

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH.

S.T.A. No.51 of 2010
Date of decision: 6.4.2011

Commissioner of Central Excise Commissionerate.

-----Appellant.

Vs.

M/s Shiva Builders.

-----Respondent.

**CORAM:- HON'BLE MR. JUSTICE ADARSH KUMAR GOEL
HON'BLE MR. JUSTICE AJAY KUMAR MITTAL**

Present:- Mr. Sukhdev Sharma, Advocate
for the appellant.

ADARSH KUMAR GOEL, J.

1. This appeal has been preferred by the revenue under Section 35G of the Central Excise Act, 1944 (for short, "the Act") against the order of the Customs Excise and Service Tax Appellate Tribunal dated 21.5.2010 in Appeal No.197/10, Annexure A-4, claiming following substantial question of law:-

"Whether the Commissioner can pass Order-In-Revision under Section 84 of the Finance Act, 1994, on an issue when the appeal decided by the Commissioner (Appeal) is entirely on different issue?"

2. The assessee is a builder and is covered by the provisions relating to levy of service tax under the Finance Act,

1994. A Show Cause Notice was issued alleging evasion of service tax and for levy of penalty and thereafter, Order-in-Original dated 13.6.2008 was passed against the assessee. The assessee filed an appeal which was allowed only in respect of the penalty. Simultaneously, *suo motu* revisional jurisdiction was exercised by the Commissioner under Section 84(1) of the Finance Act, 1994 enhancing the liability of the assessee. The assessee challenged the said order on the ground that exercise of *suo motu* revisional jurisdiction when an appeal had been filed was barred under Section 84(4) of the Finance Act, 1994. This plea has been upheld by the Tribunal, as follows:-

“Heard both sides and perused the records. We are not in agreement with the revenue’s submission, when we find that revenue did not wait to initiate suo-moto revision proceedings after examination of the appellate order passed by the Id. Commissioner (Appeals). Within two months of passing of the order by the appellate authority on 16.06.2009, while first appellate order was passed on 16.04.2009. Similar such cases are coming before us frequently. It is embarrassing for us to declare exercise of jurisdiction by one Commissioner is bad and by the other good. But in this case we are compelled to declare that the Revisional order was unsustainable following the judgment of the Hon’ble High Court of Rajasthan in the case cited (supra). When we noticed that this case is of similar nature, what that was before the Hon’ble High Court of Rajasthan, where the first appellate order was passed on 13.10.2004 and notice for revision was issued on 12.08.2005, we dispose the

appeal of the appellant as allowed, so also dispose the stay application.”

Order of Rajasthan High Court referred in the order of the Tribunal is **Union of India v. Inani Carriers** 2009(13) STR 230 (Raj).

3. We have heard learned counsel for the revenue.
4. Learned counsel for the revenue submits that the issue in appeal before the Commissioner (Appeals) related only to validity of Order-in-Original levying service tax and not to enhancement thereof and thus, Section 84(4) of the Finance Act, 1994 could not apply.
5. We are unable to accept the submission. Section 84 of the Finance Act, 1994 to the extent relevant is as under:-

“(1) The Commissioner of Central Excise may call for records of a proceeding under this chapter which has been taken by the subordinate to him and may make such inquiry or cause such inquiry to be made and subject to the provisions of this chapter, pass such order thereon as he thinks fit.

(2) xx xx xx xx xx

(3) xx xx xx xx xx

(4) No order under this section shall be passed by the Commissioner of Central Excise in respect of any issue if an Appeal against such issue is pending before the Commissioner of Central Excise (Appeal).

(5) No such order under this section shall be passed after the expiry of two years from the date of which the order sought to be revised has been passed.”

A perusal of above provision shows that if any issue is pending in appeal, the revisional jurisdiction could not be exercised. No doubt in the appeal of the assessee, the issue was only validity of Order-in-original, by virtue of Section 35A(3) of the Central Excise Act, 1944, the Commissioner (Appeals) could also go into the question of higher liability of the assessee. The said provision is as under:-

“35A. Procedure in appeal.

(3) The Commissioner (Appeals) shall, after making such further inquiry as may be necessary, pass such order as he thinks fit confirming, modifying or annulling the decision or order appealed against;

Provided that an order enhancing any penalty or fine in lieu of refund shall not be passed unless the appellant has been given a reasonable opportunity of showing cause against the proposed order:

Provided further that where the Commissioner (Appeals) is of opinion that any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, no order requiring the appellant to pay any duty not levied or paid, short-levied or short-paid or erroneously refunded shall be passed unless the appellant is given notice within the time limit specified in section 11 A to show cause against the proposed order.”

6. In view of above provision, even higher liability of the assessee had to be treated to be in issue before the Commissioner (Appeals). Thus, exercise of revisional jurisdiction

under Section 84(4) of the Finance Act, 1994 when appeal had been preferred was not permissible. The view taken by the Tribunal is consistent with above statutory provision.

7. No substantial question of law arises.

The appeal is dismissed.

(ADARSH KUMAR GOEL)
JUDGE

April 06, 2011
ashwani

(AJAY KUMAR MITTAL)
JUDGE



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