



THE HIGH COURT OF SIKKIM : GANGTOK
(Civil Appellate Jurisdiction)

DATED : 07.03.2011

CORAM

HON'BLE MR. JUSTICE S. P. WANGDI,
ACTING CHIEF JUSTICE.

RSA NO. 02 OF 2009

The Commissioner of Central Excise & Service Tax,
Siliguri Commissionerate, C.R. Buildings,
Haren Mukherjee Road, Hakimpura,
Siliguri-734 001.

..... **Appellant**

Versus

M/s Mount Distilleries Ltd.,
represented by its Managing Director,
Majitar, P.O. Majitar,
Rangpo, East Sikkim.


.... **Respondent**

For the appellant : Mr. A. Moulik, Sr. Advocate with Ms.
Kessang D. Bhutia, Advocate.

For the respondent : Mr. Zangpo Sherpa and Mr. Pem
Tshering Lepcha, Advocates

JUDGMENT

Wangdi, ACJ

 This is to consider an appeal under Section 35(G) of
the Central Excise Act, 1955 read with Section 83 of the Finance



Act, 1994, filed by the appellant, the Commissioner of Central Excise and Service Tax, Siliguri Commissionerate, challenging the final order No. A-41/KOL/09 dated 09.01.2009 passed by the Customs, Excise and Service Tax Appellate Tribunal, East Zonal Bench, Kolkata (CESTAT in short) in Service Tax Appeal No. 161/2008 whereby the CESTAT disposed of the departmental appeal ruling that the order dated 19.07.2007 passed by the Deputy Commissioner sanctioning the refund of the Service and Education Cess amounting to Rs. 96,955/- was valid and, therefore, sustained.

2. The brief facts of the case are that, the respondent M/S Mount Distilleries Ltd., an assessee registered with Rangpo Range (under Gangtok Division) of Siliguri Central Excise & Service Tax Commissionerate under Section 69 of the Finance Act 1994, had filed a refund application in Form-R under Section 11B of the Central Excise Act, 1994 as made applicable to service tax under Section 83 of Chapter V of the Finance Act, 1994, to the Deputy Commissioner of Central Excise, Gangtok Division, claiming refund of Rs. 96,995.00 paid by them in excess of "taxable services" in relation to "transportation of their goods by road in goods carriage provided by Goods Transport Agencies" during the period from October, 2005 to September, 2006. It is stated that the refund sanctioning authority, i.e., the Deputy



Commissioner of Central Excise, Gangtok Division, after consideration of the refund claim, held that the respondent was entitled to the refund as sought for in terms of Section 11(B)(2) of the Central Excise Act, 1944 read with Section 83 of Chapter V of the Finance Act, 1994 vide his refund sanction order dated 01/ST/GTK/07 dated 19.07.2007.

3. It is stated that in course of review of the above refund sanction order of the Deputy Commissioner of Central Excise, Gangtok Division, under Section 84 of the Finance Act, 1994, the Commissioner of Central Excise, Siliguri Commissionerate, vide his Order-in-Review dated 10.12.2007, held that the said refund sanction order dated 19.07.2007 was neither legal nor proper and, accordingly, directed and authorized the Assistant Commissioner, Central Excise, Gangtok Division, to file an appeal under Section 85 of the Finance Act, 1994 against the said refund sanction order dated 19.07.2007 before the Commissioner (Appeals-IV), Central Excise, Kolkata, on various grounds.

4. The Assistant Commissioner of Central Excise, Gangtok Division, accordingly filed an appeal in Form ST-4 before the Commissioner of Central Excise (Appeals-IV), Kolkata, under Section 85 of Chapter V, 1994 on 14.12.2007 praying for



modification of the refund sanction order dated 19.07.2007. However, since the period of limitation of three months prescribed for filing of such appeal before the Commissioner (Appeals) prescribed under Section 85(3) of the Finance Act, 1994 had expired, an application for condonation of such delay was also filed along with the appeal before the Appellate Commissioner praying for condonation of delay of about 35 days in filing the appeal.

5. It is the case of the appellant that the Commissioner (Appeals-IV), Kolkata, rejected the appeal as being barred by limitation holding that the Commissioner (Appeals-IV) was not empowered to condone delay beyond 90 days by erroneously relying upon the ratio of the judgment of the Tribunal in the case of *Mayor Steel Corporation vs. C. C. Ahmedabad* reported in **2004 (167) ELT 107 (T)**. On examination of the said order in appeal by the Committee of Commissioners, constituted in terms of Section 86 of the Finance Act, 1994, vide its order dated 13.08.2008, directed and authorized the Assistant Commissioner (A&R), Central Excise, Siliguri Commissionerate to file an appeal under Section 86(2A) of the Act before the CESTAT, EZB, Kolkata, against the impugned decision of the Commissioner (Appeals). Accordingly, the Assistant Commissioner filed an appeal before the CESTAT, EZB, Kolkata, as directed by the

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Committee of Commissioners praying, inter alia, for setting aside the impugned order in appeal dated 21.07.2008 passed by the Commissioner (Appeals) and for restoration of the Departmental appeal before it. The CESTAT upon hearing dismissed the appeal by its order dated 09.01.2009 thereby upholding the original order of the Deputy Commissioner of Central Excise allowing refund to the respondent. It is this order that the present appeal is directed against.

6. In the appeal before this Court, the appellant has sought to assail the impugned order of the CESTAT on the following grounds: -

(i) That the CESTAT acted in excess of its jurisdiction and enlarged the scope of the appeal suo moto, in deciding that (i) the earlier appeal of the department against the refund order in original dated 19.07.2007 made under Section 85 of the Finance Act, 1994, First Appellate Authority, i.e., Commissioner (Appeals), could not be sustained as being beyond the statutory prescription; and

(ii) that it was wrong on the part of the CESTAT to hold that the order-in-review passed by Shri C. M. Mehra dated 10.12.2007 directing and authorizing the Assistant Commissioner of Central Excise, Gangtok Division to file the said appeal before

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the Commissioner (Appeals) could not be sustained as the said Shri C. M. Mehra had no authority to act as the Commissioner of Central Excise, Siliguri, having not been so appointed by the Board as required under the law as laid down in the decision of the CESTAT in the case of *CCE, Siliguri vs. Mall Eximp Pvt. Ltd.*

7. It has been urged that since the above two questions had not been raised by either of the parties, and, therefore, no such dispute at all existed, the CESTAT had no jurisdiction to go into those questions. As per the appellant, the jurisdiction and power of the Tribunal is restricted only to decide such issues which are properly raised before it. The CESTAT committed a grave error in failing to consider the issues that were brought before it in the appeal, namely, (a) whether the Commissioner (Appeals) had erred in holding that he had no power to condone delay beyond 90 days in filing appeals in Service Tax matters and (b) as to whether or not the Commissioner (Appeals) was vested with the power to condone the delay to the extent of three months under the proviso to Section 85 (3) of the Finance Act, 1994. It is stated that the CESTAT had wrongly gone into areas extraneous to the appeal, thereby misdirecting itself in passing the impugned order dated 09.01.2009.



8. Apart from the above, certain additional grounds have also been pleaded in assailing the impugned judgment of the CESTAT which are briefly set out below:-

(a) The Commissioner (Appeals) has wrongly interpreted the provision of Service Tax Laws and erroneously placed reliance on a case law relating to customs matters to decide the issue of limitation in filing appeal in service tax matters before the Commissioner (Appeals).

(b) The CESTAT had committed an error in not appreciating that the earlier appeal of the department before the First Appellate Authority against the refund sanction order-in-original dated 19.07.2007, was filed under Section 85 of the Finance Act, 1994 and not under Section 84 of the said Act as wrongly observed by the Tribunal.

(c) In any case under Section 85 of the Finance Act, 1994 it is permissible for any person, aggrieved by any decision of the adjudicating authority subordinate to the Commissioner of Central Excise, to appeal to the Commissioner of Excise (Appeals), thereby rendering redundant and superfluous the order of Shri C. M. Mehra, Commissioner of Excise, Siliguri, with the consequence that the order of the CESTAT holding that the

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order of the said Shri C. M. Mehra as unauthorized and a nullity, became non-est and of no effect.

(d) That in any case, it was an error for the CESTAT to rely upon an erroneous decision of the Tribunal in the case of *CCE, Siliguri vs. Mall Eximp Pvt. Ltd.*, a decision under challenge in Appeal (FMAT) No. 1703 of 2008 before the Calcutta High Court to hold that Shri C. M. Mehra, the then Commissioner of Central Excise, had no authority to act as Commissioner of Central Excise, Siliguri, having not been so appointed by the board and that he ought not to have directed and authorized the Assistant Commissioner to file an appeal in his order-in-review dated 10.12.2007.

(e) That the said order-in-review dated 10.12.2007 having been passed legitimately by the said Shri C. M. Mehra, Commissioner of Central Excise, Siliguri Commissionerate within his competence, the finding of the CESTAT to be contrary was erroneous, and, therefore liable to be set aside.

9. Based on the above facts and circumstances, which are shorn of details considered irrelevant by this Court, the following questions have been formulated, that are stated to be substantial questions of law:-



- A. Whether the order dated 9/1/2009 passed by the Hon'ble Tribunal (CESTAT) is perverse for not deciding the question of limitation.
- B. Whether the Hon'ble Tribunal has suo-moto enlarged the scope of controversy and disposed off the instant departmental appeal by way of deciding uncalled, unurged and extraneous issues only, not at all placed before it by the parties for consideration.
- C. Whether the Tribunal has misdirected itself in not deciding the issue of condonation of delay/limitation raised before it and also before the Commissioner (Appeals).

10. The respondent-Company filed a counter-affidavit raising preliminary objection as to the maintainability of the appeal on the ground:

- (i) that the present appeal is barred by the law of limitation having been filed a delay of 77 days;
- (ii) that the impugned order having been passed by the CESTAT within the permissible limits of the law,

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the infirmity being pointed out to assail it cannot be sustained; and

(iii) that the appeal does not involve any substantial question of law.

11. Before dealing with the merits of the case, it may be noted that the Memorandum of Appeal was accompanied by an application for condonation of delay which was duly considered and allowed by this Court by an order dated 10.06.2010, only after which the case was admitted for hearing.

12. Mr. A. Moulik, learned Senior Advocate on behalf of the appellant submitted that the CESTAT, East Zonal Branch, Kolkata had acted in excess of its jurisdiction in the appeal filed by the appellant before it as it went into the questions that were never raised before it and by ignoring the only question raised before it in the Memo of Appeal. It was submitted that the only question raised in the appeal was as to whether the impugned order of the Commissioner (Appeals) dated 21.07.2008 holding that he had no power to condone the delay beyond 90 days and that the appeal having been filed in excess of that period, could not entertained by him. It is stated that instead of confining to that question being the question for determination before it, the



CESTAT had gone into other questions that were extraneous, namely: -

- (a) whether the power of the Commissioner of Excise acting under Section 84 of the Finance Act, 1994 was invested with the powers to authorize filing of an appeal and answering in negative; and
- (b) the question as to the validity of the order of Shri C. M. Mehra, who was holding the charge of Commissioner of Excise, Siliguri Commissionerate authorizing the Assistant Commissioner to file an appeal.

13. Mr. Moulik submitted that even if it is to be considered that those questions did arise before the CESTAT, the decision was erroneous for the following reasons: -

- (i) that the appeal of the department filed before the first appellate authority against the Refund Sanction Order-in-Original dated 19.07.2007 was under Section 85 (3) of the Finance Act, 1994 and not as per the provision of Section 84 as erroneously observed by the CESTAT. In other words, it is the case of the appellant in this appeal that notwithstanding the provision under Section 84 a distinct right of appeal was available



to the department under Section 85 which is clearly revealed by the opening words of Section 85 (1) "any person aggrieved by any decision or order". It is further submitted that Section 85 (1) when considered as a whole clearly provided for an independent right of appeal.

(ii) In so far as the incapacity of Shri C. M. Mehra, Commissioner, Siliguri Commissionerate is concerned, it has been urged that the finding was grossly erroneous as it was based upon an earlier decision of CESTAT in the case of *CCE, Siliguri vs. Mall Eximp Pvt. Ltd.*, a decision which was under challenge in an appeal before the Calcutta High Court in Appeal (FMAT) No. 1703 of 2008, which is pending decision.

14. Mr. Moulik referred to a large number of decisions in support of his contention that the amplitude of the power of the tribunal is circumscribed by the subject matter of the appeal which is born out by the Memorandum or grounds of Appeal. In order to avoid repetition and prolixity, we may mention some of the cases viz., *M/s Trojan & Co. vs. RM. N. N. Nagappa Chettiar* **AIR 1953 SC 235** (Para 22); *Raruha Singh vs. Achal Singh and others* **AIR 1961 SC 1097** (Para 7); and *R.L. Rajcharia vs. Income Tax Officer and others* **(1977) 107 ITR 347 (Cal)**.

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15. Mr. Zangpo Sherpa, learned Advocate representing the respondent-Company on the other hand submitted that the CESTAT had passed the order under challenge after duly considering the appeal and upon hearing the parties before it and, therefore, had acted in just and appropriate manner rendering the impugned judgment legally valid and passed within the power vested in it by law. It was further submitted that the Tribunal, as the final authority to go into the finding of facts, has the inherent power to consider all aspects for rendering complete justice and that it was wrong to submit that the Tribunal should confine itself only to the grounds of appeal raised before it. Such being the position, it was urged that the merits of the finding on the scope of Section 84 of the Finance Act, 1994 and the validity of the order of Shri C. M. Mehra, Commissioner of Excise, Siliguri Commissionerate authorizing the department to file appeal under Section 85 of the Finance Act, 1994 was valid in the eyes of law.

16. Mr. Sherpa referred to the decision of *the Commissioner of Income Tax, Madras vs. The Mahalakshmi Textile Mills Ltd.* **AIR 1968 SC 101** (Para 4), which we may reproduce hereunder:

“(4) By the first question the jurisdiction of the Tribunal to allow a plea inconsistent with the

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plea raised before the Departmental authorities is canvassed. Under sub-section (4) of Section 33 of the Indian Income-tax Act, 1922, the Appellate Tribunal is competent to pass such orders on the appeal "as it thinks fit". There is nothing in the Income-tax Act which restricts the Tribunal to the determination of questions raised before the departmental authorities. All questions whether of law or of fact which relate to the assessment of the assessee may be raised before the Tribunal. If for reasons recorded by the Departmental authorities in rejecting a contention raised by the assessee, grant of relief to him on another ground is justified, it would be open to the departmental authorities and the Tribunal, and indeed they would be under a duty to grant that relief. The right of the assessee to relief is not restricted to the plea raised by him."

17. The above facts and circumstances and the submissions in my view would be sufficient for the purpose of disposal of the appeal and, therefore, this Court shall restrict itself only to those. On careful consideration of the pleadings of the parties, the rival contentions placed by the learned counsels, the records available before this Court and the legal position obtaining in the field, this Court is of the view that the appeal has no merit for the reasons stated hereafter.

18. On careful examination of the impugned order of CESTAT there can be no manner of doubt that it not only considered the sole ground of appeal of the Department but also the soundness of order of Commissioner, Siliguri Commissionerate dated 10.12.2007 as the Department had



raised that question during the course of their arguments. This is apparent from the following portions of the impugned order dated 09.01.2009 passed by the CESTAT:

"2.
The Commissioner (Appeals) has passed the impugned Order dated 21.07.08 rejecting the Appeal filed by the Department holding that he has no power to condone the delay beyond 90 days. Thereafter, a Committee of Commissioners comprising Shri Jai Prakash purportedly holding the additional charge of Commissioner of Central Excise, Siliguri Commissionerate and Shri V. K. Goel holding the charge of Service Tax, Kolkata Commissionerate have authorized filing of the present Appeal to the Tribunal.

3. The argument of the learned J.C.D.R. that under Section 84 of the Finance Act, 1994, the Commissioner can authorize filing an appeal, is not supported either by a specific provision of law or by the practice followed throughout the country."

(emphasis supplied)

19. From the above, it can be reasonably inferred that rejection of the application for condonation of delay and, therefore, the appeal were questions that had been raised before the CESTAT. It can also be reasonably inferred that the soundness of the order dated 10.12.2007 passed by Shri C. M. Mehra directing filing of an appeal to the Commissioner (Appeals) had also been urged by the department and considered by the



CESTAT. Therefore, it cannot be said that the impugned order suffers from the vice of perversity, a consideration relevant in an appeal of the present kind which in substance is a second appeal.

As regards the point raised on behalf of the appellant that the conclusion of the CESTAT that Shri C. M. Mehra, Commissioner, Siliguri Commissionerate, was bereft of the authority and jurisdiction to direct filing of appeals being based on an erroneous decision of the CESTAT in the case of *CCE, Siliguri vs. Mall Eximp Pvt. Ltd.* is concerned, this Court is of the view that so long as that decision is not set aside and/or stayed by the appellate forum, in this case said to be the Calcutta High Court, the position of law shall continue to prevail. It is nowhere said that the said decision of the Commissioner, Central Excise has been stayed by the Calcutta High Court in the appeal against the decision, being Appeal (FMAT) No. 1703 of 2008 which is said to be pending decision by that Court. The CESTAT, therefore, cannot be faulted for having relied upon the impugned order of *CCE, Siliguri vs. Mall Eximp Pvt. Ltd.*

20. Under such circumstances, it is difficult to accept the argument of Mr. Moulik that the CESTAT had gone into the questions that had never been raised before it and that it had overlooked the sole contention in the appeal of the department



that the rejection of application for condonation of delay by the Commissioner (Appeals) was erroneous in law.

21. The judgment in the case of *the Mahalakshmi Textile Mills Ltd.* (supra) cited by Mr. Zangpo Sherpa fully supports the above view. No doubt, the decision was rendered in respect of sub-Section (4) of Section 33 of the Income-tax Act, 1922, but the words used in that provision, namely, "pass such orders on the appeal as it thinks fit" is in-verbatim the words used in Section 35C of the Central Excise Act, 1944, sub-section (1) of which may be reproduced below: -

"35C. 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.

(emphasis supplied)

22. In the case of *R. L. Rajgharia* (supra) referred to Mr. Moulik, the Calcutta High Court has referred to the following passage of the Chief Justice in the case of *Commissioner of Income-tax vs. Calcutta Discount Company Ltd.* [1971][82 ITR 941 (Cal): -



"The above decisions of the different High Courts in India establish beyond doubt that the word 'thereon' in section 33(4) is restricted to the subject-matter of the appeal before the Tribunal and the subject-matter of the appeal consists of the memorandum or grounds of appeal,, the additional grounds, if any, allowed by the Tribunal, and the grounds, if any, urged by or on behalf of the respondent, to support the order under appeal. If the Tribunal, therefore, does not allow a particular ground to be urged, that ground can never be included in or considered to be part of the 'subject-matter of the appeal.'"

(emphasis supplied)

23. From the above decisions of the Apex Court and the Calcutta High Court, we find that while deciding an appeal, the CESTAT is not restricted by the grounds set out in the Memorandum of Appeal alone, but also possesses the necessary jurisdiction to entertain additional grounds allowed to be raised by the Tribunal and the grounds urged, if any, by a party.

24. The decisions cited by Mr. Moulik are of no assistance to him as they are based upon facts that were 'in lis' in those cases and would not be applicable to the facts and circumstances of the present one.

25. In the above facts and circumstances, the questions of law raised and which have been extracted above are answered as under: -



(i) (Questions A and C taken up together as they are substantially the same.)

A. Whether the order dated 9/1/2009 passed by the Hon'ble Tribunal (CESTAT) is perverse for not deciding the question of limitation.

and

C. Whether the Tribunal has misdirected itself in not deciding the issue of condonation of delay/limitation raised before it and also before the Commissioner (Appeals).

Answer: In view of the impugned order of the CESTAT relevant portion of which is set out in paragraph 17 of this judgment, the answer to those questions are in the negative. It is held that those questions were duly considered by the CESTAT.

(ii) B. Whether the Hon'ble Tribunal has suo-moto enlarged the scope of controversy and disposed off the instant departmental appeal by way of deciding uncalled, unurged and extraneous issues only, not at all placed before it by the parties for consideration.

Answer: Paragraph 3 of the impugned order of the CESTAT clearly reveals that the question as regards the competence of the Commissioner to authorize filing an appeal while acting under Section 84, had been raised by the

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department and by virtue of the powers conferred under Section 35C of the Central Excise Act, 1944 and in the light of the judgment in the cases of *the Commissioner of Income Tax, Madras vs. The Mahalakshmi Textile Mills Ltd.* **AIR 1968 SC 101** and *Commissioner of Income-tax vs. Calcutta Discount Company Ltd.* **[1971][82 ITR 941 (Cal)]**, it is held that the Tribunal can enlarge the scope of controversy under the said provision if urged by the parties and allowed by the Tribunal, which appears to be so in the facts and circumstances of the case.

26. In the above facts and circumstances, I find no merit in the appeal.

27. In the result, the appeal is dismissed and the order of the CESTAT stands hereby confirmed.

No order as to costs.

(S. P. Wangdi)
Acting Chief Justice
07.03.2011

Index : Yes/~~No~~

Internet : Yes/~~No~~