

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE  
TRIBUNAL, KOLKATA  
EASTERN ZONAL BENCH : KOLKATA**

REGIONAL BENCH - COURT NO.1

**Excise Appeal No.171 of 2010**

(Arising out of Order-in-Appeal No.124/CE/BBSR-I/2009 dated 11.12.2009 passed by Commissioner(Appeals), Central Excise, Customs & Service Tax, Bhubaneswar.)

**M/s. Gannon Dunkerly & Co.Ltd.**

(At/PO:- Rayagada-766001, Dist: Rayagada, Orissa.)

**...Appellant**

*VERSUS*

**Commissioner of CGST & CX, Bhubaneswar-I Commissionerate**

**.....Respondent**

(Central Revenue Building, Rajaswa Vihar, Bhubaneswar-751007.)

**APPEARANCE**

Shri Sagar Chowdhury, Advocate for the Appellant (s)

Shri S.Mukhopadhyay, Authorized Representative for the Revenue

**CORAM: HON'BLE SHRI ASHOK JINDAL, MEMBER(JUDICIAL)**

**HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)**

**FINAL ORDER NO. 75960/2023**

DATE OF HEARING : 1 June 2023  
DATE OF DECISION : 07, July, 2023

**Per : ASHOK JINDAL :**

The appellant is in appeal against the impugned order wherein benefit of the exemption Notification No.108/95-CE dated 28.08.1995 was denied.

2. The facts of the case are that the appellant is manufacturer of PSC Sleepers and dispatched the sleepers to M/s. Rail Vikas Nigam Ltd. on payment of excise duty for railway projects which was funded by Asian Development Bank.

3. Subsequently, the revenue accorded them a permission to avail the exemption under Notification No.108/95-CE dated 28.08.1995. In terms of Notification No.108/95-CE dated 28.08.1995, the condition is that the said Notification requires production of certificate to the

jurisdictional authority before clearance. Admittedly in this case the clearance were effected on 15.02.2008 and the certificate was produced only on 20.02.2008, therefore, the refund claim filed by the appellant for their earlier clearances was denied to the appellant. Against the said order the appellant is before us.

4. The Ld.Counsel appearing on behalf of the appellant submits that initially the Deputy Commissioner of Central Excise & Service Tax, Raigada Division sanctioned their refund claim, but an appeal was filed against the said order and the Commissioner(Appeals) set aside the order of sanctioning the refund claim for non-fulfillment of the condition of the Notification No.108/95-CE dated 28.08.1995. It is his submission that the Deputy Commissioner who was the adjudicating authority has filed the appeal before the Ld.Commissioner(Appeals). The adjudicating authority cannot file appeal against its own order as the adjudicating authority being not an aggrieved person, therefore, the impugned order is not sustainable.

5. On merits, he submits that the issue as to whether the assessee could have produced certification of exemption after clearance or not. It is his submission that initially adjudicating authority held this question in favour of the appellant and the Commissioner reversed the decision of the original authority not on this ground, therefore, the finding of the original authority in this regard has attained finality. Further he relied on the decision of the Hon'ble Apex Court in the case of Commissioner of Customs (Imports) Mumbai v. Tullow India Operations Ltd. [2005 (189) ELT 401 (SC)] that even production of certificates post facto is permissible in law. Therefore, he prayed that the impugned order is to be set aside.

6. On the other hand the Ld.Authorized Representative for the department contended that the objection raised by the Ld.Counsel with regard to filing appeal by the adjudicating authority before the Ld.Commissioner is not correct in terms of section 35E(2) of the Central Excise Act, 1944 wherein the adjudicating authority is empowered to file appeal before the Ld.Commissioner(Appeals). On merits, he submits

that the Hon'ble Rajasthan High Court in the case of H.R. Steels Pvt.Ltd. v. Commissioner of Central Excise, Jaipur-I [2019 (368) ELT 52 (Raj.)] has examined the issue with regard to production of certificate after clearance and in that case the Hon'ble High Court answered in negative holding that certificate produced after goods are cleared, the benefit of Notification is not available. The said decision was affirmed by the Hon'ble Apex Court as reported in 2019 (368) ELT A-34 (SC). Further the same view was taken by the Hon'ble Rajasthan High Court in the case of Ashoka Industries v. CCE-I [2016 (342) ELT 37 (Raj.)]. Therefore, the appeal is to be dismissed.

7. Heard the parties, considered the submissions.

8. After hearing both sides we find that two issues emerge to be answered by us.

(a) This appeal under section 35E of the Central Excise Act, 1944 before the Ld.Commissioner(Appeals) filed by the adjudicating authority being aggrieved person is maintainable or not?

(b) Whether production of certificate after clearance of the goods the appellant is entitled for the benefit of exemption Notification No.108/95-CE dated 28.08.1995 or not?

(a) This appeal under section 35E of the Central Excise Act, 1944 before the Ld.Commissioner(Appeals) filed by the adjudicating authority being aggrieved person is maintainable or not.

9. Section 35E of the Central Excise Act, 1944 deals with the provisions of filing of appeal by the revenue before the higher authorities. For better appreciation, the provisions of section 35E(2) are extracted below:-

SECTION 35E. Powers of [Committee of Chief Commissioners of Central Excise] or [Principal Commissioner of Central Excise or Commissioner of Central Excise] to pass certain orders. —

.....

(2) The [Principal Commissioner of Central Excise or Commissioner of Central Excise] may, of his own motion, call for and examine the record of any proceeding in which an adjudicating authority subordinate to him has passed any decision or order under this Act for the purpose of satisfying himself as to the legality or propriety of any such decision or order and may, by order, direct [such authority or any Central Excise Officer subordinate to him] to apply to the [Commissioner (Appeals)] for the determination of such points arising out of the decision or order as may be specified by the [Principal Commissioner of Central Excise or Commissioner of Central Excise] in his order.

10. On going through the said provisions we find that the Commissioner of Central Excise (Appeals) may direct such authority to apply to the Commissioner(Appeals) for determination of such point arising out of a decision or order which means that the Commissioner can direct the adjudicating authority to file appeal before the Ld.Commissioner(Appeals).

11. Therefore, the provisions of the Central Excise Act are very much clear that the Commissioner of Central Excise can direct the Deputy Commissioner who has adjudicated the matter to file before the Ld.Commissioner(Appeals). Therefore, we hold that the Deputy Commissioner has rightly filed the appeal before the Ld.Commissioner(Appelas) in terms of section 35E(2) of the Central Excise Act, 1944. Hence the issue A is answered in favour of the revenue.

(b) Whether production of certificate after clearance of the goods the appellant is entitled for the benefit of exemption Notification No.108/95-CE dated 28.08.1995 or not.

12. It is a fact on record that Notification No.108/95-CE dated 28.08.1995 allows the benefit of duty free clearance provided that before clearance of the said goods, the manufacturer produce before the Assistant Commissioner of Central Excise having jurisdiction over

their factory a certificate from United Nation or an international organization that the said goods are intended for official use by the United Nations or the international organization or are to be supplied to a project financed by the said United Nations or the international organization and the said project has duly been approved by the Government of India. Admittedly in the case in hand, the appellant has not produced the certificate before the Assistant Commissioner of Central Excise before the clearance of the goods in question. Therefore, it is to be seen that the certificate produced later on, the appellant is entitled for benefit of the said Notification or not.

13. The appellant has relied on the decision of Tullow India Operations Ltd. (supra) wherein the Hon'ble Apex Court has held that post facto production of certificate entitles to get exemption. In the case of H.R. Steels Pvt.Ltd. (supra) the issue before the Hon'ble Apex Court was that whether the assessee has complied with the condition of Notification No.108-95-CE dated 28.08.1995 or not was raised by the Ld.Counsel for the appellant, but the Hon'ble High Court held that no substantial question of law arises and even otherwise the certificate ought to have been in MOP or no substantive argument for ANS has purchased the material from the present appellant. But the Hon'ble High Court has not answered the question whether the certificate produced by the assessee after clearance of the goods is entitled for the benefit of the same or not? Therefore, the decision is not applicable to the facts of this case. Further, in the case of Ashoka Industries (supra), the Hon'ble High Court discarded the photocopy of the certificate which is not the issue in hand.

14. Therefore, in the case of Tullow India Operations Ltd. (supra) which the appellant have relied the Hon'ble Apex Court held that eligibility criteria deserves strict construction although construction of the condition thereof may be given a liberal meaning. It was also held that once the assessee satisfies the eligibility clause, the exemption clause therein may be construed liberally. Further, it was held that it is well settled that Legislature always intends to avoid hardship. In a

situation of this nature, the exemption notification cannot be construed in a way which would prove to be oppressive in nature.

15. Admittedly in the case in hand the appellant has produced the certificate although late but the said certificate fulfills the criteria of exemption available to the appellant therefore following the decision in the case of Tullow India Operations Ltd. (supra) we hold that the appellant is entitled to take benefit of exemption Notification No.108/95-CE dated 28.08.1995.

In view of this we allow the appeal with consequential relief, if any, by setting aside the impugned order.

(Order pronounced in the open court on 07 July, 2023.)

Sd/  
**(ASHOK JINDAL)**  
**MEMBER (JUDICIAL)**

Sd/  
**(K. ANPAZHAKAN)**  
**MEMBER (TECHNICAL)**