The FDG are delivered in a lead vial and marketed according to the need of the customers. As a new product emerges due to this process which is also being marketed, the goods manufactured by the petitioner are excisable. However, the Adjudicating Authority held that FDG/F-18 is a product used in diagnosis of certain diseases, especially, cancer and it is administered to a person before he/she is subjected to tests on a PET scanner machine, it is a compound of two or more ingredients and therefore, it is a diagnostic reagent used in the medical field for diagnostic purpose and classifiable under CETH medical field for diagnostic purpose and classifiable under CETH 30063000 only. But the 2nd respondent after examining the materials on record and information available in public domain found that the product is classifiable only under CETH 28444000 and therefore, issued notice in the pending appeal and thereafter, passed the impugned order, which is in accordance with law. If the petitioner is aggrieved against the impugned order, they have further statutory appeal remedy and thus, the present writ petition is not maintainable.

4. Mr.N.Viswanathan, learned counsel for the petitioner made his oral submissions. A written submission is also filed on behalf of the petitioner. The sum and substance of the submissions made on behalf of the petitioner are as follows:

(i) The original show cause notice dated 03.05.2016 issued by the first respondent has already been merged with the order passed by him and therefore, in the absence of Revenue preferring an appeal against the order of the first respondent, they cannot re-validate the show cause notice, as such course is

not permitted under the 2nd proviso to Section 35A(3) of the said Act. The very notice dated 06.03.2018 had not been issued by the second respondent expressing his opinion as mandated under the 2nd proviso appended to Section 35A(3) but by an authority not competent to issue such notice. Here admittedly, the Superintendent at the office of the second respondent had issued the said notice who has no jurisdiction to do so. The second respondent had acted, both as appellate authority and the reviewing authority in the same matter, while exercising his jurisdiction is confined only as appellate authority. The second respondent has to first form an opinion and then only, he is authorised to issue the notice as prescribed under section 11A, that too, within the time specified therein. Here in this case, no such opinion was formed by the second respondent. Even the said notice dated 06.03.2018 was not issued by him. Thus, the re-classification done by the second respondent is totally without jurisdiction. The second respondent is not authorised, in terms of Section 35A, to revive the already issued notice, in terms of Section 11-A, by a proper officer, once again when the said notice was already merged with the order of the first respondent. Otherwise, it would amount to issue of the same notice twice, which is not permissible in law. When the power of the Appellate Authority and the Reviewing Authority has been separated by the introduction of Section 35A and Section 35E, the second respondent, sitting under the Appellate jurisdiction and considering an Appeal filed by the petitioner, cannot assume himself as the reviewing authority. The issue involved in the petitioner's case did not involve a simple case of demand for duty to be called as non-levy or non-payment etc., but the one basically rested on the determination of the correct classification of the impugned goods. The original show cause notice issued to the petitioner proposed the classification of the subject goods under CETH 2844. However, the original authority traverses beyond the scope of the said notice and ordered classification of the subject goods under CETH 3003 3006. Therefore, there is no scope for the Revenue to contend that their case involved the short levy or non-levy of the duty, whereas the whole issue hinges on the only question as to the correct classification of the goods. The notice dated 06.03.2018 is also barred by limitation, as it cannot cover the demand for the period from April 2011 to March 2013, which is beyond the period prescribed under section 11A of the Act.

(ii) In support of the above contentions, the learned counsel for the petitioner relied on the following decisions.

- i) 1999 (106) ELT 12 (Hindustan Polymers Co.Ltd. vs. Collector of Central Excise, Guntur)
- ii) 1999 (113) ELT 24 (Warner Hindustan Ltd. vs. Collector of Central Excise, Huderabad)

iii) 2016 (340) ELT 6 (Madras) (Megatrends Inc. vs. Commissioner of Income-tax and another)

5. Mr.T.Pramod Kumar Chopda, learned Senior Standing Counsel appearing for the respondents made his oral submissions. He also filed written submissions. The sum and substance of the submissions made on behalf of the respondents are as follows:

(i) The second respondent is empowered under Section 35A(3) read with second proviso to Section 35A of Central Excise Act, 1944, to pass an order requiring the assessee to pay any duty not levied or paid, short levied or short paid or erroneously refunded. Short levy or short payment arises in the cases relating to wrong classification or misclassification or adoption of incorrect rate of duty on goods or wrong application of notification, granting exemption or concessional rate of duty. The original show cause notice dated 03.05.2016 was issued within the period of limitation and therefore, the enhancement notice dated 06.03.2018 is also within the period of limitation. In the present case, the subject goods manufactured by the petitioner would merit correct classification under CETH 2844400 but in the Order-in-Original, it was classified under CETH 30063000 which resulted in short levy of duty. Hence, the second respondent issued notice and afforded the petitioner, personal hearing and thereafter, passed the impugned order, which is in accordance with law, also by complying with the principles of natural justice. The jurisdiction of the second respondent under 2nd proviso to section 35A(3) is independent and not connected or related to power conferred on the Commissioner under Section 35E. There is no bar under the Act to pass adverse order against the petitioner in their appeal and to confine the order only to the issue raised in the appeal.

(ii) In support of the above contentions, the learned counsel for the respondents relied on the following decisions:

i) 51 STC 381 (FB) (State of Tamil Nadu v. Arulmurugan and Co.)

ii) 2012(25) taxman.com 174 (Mad.) (M.Loganathan vs. Income-tax Officer, Erode)

6. Heard the learned counsel for the petitioner and the learned Standing counsel appearing for the respondents. I have given my careful consideration to the submissions made by the respective counsels. I have also perused the materials placed before this Court.

7. The petitioner is aggrieved against the order of the Appellate Authority. The said appeal was filed challenging the order passed by the Adjudicating Authority. Even though further

appeal remedy is available to the petitioner against the order impugned in this writ petition, this writ petition is sought to be maintained on the sole ground that the Appellate Authority exceeded his jurisdiction and traversed beyond the scope of appeal by modifying the order of the Adjudicating Authority and confirming the demand. Therefore, this Court has to find out as to whether the second respondent/ Appellate Authority has exceeded his jurisdiction and traversed beyond the scope of appeal as contended by the petitioner or was well within his power in modifying the order of the Adjudicating Authority and dismissing the Appeal filed by the petitioner under sections 35 and 35A of the Central Excise Act, 1944.

8. I have already narrated the facts and circumstances warranting filing of this writ petition and the rival contentions of the parties. Therefore, I am not reiterating the same once again hereunder.

9. The petitioner commissioned the Cyclotron facility at their Hospital for the purpose of processing Flourine-18, out of O-18(oxygen), which according to them, is nothing but enriched water and for its synthesis with glucose so as to produce FDG, a nuclear drug, which has got radio tracer traits. It is stated that Cyclotron is used to process on variety of nuclear drugs/ Radio Pharmaceuticals for use in diagnosis of various diseases such as Alzheimer, thyroid, bone cancer, cancer in the body cells/tissues etc. It is further seen that though there are about 25 known types of radio pharmaceuticals and Flourine-18 is one among them, the petitioner is licensed only to develop/synthesis F-18-FDG. The Revenue claimed that the process of synthesis to generate the final product, viz., FDG/F18 amounts to "manufacture" and that the said commodity namely, 'FDG/F18' is classifiable under CETH 2844 4000 of Central Excise Tariff Act, 1985. Accordingly, by categorically ascertaining that the subject matter product is classifiable under CETH 2844 4000 of the Central Excise Tariff Act, 1985, the Revenue issued a show cause notice to the petitioner on 03.05.2016 as to why an amount of Rs.78,19,339/- being the Excise duty etc. should not be recovered from the petitioner with interest and penalty. Thus, it is evident that the very show cause notice issued on the petitioner was for calling upon the petitioner to show cause as to why the subject matter goods shall not be classified under CETH 2844 4000 and on the other hand, it was issued with firm stand that the said product is classifiable under the said heading and consequently, the petitioner is liable to pay the excise duty, interest and penalty for the manufacture of the said product. Therefore, the question before the Adjudicating Authority, being the quasi judicial authority, was as to whether the proposal made in the show cause notice for demand of duty, interest and penalty on

the subject matter goods which was already classified by the Revenue under CETH 2844 4000, has to be confirmed or rejected.

10. The petitioner made a very detailed reply on 26.08.2016 in response to the said show cause notice. It is their very specific case that the Inspecting Officer did not make any attempt to note the nature of drug by either getting it tested by expert or obtaining any opinion from such expert but straightaway determined the classification under the heading 2844 without letting in any reasons in support of the said classification and without even proposing such classification in the notice issued to the petitioner. It is also stated by the petitioner that the notice has drawn pre-conclusion as to the correct classification of the impugned goods when the onus of classifying commodity is cast on the Revenue. Thus, it was contended that the pre-conclusion arrived by the Revenue with regard to the classification, without putting the petitioner on notice amounts to violation of principles of natural justice. The petitioner also contended in the reply that the FDG produced and cleared by them is either an organic or inorganic chemicals or its compounds consisting of radio active elements. Therefore, assumed classification of the FDG under sub heading 2844 4000 is erroneous. They further contended that only pure radioactive materials greater than the atomic no.84 is covered under CETH 2844 and not the radio pharmaceutical, viz., FDG produced by the petitioner with atomic number of merely 9, as it is outside the scope of CETH 2844. Therefore, it is evident from the above reply of the petitioner that they disputed the very classification under the heading CETH 2844.4000. However, the petitioner, in their reply though submitted that the subject matter product being pharmaceutical has to fit in the scope of Chapter 30 only and that the FDG administered on patient is to be necessarily held as goods attracting the levy of excise duty, then the only appropriate heading under which it is classifiable is heading 3006 3000 and not under CH2844 4000, they also doubted whether the traces administered on the patient and used for diagnostic purpose, would fall under the category of reagent.

11. Based on the above reply submitted by the petitioner, the Adjudicating Authority passed an order on 28.04.2017 classifying the subject matter product FDG/F-18 under CETH 3006 3000 of the Central Excise Tariff Act, 1985 and ordered for recovery of an amount of Rs.36,64,506/- being excise duty payable etc., and dropped the demand for duty of Rs.41,54,833/- and also confirmed the interest and penalty of Rs.36,64,506/-. The Adjudicating Authority, has found that the subject matter product is rightly classifiable under CETH 3006 3000 only and cannot be classified under CETH 2844 4000 as alleged in the show cause notice. In other words, the

Adjudicating Authority rejected the claim of the Revenue that the subject matter goods would fall under classification CETH 2844 4000, based on which, the show cause notice was issued. Therefore, it is evident that the said show cause notice and the claim made therein by the Revenue, having been adjudicated by the Adjudicating Authority, got merged with the order in original. The Revenue did not challenge the said order of the Adjudicating Authority, as admittedly, no appeal is filed against the said order by the Revenue. Therefore, it is evident that the Revenue has accepted the classification made by the Adjudicating Authority.

12. Being aggrieved against the order of the Adjudicating Authority, the petitioner, went on appeal before the First Appellate Authority, namely, the 2nd respondent herein. The Appellate Authority rejected the Appeal, however, by modifying the order of the Adjudicating Authority by reclassifying the subject matter product under 2844 4000. In other words, the Appellate Authority confirmed the demand made in the show cause notice as such, in the absence of any appeal filed by the Revenue against the order-in-original.

13. It is contended on behalf of the respondents that the Appellate Authority has ample power to modify the classification in view of the power conferred on such authority under second proviso to Section 35A(3) of the Central Excise Act, 1944, which reads as follows:

35-A. Procedure in appeal -

...
...

(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 the 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 11-A to show cause against the proposed order.

14. I have given my careful consideration to the above said submission and also perused the above provision of law conferring power on the Commissioner (Appeals) while dealing with the Appeal filed against the order-in-original. Sub Section 3 of Section 35-A empowers the Commissioner either to confirm or modify or annul the decision or order appealed against. In this case, the Commissioner (Appeals) has not confirmed the order of the Adjudicating Authority and on the other hand, confirmed the show cause notice which was already got merged with the order of the Adjudicating Authority. It is to be stated at this juncture that when the Revenue has not chosen to file the Appeal against the order of the Adjudicating Authority, the Commissioner (Appeals) is not entitled to confirm the demand made in the show cause notice, which includes the categorical stand taken by the Revenue with regard to the classification of the product as one under 2844 4000. However, in this case, the Appellate Authority modified the order of the Adjudicating Authority only in respect of the classification head. In other words, the Commissioner (Appeals) rejected the conclusion arrived by the Adjudicating Authority on the question of classification and confirmed the classification head as claimed by the Revenue in the show cause notice. I do not think that the Commissioner (Appeals) is empowered to do such modification of the classification, especially, when the Revenue has accepted the order of the Adjudicating Authority. In other words, insofar as the classification issue is concerned, it reached the finality insofar as the Revenue is concerned, as they have accepted the order of the Adjudicating Authority. When such being the position, the Appellate Authority is not entitled to modify the classification, that too, while deciding the appeal filed by the assessee questioning the alternative classification made by the Adjudicating Authority under 3006 3000, since it is contended by them that it is only a plausible classification when the product FDG/F18 acts as a diagnostic reagent and not otherwise.

15. No doubt, the learned counsel for the Revenue sought to rely on the second proviso of Section 35A(3) of the Central Excise Act to contend that the Commissioner has power to reclassify even in the absence of an appeal by the Revenue. A careful perusal of the above said proviso would show that the Commissioner (Appeals) is entitled to pass an order requiring the appellant to pay any duty not levied or paid, short levied or short paid or erroneously refunded, provided he is of the opinion that any duty of excise has not been levied or paid or

has been short levied or short paid or erroneously refunded. Before passing such an order, the Commissioner (Appeals) is duty bound to issue notice on the assessee within the time limit specified under section 11-A to show cause against the proposed order.

16. First of all, in this case, it is to be noted that no such notice was issued by the Commissioner of Central Excise (Appeals) and on the other hand, a notice dated 06.03.2018 issued by the Superintendent, Central Tax, calling upon the petitioner to show cause to the Commissioner (Appeals) as to why the product FDG/F18 should not be classified under the heading 2844 4000 and the demand proposed in the show cause notice should not be recovered, is sought to be relied on. In my considered view, when the statute contemplates issuance of notice by the Appellate Authority, I fail to understand as to how the Superintendent, working under the Appellate Authority, is entitled to issue such notice. Therefore, I find that the very issuance of notice is not valid. Even otherwise, this is not the case where the duty of excise has not been levied or paid or erroneously refunded. On the other hand, the Adjudicating Authority has levied the duty by classifying the goods under the heading 3006 3000.

17. It is contended by the Revenue that the Commissioner (Appeals) is empowered since the subject matter goods is short levied. I am unable to appreciate the above said contention. The term short levy cannot widen the scope of the Appellate Authority to go into the undisputed or unquestioned issue on classification by the Revenue. In this case, the Revenue accepted the classification as the one under 3006 3000 as found by the Adjudicating Authority. When the revenue has accepted the said classification, the duty payable under the said classification would certainly fall under the said classification only and therefore, in the absence of any appeal by the Revenue, there is no question of considering short levy, as claimed by the 2nd respondent. Hence, the scope of appeal challenging the very classification made by the Adjudicating Authority, the Commissioner (Appeal) cannot be widened and consequently, the appellate authority cannot travel beyond his jurisdiction under section 35-A to decide the Appeal and reclassify the goods as has been done in this case.

18. At this juncture, it is relevant to be noted that the power conferred under section 35A is totally different and distinguishable from the power conferred under section 35E of the Central Excise Act, 1944. While the power under section 35A has to be exercised by the Appellate Authority within the purview and scope of the appeal, the power of review conferred under section 35E is more wider in nature and thus, the

authority who is exercising the power under section 35A is not competent to exercise such power which is available only within the domain and scope of section 35E.

19. In 1999 (106) ELT 12 (S.C.) (Hindustan Polymers Co.Ltd. vs. Collector of Central Excise, Guntur), the Honourable Supreme Court observed at paragraph No.6 as follows:

6. While we appreciate the Tribunal's desire to do complete justice and mould the relief in that direction, we think that, in the circumstances, the Tribunal should not, in this case, have passed an order which proceeded upon a basis that is altogether different from that of the demand made upon the appellants. That is not "moulding" relief. The demand that was made upon the appellants was under Tariff Item 68 and it proceeded upon the basis that there was a process of manufacture of coloured polystyrene from uncoloured polystyrene. Having come to a conclusion against the Revenue on these counts, the appropriate order for the Tribunal to have passed was to have set aside the demand and left it open to the Revenue to proceed against the appellants, as permissible under the law. The appellants would then have had the opportunity of meeting the precise case made out by the Revenue.

20. In 1999 (113) ELT 24 (S.C.), (Warner Hindustan Ltd. vs. Collector of Central Excise, Hyderabad), the Apex Court held at paragraph No.2 as follows:

2. The appellant manufactures what it calls "Halls Ice Mint Tablets". It classified these tablets as "Ayurvedic medicines" under Heading 3003.30 of the Central Excise Tariff. It was issued a notice to show cause why these tablets should not be classified under Tariff Heading 3003.19 as "patent or proprietary medicines". The Assistant Collector, after hearing the appellant, held that the tablets were patent or proprietary medicines classifiable under Heading 3003.19. In appeal by the appellant, the Collector of Central Excise (Appeals) held that the tablets were Ayurvedic medicines

classifiable under Heading 3003.30. The Excise Authorities went in appeal to the Tribunal and, for the first time, took the stand that the tablets were correctly classifiable under Heading 17.04 as "confectionery". The appellant, of course, stuck to its stand that the tablets were Ayurvedic medicines classifiable under Heading 3003.30. The Tribunal noted that the Assistant Collector had classified the tablets under Heading 3003.19 (sic 3003.10), that is, as patent or proprietary medicines. This was clear indication that the stand of the Excise Authorities prior to the stage of the appeal to the Tribunal was that the tablets were patent or proprietary medicines classifiable under Heading 3003.19. The Tribunal also noted that "both sides have not adduced any detailed arguments as to why these tablets can be considered as confectionery item or otherwise although a plea is there from the Collector in the grounds of appeal that the goods are assessable under Tariff Heading 17.04". In our opinion, the Tribunal was quite wrong in these circumstances in allowing the appeal of the Excise Authorities and classifying the mint tablets as items of confectionery under Heading 17.04. The correct course for the Tribunal to have followed was to have dismissed the appeal of the Excise Authorities making it clear that it was open to the Excise Authorities to issue a fresh show-cause notice to the appellant on the basis that the tablets were classifiable under Heading 17.04 as items of confectionery. This would have given the appellant the opportunity to place on record such material as was available to it to establish the contrary. It is impermissible for the Tribunal to consider a case that is laid for the first time in appeal because the stage for setting out the factual matrix is before the authorities below.

21. While considering the scope of Section 35-A of the Central Excise Act, 1944 and the power of the Appellate Authority, the Division Bench of this Court, in a case reported in 2016 (340) ELT 6 (Mad.) (Megatrends Inc. vs. Commissioner of

Income-tax and another) has observed at paragraph Nos.17 to 26 as follows:

17. On August 8, 2016, when the writ appeal came up for hearing, learned counsel for the appellant submitted that S.L.P. (C) No. 19815 of 2016 filed, challenging the order made in W.A. No. 276 of 2016 dated April 25, 2016, has been permitted to be withdrawn, with liberty to approach the High Court for appropriate relief and accordingly, orders were passed on July 29, 2016 by the Hon'ble Apex Court. We perused the copy of the order of the Apex Court. Ms. T.C.A. Sangeetha, learned counsel for the appellant submitted that she would only address the issues raised in writ appeal No. 276 of 2016 and would not make any submissions, with reference to the order dated April 25, 2016.

18. Assailing the correctness of the order made in W.P. No. 37072 of 2015, learned counsel for the appellant reiterated the submissions made before the writ court and contended that the Commissioner of Income Tax, Appeals-4, Chennai has exceeded in his jurisdiction, in issuing the impugned show cause notice dated November 6, 2015, changing the status of the appellant, which was not a part of the proceedings, before the Assistant Commissioner of Income Tax, Chennai/respondent No. 2, the Assessing Officer. She also submitted that the first respondent has predetermined the status of the appellant. It is also her contention that earlier, in the assessment proceedings, the appellant had disclosed all the material facts. She further submitted that the writ court has failed to consider that the Commissioner of Income-tax, (Appeals)-4 has not applied his mind to the facts and circumstances of the case, and also the provisions of the Income Tax Act, 1961, that a person can be a partner, representing another firm.

19. Learned counsel for the appellant further submitted that the writ court, has also erred to consider that the Commissioner of Income-tax, (Appeals)-4, Chennai/respondent No. 1, has no jurisdiction to issue the impugned show cause notice dated November

6,2015 for enhancement, proposing to disallow, on the premise, treating the appellant as an Associate of Person.

20. To substantiate the contention that the Commissioner of Income-tax (Appeals)-4, has no power to issue a show cause notice or to enhance the assessment, reliance has been made to a decision of this court in CIT v. Chaganlal Kailas & Co. reported in (1984) 148 ITR 7 (Mad).

21. Per contra, Mr. T.S. Ravikumar, learned senior standing counsel for the Income Tax department submitted that, though rightly or wrongly, the Commissioner of Income Tax(Appeals)-4, Chennai in the impugned show cause notice dated November 6, 2015 has referred the appellant as an AOP, the same is based on the perusal of the assessment records, information and facts available before the said authority and that the Commissioner of Income Tax (Appeals)-4, Chennai/1st respondent, has noticed that the appellant/assessee had been wrongly assessed, as a firm, instead of AOP. To arrive at a prima facie conclusion, the Commissioner of Income Tax(Appeals)-4, Chennai has also perused schedules 1 and 2 forming part of the balance sheet, wherein, it was shown that the appellant/assessee had 13 share holders, in the status of individuals, belonging to one Patel family and two other shareholders, namely, M/s. Krupa Trading Co. having six partners and M/s. DCP Trading Co., in all, totalling up to 15 shareholders.

22. Learned counsel for the Revenue also pointed that the Commissioner of Income Tax (Appeals)-4, Chennai/1st respondent has considered that the last two share holders are firms, and thus prohibited to be partners, in another firm. Taking note of the decision of the Hon'ble Apex Court in Dulichand Lakshminarayanan v. CIT-II (1956) 29 ITR 535 (SC), and by arriving at a prima facie view, the impugned show cause notice dated November 6, 2015 has been issued. According to the learned Senior Standing Counsel for Income Tax Department, challenge to the same is premature and it is always

open to the appellant/assessee to submit its response/explanation, to the same.

23. He further submitted that when the appellant has preferred a statutory appeal before the Commissioner of Income Tax (Appeals)-4, Chennai, challenging the assessment order dated March 30, 2015 of the Assistant Commissioner of Income Tax, viz. respondent No. 2, there cannot be a parallel proceeding before this court. He submitted that as against the impugned notice dated November 6, 2015 issued under Section 251(1) of the Income Tax Act, 1961, it is always open to the appellant to respond and at this juncture, writ petition is not maintainable. Reliance has been made on the decision of this court in Commissioner of Income Tax v. Express Newspapers Ltd. reported in (2003) 179 CTR (Mad) 550.

24. On the reliance to the decision in Commissioner of Income Tax v. Chaganlal Kailas & Co. reported in (1984) 148 ITR 7 (Mad), Mr. T.S. Ravikumar, learned senior standing counsel submitted that on pari materia provision in the Tamil Nadu General Sales Tax Act, 1959 dealing with the powers of the appellate authority to issue notice for enhancement, a Hon'ble Full Bench of this court in State of Tamil Nadu v. Arulmurugan reported in 51 STC 381 (Mad), held that the Appellate Authority has jurisdiction to issue such notice for enhancement.

25. In this context, learned Senior Standing counsel for the Income Tax department referred to the provisions under Section 251(1) of the Income Tax Act and Section 31(3) of the Tamil Nadu General Sales Tax Act, 1959 and prayed that the latter decision of the Hon'ble Full Bench of this court, be applied to the instant case, and for the above said reasons, prayed for dismissal of the writ appeal.

26. Though on August 8, 2016, Ms. T.C.A. Sangeetha, learned counsel for the appellant made a submission that she would address only the issues raised in instant appeal W.A. No. 276 of 2016, and thus we have recorded her submission, and accordingly directed the

Registry to post the writ appeal for final hearing, today, learned counsel for the appellant made submissions on the order, recalling the earlier order dated April 23, 2016. She also submitted that there are contradictory statements made by the Commissioner of Income Tax (Appeals)-4, Chennai, in the counter/sur rejoinder affidavits. According to her, the impugned show cause notice dated November 6, 2015, has to be set aside, as without jurisdiction.

The above decisions would justify that the appellate authority, in this case, has exceeded his jurisdiction and travelled beyond the scope of appeal.

22. No doubt, the learned counsel for the respondents relied on the Full Bench decision of this Court reported in 51 STC 381 (FB) (State of Tamil Nadu v. Arulmurugan and Co.), wherein it is observed as follows:

.... An appellate authority under the taxing enactments sits in appeal, only in a manner of speaking. What it does, functionally, is only to adjust the assessment of the appellant in accordance with the facts on the record and in accordance with the law laid down by the legislature. An appeal is a continuation of the process of assessment, and an assessment is but another name for adjustment of the tax liability to accord with the taxable event in the particular tax-payer's case. There can be no analogy or parallel between a tax appeal and an appeal, say, in civil cases. A civil appeal, like a law suit in the court of first instance out of which it arises, is really and truly an adversary proceeding, that is to say, a controversy or tussle over mutual rights and obligations between contesting litigants ranged against each other as opponents. A tax appeal is quite different. Even as the assessing authority is not the tax-payer's "opponent", in the strictly procedural sense of the term, so too the appellate authority sitting in appeal over the assessing authority's order of assessment is not strictly an arbitral tribunal deciding a contested issue between two litigants ranged on opposite sides. In a tax appeal, the appellate authority is very much

committed to the assessment process. The appellate authority can itself enter the arena of assessment, either by pursuing further investigation or causing further investigation to be done. It can do so on its own initiative, without being prodded by any of the parties. It can enhance the assessment, taking advantage of the opportunity afforded by the tax-payer's appeal, even though the appeal itself has been mooted only with a view to a reduction in the assessment. These are special and exceptional attributes of the jurisdiction of a tax appellate authority. These attributes underline the truth that the appellate authority is no different, functionally and substantially, from the assessing authority itself.....

23. I have given my careful consideration to the above decision of the Full Bench. I am of the view that the said decision is distinguishable on fact. Firstly, the said decision was made by considering the scope of Section 8(4) of the Central Excise Act, 1944, and the power conferred on the Appellate Authority under the Tamil Nadu General Sales Tax Act, 1959, which admittedly, includes the power to enhance the assessment. The case on hand is arising out of the power conferred on the appellate authority under Sections 35 and 35A of the Central Excise Act, 1944, where no such power to enhance the assessment is granted on the Appellate Authority, except to state that such authority may confirm, modify or annul the decision appealed against. It is doubtful whether the term 'modify' would also include power to enhance. Even otherwise, as I have found that the Appellate Authority, in this case, has not followed the procedure in issuing proper notice to the petitioner, as observed supra, I am of the view that the above decision of the Full Bench cannot be applied to the facts and circumstances of the present case.

24. The next decision relied on by the learned counsel for the respondents is reported in 2012(25) taxman.com 174 (Mad.) (M.Loganathan vs. Income-tax Officer, Erode), wherein at paragraph No.11, it is observed as follows:

11. A reading of the above provision shows that the powers of the Commissioner (Appeals) extend not only to the subject matter of the appeal against the assessment, that in a given case, it is open to the first appellate authority to even enhance

the assessment. Thus, apart from confirming an assessment or granting relief to the assessee or cancelling the assessment, the first appellate authority has the power of an Assessing Officer to enhance the assessment which is under appeal before him. The Commissioner (Appeals) has the jurisdiction to examine all matters covered by the assessment order and correct the assessment in respect of all such matters even to the prejudice of the assessee and remand the case to the Assessing Officer to inquire into matters which were not the subject-matter of appeal, vide CIT v. McMillan and Co., [1958] 33 ITR 182 (SC). The only restriction on the power while enhancement is that, the assessee must be given a reasonable opportunity of showing cause as against such assessment or reducing the amount of refund. The Explanation appended to section 251 is a further addition to the power given to the Commissioner (Appeals) as specified under sub-section (1). A reading of the abovesaid Explanation shows that the authority of the Commissioner of Income-tax (Appeals) travels to any matter which may arise out of the proceedings, which is appealed against, notwithstanding the fact that such matter was not raised by an assessee before the Commissioner (Appeals). The sum and substance is that when the entire assessment is before the Commissioner (Appeals), the jurisdiction of the Commissioner (Appeals) is not restricted either by the grounds raised or limited by the assessment made and the authority of the Commissioner of Income-tax (Appeals) is co-terminus with that of the Assessing Officer to enhance the assessment too. Barring this, the Act does not contemplate a withdrawal of the appeal filed by an assessee.

25. The above decision will also not help the respondents in any manner since the same was made by considering the powers of the Appellate Authority conferred under section 251 of the Income Tax Act where the power to enhance the assessment has been specifically provided.

26. In this case, I have already pointed out that the Adjudicating Authority himself had traversed beyond the scope of the show cause notice and had given a finding on the classification of the subject matter product as the one falling under heading 3006 3000 and not under heading 2844 4000 as alleged in the show cause notice. Therefore, it is evident that the Adjudicating Authority, before arriving at such conclusion on the classification of the subject matter product has not put the assessee on notice to call for their explanation/objection on such proposal. A finding given beyond the scope of the show cause notice, more particularly, touching upon the classification issue, without there being any notice of proposal on such issue, cannot be termed as a finding rendered in compliance of the principles of natural justice. Therefore, I am of the firm view that the very order of the Adjudicating Authority classifying the subject matter product as the one falling under 3006 3000 is not in conformity with the principles of natural justice. It is not that the petitioner had accepted the said classification. On the other hand, the very filing of the appeal against such finding on classification would show that they are disputing even such classification. Under the above circumstances, when the appeal was filed, unfortunately the Appellate Authority, on his turn, travelled beyond the scope of the appeal and found that the subject matter product is not classifiable under 30063000 and on the other hand, it is classifiable under 2844 4000 as alleged in the show cause notice. I have already pointed out that this finding of the Appellate Authority is totally beyond the scope of the appeal as the Revenue has not chosen to file any appeal against the classification finding rendered by the Adjudicating Authority. I have already pointed out that the Appellate Authority has travelled beyond his power and competence conferred under section 35A of the said Act in re-classifying the subject matter product.

27. Considering the above stated facts and circumstances, this Court is of the view that the classification issue on the subject matter product is to be reconsidered once again from the stage of adjudication, after issuing proper notice of proposal on the petitioner. I have already pointed out that classifying the subject matter product under heading 3006 3000 by the Adjudicating Authority was not preceded by any show cause notice based on such heading. Therefore, any finding rendered by such authority on the classification in the absence of proper show cause notice cannot be sustained. Therefore, this Court is of the view that in order to decide the classification dispute, the matter has to go back to the Adjudicating Authority so as to pass a fresh order of adjudication on the classification issue, after issuing proper notice to the petitioner.

28. Accordingly, the Writ Petition is allowed and the impugned order of the Appellate Authority is set aside and the matter is remitted back to the first respondent, Adjudicating Authority, for re-considering the whole issue and pass a fresh order of adjudication, after putting the petitioner on notice. This Court is also of the view that before issuing such notice on the petitioner, it is better for the Adjudicating Authority to take opinion/view from the experts on the subject matter product and thereafter, to form an opinion and issue show cause notice to the petitioner. Needless to say that the earlier finding rendered by the Adjudicating Authority on the above classification issue, cannot stand in the way of deciding the matter afresh after considering the objections filed by the petitioner. In other words, the Adjudicating Authority has to apply his independent mind on the issue, uninfluenced by any of the observations made in the order of Adjudicating Authority as well as in the order of the first Appellate Authority. The whole exercise shall be done by the first respondent, Adjudicating Authority, within a period of twelve weeks from the date of receipt of a copy of this order. No costs. Consequently, connected miscellaneous petitions are closed.

vsi

Sd/-

Deputy Registrar

//True copy//

Sub Assistant Registrar

To

1. The Additional Commissioner of
Central Excise,
Office of the Commissioner of Central Excise,
Chennai IV Commissionerate, MHU Complex,
Nandanam, Chennai - 600 035.

2. The Commissioner (Appeals II),
Office of the Commissioner of Central
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CGST & Central Excise, Newry Towers,
3rd Floor, Plot No.2054, I Block, II Avenue,
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+2ccs to Mr.N.Viswanathan, Advocate SR.No.78167

+1cc to Mr.T.Pramod Kumar Chopda, Advocate SR.No.78362

KR/20/11/18

W.P.No.16968 of 2018