

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. I

SERVICE TAX APPEAL NO. 50949 OF 2021

(Arising out of Order-in-Appeal No. 161(SM)ST/JPR/2021 dated 31.03.2021 issued vide C. No. APPL/JPR/ST/AL/208/V/18/5352 dated 10.05.2021 passed by the Commissioner (Appeals), Central Excise & CGST, Jaipur)

M/s KEI Industries Limited

SP-919, 920, 922, Phase-III,
RIICO Industrial Area, Bhiwadi,
Dist-Alwar (Raj.)-301109

...Appellant

versus

**Commissioner (Appeals), C.E. &
CGST, Jaipur**

NCRB, C Scheme, Statue Circle,
Jaipur- 302005

...Respondent

APPEARANCE:

Shri B.L. Narsimhan and Ms. Poorvi Asati, Advocates for the Appellant

Shri Ajay Jain, Special Counsel and Shri Harshvardhan, Authorized Representative for the Respondent

CORAM:

**HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)**

Date of Hearing: 14.12.2022

Date of Decision: 06.01.2023

FINAL ORDER NO. 50014/2023

JUSTICE DILIP GUPTA:

M/s. KEI Industries Limited¹ has assailed the order dated 31.03.2021 passed by the Commissioner (Appeals), Central Excise & CGST, Jaipur² in the appeal filed by the appellant against the order dated 19.03.2018 passed by the Additional Commissioner. The Additional Commissioner, by the said order, adjudicated the show cause notice dated 07.09.2017 issued for the period from October 2014 to June 2017 and confirmed the demand of Rs.1,70,89,498/- with interest and penalty. The Commissioner (Appeals), however,

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- 1. the appellant**
 - 2. the Commissioner (Appeals)**

after issuing a fresh notice dated 29.12.2020 to the appellant by exercising powers under section 85 (4) of the Finance Act 1994³ read with the second proviso to section 35A (3) of the Central Excise Act 1944⁴ and section 73 of the Finance Act confirmed the demand of Rs.37,05,65,104/- proposed in the notice dated 29.12.2020 with interest and penalty.

2. The appellant is engaged in the manufacture of winding wire, plastic cable and SS wire. In addition to the manufacturing activity, the appellant is also engaged in providing turnkey project services and erection and commissioning services, mainly to electricity distribution companies.

3. It transpires from the records that earlier, pursuant to an audit of the records of the appellant, a show cause notice dated 07.09.2017 was issued to the appellant proposing a demand of Rs. 1,70,89,498/- under rule 6(3A) of the CENVAT Credit Rules, 2004⁵ on the ground that apart from manufacturing excisable goods (on which appropriate excise duty was paid) and provision of output services (on which appropriate service tax was paid), the appellant was also engaged in trading of goods in such turnkey projects, which would qualify as 'exempted service' and accordingly, CENVAT credit was liable to be reversed under rule 6(3A) of the 2004 Credit Rules. The proposed demand of Rs. 1,70,89,498/- was confirmed by the Additional Commissioner by the order dated 19.03.2018 with interest and penalty.

4. Feeling aggrieved, the appellant filed an appeal before the Commissioner (Appeals). During the course of hearing, the

3. the Finance Act
4. the Excise Act
5. the 2004 Credit Rules

Commissioner (Appeals) entertained a view that the appellant had short-paid service tax on turnkey projects, but as this was not a matter covered by the show cause notice dated 07.09.2017, the Commissioner (Appeals) purported to exercise powers conferred on Commissioner (Appeals) under the second proviso to section 35A(3) of the Excise Act read with section 73 of the Finance Act and issued a fresh notice dated 29.12.2020 to the appellant proposing a demand of service tax of Rs. 37,05,65,014/- for short payment of service tax for the period from October 2014 to June 2017 with interest and penalty. The Commissioner (Appeals) also invoked the extended period of limitation contemplated under the second proviso to section 73(1) of the Finance Act. The relevant portion of the show cause notice dated 29.12.2020 is reproduced below:

"4. During the course of examination of the appeal memo and other relevant documents furnished by the assessee alongwith the appeal memo, it was observed that besides the manufacturing activity the assessee is also engaged in the execution of Turnkey Projects for various service receivers and it appeared that the assessee has not computed the proper service tax payable on execution of such Turnkey Projects resulting in short payment of Service Tax.

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5.4 Accordingly, in terms of the second proviso to Section 35A(3) of the Central Excise Act, 1944, as made applicable in Service tax matters read with Section 73 of the Finance Act and Section 6 of the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions)Act, 2020, instant notice is being served upon to the assessee on issue of the short payment of service tax as enumerated hereunder.

6. On scrutiny and examination of the appeal memo and other relevant documents furnished by the

assessee, it was observed that besides the manufacturing activity the assessee is engaged in the execution of Turnkey Projects for various service receivers and it appeared that **the assessee has not computed the proper service tax payable on execution of such Turnkey Projects resulting in short payment of Service Tax amounting to Rs. 37,05,65,014/- during the period October, 2014 to June, 2017 (Annexure-A) (RUD-1)** in contravention of the provisions of Section 66B, 67,68 of the Finance Act, 1994 read with rules made thereunder.

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20. From the above, it appears that, the assessee failed to discharge the service tax liability as discussed in the preceding paragraphs. xxxxxxx. **It appears that there has been a deliberate act by the assessee to suppress their correct taxable value in order to intentionally short pay and evade the service tax payment to the Govt. exchequer and not following the provisions of the law.** Had the department not initiated the inquiry/investigation against them in the instant case, the said short payment of Service Tax would have remained unnoticed and unearthed, therefore, the extended period of limitation as contained under the proviso to Section 73(1) of the Finance Act, 1994 read with Section 6 of The Taxation And Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020, appears to be invocable in the instant case for recovery of Service tax amounting to Rs. 37,05,65,014/- read with Section 73A of the Finance Act, 1944. **Further interest for non-payment of Service Tax within the stipulated period, also appears to be recoverable from them in terms of Section 75 of the Act and since the assessee appear to have contravened the provisions of the Act & Rules referred above with intention to evade service tax, they also appear to be liable to penalty under Section 77 and 78 of the Finance Act."**

(emphasis supplied)

5. The appellant filed a reply to the said show cause notice and also filed additional submissions.

6. The Commissioner (Appeals) found that the appellant had exorbitantly enhanced the value of goods and reduced the value of service portion in the turnkey projects and so the valuation of the activities for the period from October 2014 to June 2017 was required to be undertaken under rule 2A(ii)(A) of the Service Tax (Determination of Value) Rules 2006⁶. The Commissioner (Appeals), therefore, by the order dated 31.03.2022, confirmed the service tax demand of Rs.37,05,65,014/-.

7. This appeal has been filed to assail the aforesaid order dated 31.03.2021 passed by the Commissioner (Appeals) primarily on the ground that the Commissioner (Appeals) did not have the jurisdiction to issue the show cause notice 29.12.2020 by purporting to exercise powers under the second proviso to section 35A (3) of the Excise Act.

8. To examine this contention, it will be useful to refer to the relevant provisions of the Finance Act and the Excise Act.

9. Chapter V of the Finance Act deals with Service Tax and contains sections from 64 to 96. **Section 83** of the Finance Act provides that certain sections of the Excise Act shall apply, so far as may be, in relation to service tax as they apply in relation to a duty of excise. Section 35A of the Excise Act is not a section mentioned in section 83 of the Finance Act.

10. **Section 73** of the Finance Act deals with recovery of service tax not levied or paid or short levied or short paid or erroneously refunded and the relevant portion of this section is reproduced below:

6. **the 2006 Valuation Rules**

“73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded.

(1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may, within thirty months from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

PROVIDED that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of—

- (a) fraud; or
- (b) collusion; or
- (c) wilful mis-statement; or
- (d) suppression of facts; or
- (e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax, by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words “thirty months”, the words “five years” had been substituted.

Explanation.— Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of thirty months or five years, as the case may be.

(1A) Notwithstanding anything contained in sub-section (1) (except the period of thirty months of serving the notice for recovery of service tax), the Central Excise Officer may serve, subsequent to any notice or notices served under that sub-section, a statement, containing the details of service tax not levied or paid or short levied or short paid or erroneously refunded for the subsequent period, on the person chargeable to service tax, then, service of such statement shall be deemed to be service of notice on such person, subject to the condition that the grounds

relied upon for the subsequent period are same as are mentioned in the earlier notices.

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(2) The Central Excise Officer shall, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), **determine the amount of service tax due from, or erroneously refunded to, such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined."**

(emphasis supplied)

11. **Section 85** of the Finance Act deals with appeals to the Commissioner of Central Excise (Appeals). Sub-section (1) of section 85 provides that any person aggrieved by any decision or order of an adjudicating authority may appeal to the Commissioner of Central Excise (Appeals). Sub-section (3) deals with the limitation for filing an appeal. Sub-sections (4) and (5) of section 85, which are relevant for the purposes of this appeal, are reproduced below:

"85. Appeals to the Commissioner of Central Excise (Appeals).

(1) xxxxxxxxxxxx

(2) xxxxxxxxxxxx

(3) xxxxxxxxxxxx

(3A) xxxxxxxxxxxx

(4) The Commissioner of Central Excise (Appeals) shall hear and determine the appeal and, subject to the provisions of this Chapter, pass such orders as he thinks fit and such orders may include an order enhancing the service tax, interest or penalty:

PROVIDED that an order enhancing the service tax, interest or penalty shall not be made unless the person affected thereby has been given a reasonable opportunity of showing cause against such enhancement.

(5) Subject to the provisions of this Chapter, in hearing the appeals and making order under this section, the Commissioner of Central Excise (Appeals) shall exercise the same powers and follow the same procedure as he exercises and follows in hearing the appeals and making orders under the Central Excise Act, 1944 (1 of 1944).”

12. It would be seen that sub-section (4) of section 85 of the Finance Act provides that the Commissioner (Appeals) shall hear and determine the appeal and pass such orders as he thinks fit and such orders may include an order enhancing the service tax, interest or penalty. Sub-section (5) of section 85 of the Finance Act provides that subject to the provisions of Chapter V of the Finance Act, in hearing the appeals and making order under section 85, the Commissioner (Appeals) shall exercise the same powers and follow the same procedure as he exercises and follows in hearing the appeals and making orders under the Excise Act.

13. **Section 35** of the Excise Act deals with appeals to Commissioner (Appeals), while **section 35A** deals with the procedure in appeal. The relevant portion of section 35A of the Excise Act, is reproduced below:

“Section 35A. Procedure in appeal.-

(1) xxxxxxxx

(2) xxxxxxxx

(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 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 11A to show cause against the proposed order.

14. At this stage, what needs to be remembered is that the Commissioner (Appeals), in an appeal filed by the appellant to assail the order passed by the Additional Commissioner confirming the demand of service tax while adjudicating the notice dated 07.09.2017, proceeded to issue a fresh notice dated 29.12.2020 to the appellant on allegations not contained in the earlier notice dated 07.09.2017 by purporting to exercise powers under the second proviso to section 35A(3) of the Excise Act read with the second proviso to section 85(3) and section 73 of the Finance Act.

15. The issue, therefore, that would arise for consideration in this appeal is whether the powers conferred upon the Commissioner (Appeals) under the second proviso to section 35A(3) of the Excise Act could have been exercised by the Commissioner (Appeals), while hearing an appeal under section 85 of the Finance Act against an order confirming the demand of service tax proposed in the show cause notice, to issue a fresh notice to the appellant under section 73 of the Finance Act.

16. Shri B.L. Narasimhan, learned counsel for the appellant made the following submissions:

- (i)** The Commissioner (Appeals), while hearing an appeal under section 85 of the Finance Act against the order passed by the Additional Commissioner, did not have the jurisdiction to issue a fresh notice to the appellant by exercising powers under the second proviso to section 35A(3) of the Excise Act. Elaborating this submission, learned counsel pointed out that while hearing an appeal, the Commissioner (Appeals) has the power under sub-section (4) of section 85 of the Finance Act to pass such orders as he thinks fit and such orders may include an order enhancing the service tax, interest or penalty and though sub-section (5) of section 85 provides that the Commissioner of Central Excise (Appeals) shall exercise the same powers and follow the same procedure as he exercises and follows in hearing the appeals and making orders under the Excise Act, but the said powers are subject to the provisions of Chapter V of the Finance Act;
- (ii)** From a combined reading of sub-sections (4) and (5) of the Finance Act, it is clear that a reasonable opportunity of showing cause has to be given by the Commissioner (Appeals) before enhancing the service tax, interest or penalty but such enhancement has to be within the bounds of the subject-matter of the notice already issued and a fresh notice cannot be issued by Commissioner

(Appeals). In other words, only such powers provided under the Excise Act can be exercised by the Commissioner (Appeals) which are not in conflict with the provisions of Chapter V of the Finance Act. In support of this contention reliance has been placed on the decisions of the Supreme Court in **South India Corporation (P) Ltd. (In all Appeals) vs. Secretary, Board of Revenue Trivandrum and Another**⁷ and **Union of India vs. Brigadier P.S. Gill**⁸;

- (iii) This interplay between the provisions of section 85(4) of the Finance Act and section 35A of the Excise Act came up for interpretation before the Gujarat High Court in **Commissioner of Service Tax vs. Associated Hotels Ltd.**⁹ and the Madras High Court in **A. S. Babu Sah Designs vs. Commissioner of C. Ex. (Appeals), Chennai-1**¹⁰ and before the Tribunal in **Commissioner of Service Tax, Delhi vs. World Vision**¹¹, wherein it was observed that sub-section (3) of section 35A of the Excise Act cannot be superimposed into sub-section (5) of section 85 of the Finance Act;
- (iv) The demand proposed in the notice issued by the Commissioner (Appeals) is on a completely new

7. AIR 1964 SC 207
8. 2012 (279) E.L.T. 321 (S.C.)
9. 2015 (37) S.T.R. 723 (Guj.)
10. 2020 (38) G.S.T.L. 161 (Mad.)
11. 2010 (20) S.T.R. 49 (Tri.-Del.)

and fresh issue, which is beyond the subject-matter of original notice;

- (v) A person cannot be placed in a worse position as a result of filling of an appeal and in support of this contention reliance has been placed upon the judgment of the Madras High Court in **Servo Packaging Ltd. vs. CESTAT, Chennai**¹²;
- (vi) In any case, the findings recorded by the Commissioner (Appeals) in the impugned order to confirm the demand of service tax in the notice dated 29.12.2020 are not only incorrect but have also been incorrectly computed; and
- (vii) The extended period of limitation could not have been invoked by the Commissioner (Appeals) in the facts and circumstances of the case.

17. Shri Ajay Jain, learned special counsel appearing for the department assisted by Shri Harshvardhan, learned authorised representative appearing for the department, however, supported the impugned order and made the following submissions:

- (i) In view of the second proviso to section 35A(3) of the Excise Act and sub-section (5) of section 85 of the Finance Act, where the Commissioner (Appeals) is of opinion that any service tax has been short paid, he can pass an order confirming the demand of such short paid tax after giving the appellant a notice within time limit specified in

12. 2016 (340) E.L.T. 6 (Mad.)

section 73 of the Finance Act. Thus, there are no fetters on Commissioner (Appeals) to restrict himself only to the grounds which had been brought before him in the appeal;

- (ii)** The decisions relied upon by learned counsel for the appellant are distinguishable and would not be applicable to the facts of the present case;
- (iii)** Even if it is contended that the provisions of section 35A(3) of the Excise Act are not applicable to section 85 of Finance Act, the powers of Commissioner (Appeals) under section 85 of the Finance Act are very wide as he can pass such orders as he thinks fit and there is no restriction on the power of Commissioner (Appeals) to issue a fresh notice; and
- (iv)** The appellant is not correct in stating that the service tax liability had been correctly discharged or that the extended period of limitation was not correctly invoked.

18. The contentions advanced by the learned counsel for the appellant and the learned special counsel for the department have been considered.

19. As noticed above, section 85 of the Finance Act deals with appeals to the Commissioner (Appeals) and provides that any person aggrieved by any decision of the adjudicating authority may appeal to the Commissioner (Appeals). Sub-section (4) provides that the Commissioner of Central Excise (Appeals) shall hear and determine

the appeal and, subject to the provisions of Chapter V, pass such orders as he thinks fit and such orders may include an order enhancing the service tax, interest or penalty, but such an order enhancing the service tax, interest or penalty shall not be made unless the person affected thereby has been given a reasonable opportunity of showing cause against such enhancement. Sub-section (5) of section 85, however, provides that, subject to the provisions of Chapter V of the Finance Act, the Commissioner (Appeals) shall exercise the same powers and follow the same procedure as he exercises and follows in hearing the appeals and making orders under the Excise Act. It is section 35(A) of the Excise Act that deals with procedure of appeals before the Commissioner (Appeals). Sub-section (3) of section 35A of the Excise Act provides that 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 but an order enhancing any penalty or fine in lieu of confiscation 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. The second proviso to section 35A(3), however, further provides 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 11A to show cause against the proposed order.

20. The submission of learned counsel for the appellant is that since sub-section (4) of section 85 of the Finance Act contains a detailed procedure for hearing and determining the appeal and the procedure followed by the Commissioner (Appeals) under the Excise Act has been made applicable, subject to the provisions of Chapter V of the Finance Act, (which would include section 83 and sub-section (4) of section 85 of the Finance Act), the power available to a Commissioner (Appeals) under the second proviso to sub-section (3) of section 35A of the Excise Act to issue a fresh notice would not be available to a Commissioner (Appeals) under sub-section (4) of section 85 of the Finance Act as it would be in conflict with the provisions of section 83 and sub-section (4) of section 85 of the Finance Act.

21. The contention of learned special counsel for the department, however, is that there is no reason to restrict the power of the Commissioner (Appeals) while hearing an appeal under the Finance Act to sub-section (4) of section 85 and exclude the power of the Commissioner (Appeals) under the second proviso to sub-section (3) of section 35A of the Excise Act, as made applicable by virtue of sub-section (5) of section 85 of the Finance Act, to issue a fresh notice and in any event sub-section (4) of section 85 the Finance Act is wide enough to confer power on the Commissioner (Appeals) to issue a fresh notice demanding service tax that was short paid.

22. The second contention of the learned special counsel appearing for the department that there is enough power with the Commissioner (Appeals) under sub-section (4) of section 85 of the Finance Act to issue a notice to the appellant requires to be examined first, because if this is decided in favour of the department, it may not be necessary to examine the first contention raised on behalf of the department.

23. To examine this contention, it is necessary to examine the provisions of section 85 (4) of the Finance Act. It provides that the Commissioner (Appeal) shall hear and determine the appeal and **pass such orders as he can thinks fit** and such order **may include** an order enhancing the service tax, interest or penalty. It is no doubt true that the Commissioner (Appeals) has wide powers because of the use of the phrase 'pass such orders as he can thinks fit', particularly when it is contrasted with the provisions of sub-section (3) of section 35A of the Excise Act which provides that the Commissioner (Appeals) shall pass such order, as he can thinks just and proper, confirming, modifying or annulling the decision or order appealed against. In the latter case, the powers of the Commissioner (Appeals) under section 35A of the Excise Act to pass such orders, as he can thinks just and proper, would be confined to confirming, modifying or annulling the decision or order appealed against. Such a limitation is not contained in sub-section (4) of section 85 of the Finance Act as the Commissioner (Appeals) can pass such orders as he thinks fit and such orders may include an order enhancing the service tax and interest or penalty. Such wide powers conferred upon the Commissioner (Appeals) have been held to include the power to remand matters to the adjudicating authority, even though such a power has not been expressly stated and is not available to a Commissioner (Appeals) under sub-section (3A) of section 35 of the Excise Act after it was amended on 11.05.2001. This is what was observed by the Gujarat High Court in **Associated Hotels** and the Madras High Court in **A. S. Babu Sah Designs**.

24. The issue, however, that arises for consideration in this appeal is whether such wide powers conferred upon the Commissioner

(Appeals) under sub-section (4) of section 85 of the Finance Act would include a power to issue a notice to the appellant if he is of the opinion that any service tax has been short levied and thereby require the appellant to show cause why he should not pay the amount specified in the notice.

25. To examine this issue, the elementary principle that a notice is the foundation for levy of tax and the adjudicating authority or the appellate authority cannot go beyond the issues raised in the show cause notice, needs to be remembered.

26. In **Commissioner of Central Excise, Nagpur vs. Ballarpur Industries Ltd.**¹³, the Supreme Court observed that it is well settled that a show cause notice is the foundation in the matter of levy and recovery of duty, penalty and interest and if Rule 7 of the Valuation Rules, 1975 was not invoked in the show cause notice, it would not be open to the Commissioner to invoke the said Rule.

27. The same view was reiterated by the Supreme Court in **Commissioner of Central Excise, Bangalore vs. Brindavan Beverages (P) Ltd**¹⁴.

28. In **Nestor Pharmaceuticals Ltd. vs. Commissioner of Central Excise, Delhi**¹⁵, a Division Bench of the Tribunal observed that the Commissioner (Appeals) cannot go beyond the scope of the show cause notice and that no matter can be decided on a ground other than the grounds raised in the show cause notice and for this reason the impugned order was set aside.

13. (2007) 8 (2007) 8 SCC 89

14. Appeal (Civil) 3417-3425 of 2002 decided on 15.06.2007

15. 2000 (116) E.L.T. 477 (Tribunal)

29. In **Tata Johnson Controls Automotive vs. Commissioner of Customs, Mumbai** ¹⁶ a Division Bench of the Mumbai Tribunal observed that it was not open to the Commissioner (Appeals) to make out a new case in the order passed by the Commissioner and, therefore, the order passed by the Commissioner (Appeals) was set aside on this ground alone.

30. No matter how wide the powers of the Commissioner (Appeals) may be under section 85(4) of the Finance Act to pass such orders, as he thinks fit, but he cannot under sub-section (4) of section 85 assume to himself the power to issue a notice contemplated under section 73 (1) of the Finance Act to raise a demand unless such a power is specifically conferred upon him. It is imperative for the Commissioner (Appeals) to restrict himself to the appeal and he cannot travel beyond the allegations made in the show cause notice, irrespective of the width of the powers conferred upon him, for otherwise the order would be set aside on this ground alone.

31. The power to issue a notice is specifically provided for in section 73 (1) of the Finance Act. Once it is specifically so provided, it cannot be urged that this power to issue the notice would also be available under sub-section (4) of section 85 of the Finance Act to a Commissioner (Appeals) when he is hearing an appeal, merely because of the use of the expression 'pass such orders, as he thinks fit'. The Commissioner (Appeals) cannot assume to himself all the powers conferred under various sections of the Finance Act, only for the reason that he can 'pass such order, as he thinks fit'.

32. Learned special counsel for the department also contended that sub-section (4) of section 85 confers power of enhancement of service

16. 2004 (167) E.L.T. 93 (Tri.-Mum.)

tax, interest or penalty and, therefore, the notice dated 29.12.2020 that was issued by the Commissioner (Appeals) can be said to be in terms of the proviso to sub-section (4) of section 85 of the Finance Act.

33. The power of enhancement of service tax under the proviso to sub-section (4) of section 85 of the Finance Act has necessarily, for the reasons stated above, to be restricted to the subject matter of the notice that resulted in the adjudication order, against which the appeal was filed. It is for this reason that learned counsel for the appellant contented that under the first proviso to sub-section (4) of section 85 Finance Act, the Commissioner (Appeals) could enhance the service tax, interest or penalty by confining himself to the allegations made in the notice dated 07.09.2017 and this power would not include the power to issue a notice for enhancement of demand beyond the original show cause or on fresh ground. For instance, if the demand proposed in the show cause notice is for Rs. 100/- and the adjudicating authority confirms the demand for Rs. 75/- only, it will be open to the Commissioner (Appeals) to enhance the duty by another amount upto Rs. 25/-, after providing an opportunity to the appellant to show cause, even in an appeal filed by an assessee against the confirmation of demand of Rs. 75/-.

34. In this connection reliance can be placed on the decision of the Supreme Court in **Commissioner of Income Tax, Calcutta vs. Rai Bahadur Hardutroy Motilal Chamarai**¹⁷, wherein it was observed:

"The principle that emerges as a result of the authorities of this Court is that the Appellate Assistant Commissioner has no jurisdiction,

17. 2002-TIOL-756-SC-IT-LB

under section 31 (3) of the Act, to assess a source of income which has not been processed by the Income- tax Officer and which is not disclosed either in the returns filed by the assessee or in the assessment order, and therefore the Appellate Assistant Commissioner cannot travel beyond the subject- matter of the assessment. **In other words, the power of enhancement under section 31 (3) of the Act is restricted to the subject-matter of assessment or the sources of income which have been considered expressly or by clear implication by the Income-tax Officer from the point of view of the taxability of die assessee.** xxxxxxxxxxxx.

(emphasis supplied)

35. It is, therefore, not possible to accept the contention advanced by the learned special counsel appearing for the department that sub-section (4) of section 85 of the Finance Act itself confers enough powers on the Commissioner (Appeals) to issue a notice to raise a fresh demand of service tax short paid, in an appeal filed by the appellant against an adjudication order confirming the demand of service tax on the basis of an earlier notice.

36. It would now be necessary to examine the main contention advanced by learned counsel appearing for the appellant that the Commissioner (Appeals) would not have the power to issue a fresh notice demanding service tax short paid by the appellant in an appeal filed by the appellant to assail the order passed by the adjudicating authority confirming the demand of service tax on the basis of an earlier show cause notice.

37. To examine this issue, it would be necessary to once again examine the provisions of sub-section (5) of section 85, as reliance has been placed by the learned special counsel for the department on this sub-section. It provides that subject to the provisions of Chapter

V of the Finance Act, in hearing the appeals and making order under section 85, the Commissioner (Appeals) shall exercise the same powers and follow the same procedure as he exercises and follows in hearing the appeals and making orders under the Excise Act. In this connection, learned special counsel for the department placed reliance on the provisions of sub-section (3) of section 35A of the Finance Act that deals with the 'procedure in appeal'.

38. What needs to be noticed, in the first instance, is that section 35A is not included as one of the sections of the Excise Act made applicable in relation to service tax as they apply in relation to a duty of excise by section 83 of the Finance Act.

39. What also needs to be noticed is that sub-section (5) of section 85 begins with the phrase '**subject to the provisions of this Chapter**' and then states that in hearing the appeals and making orders under section 85, the Commissioner (Appeals) shall exercise the same powers and follow the same procedure as he exercises and follows in hearing the appeals and making orders under the Excise Act. Thus, the exercise of the powers by the Commissioner (Appeals), while hearing an appeal under sub-section (4) of section 85 of the Finance Act, are subject to the provisions of Chapter V of the Finance Act, which contains sections 66 to 96. The power available to a Commissioner (Appeals) under sub-section (5) of section 85 would, therefore, be subject to, amongst others, the provisions of sections 83 and sub-section (4) of section 85 of the Finance Act. The phrase 'subject to the provisions of this Chapter', therefore, assumes importance.

40. **P. Ramanatha Aiyar's 'The Law Lexicon-Third Edition 2012'** explains the meaning of the phrase 'subject to the provisions of this Act' in the following manner:

"The expression 'subject to the provisions of this Act' merely means that if there are any provisions regulating the Board in the matter of supplying electricity to any person not being a licensee, then the supply by the Board will be subject to those provisions. There is no provision which regulates the Board in the matter of the charges which it may fix for the supply of electricity.

The true scope of the limitation enacted in S. 90(2) (subject to the provisions of this Act) on the application of the procedure under the Civil Procedure Code (5 of 1908), is that when the same subject matter is covered both by a provision of the Act or the rules and also of the Civil Procedure Code, and there is a conflict between them, the former is to prevail over the latter. This limitation cannot operate, when the subject matter of the two provisions is not the same. Harish Chandra Bajpai v. Triloki Singh, AIR 1957 SC 444, 454."

41. The judgment of the Supreme Court in **Harish Chandra Bajpai vs. Triloki Singh**¹⁸ referred to in The Law Lexicon was in the context of section 90(2) of the Representation of Peoples Act, 1951. This section is reproduced below:

"90(2).Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the Tribunal, as nearly as may be, in accordance with the procedure application under the Code of Civil Procedure, 1908 (Act V of 1908), to the trial of suits."

42. And the relevant observation of the Supreme Court is reproduced below:

"The true scope of the limitation enacted in s. 90(2) on the application of the procedure under the Civil Procedure Code is that when the same subject-matter

18. 1957 AIR 444 decided on 21.12.1956

is covered both by a provision of the Act or the rules and also of the Civil Procedure Code, and there is a conflict between them, the former is to prevail over the latter.”

43. The expression ‘subject to other provisions of the Constitution’ was also examined by the Supreme Court in **South India Corporation (P) Ltd. (In all Appeals) vs. Secretary, Board of Revenue Trivandrum and Another**¹⁹ and it was held that the words "subject to other provisions of the Constitution" would mean that if there is a conflict between the pre-existing law and a provision or provisions of the Constitution, the latter shall prevail to the extent of that inconsistency. The Supreme Court also examined the expression ‘subject to’ and held that the expression "subject to" conveys the idea of a provision yielding place to another provision or other provisions to which it is made subject.

44. In **Union of India vs. Brigadier P.S. Gill**²⁰, the precise question that arose for consideration before the Supreme Court was whether an aggrieved party can file an appeal against a final decision or order of the Tribunal under section 30 of the Armed Forces Tribunal Act without taking resort to the procedure prescribed under section 31 of the said Act because of the expression ‘subject to the provisions of section 31’. The relevant provisions of section 30 and 31 of Armed Forces Tribunal Act are, therefore, reproduced below:

“30. Appeal to Supreme Court. - (1) Subject to the provisions of Section 31, an appeal shall lie to the Supreme Court against the final decision or order of the Tribunal (other than an order passed under Section 19):

Provided that such appeal is preferred within a period of ninety days of the said decision or order:

19. AIR 1964 SC 207

20. 2012 (279) E.L.T. 321 (S.C.)

Provided further that there shall be no appeal against an interlocutory order of the Tribunal.

(2) An appeal shall lie to the Supreme Court as of right from any order or decision of the Tribunal in the exercise of its jurisdiction to punish for contempt :

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31. Leave to appeal. - (1) An appeal to the Supreme Court shall lie with the leave of the Tribunal; and such leave shall not be granted unless it is certified by the Tribunal that a point of law of general public importance is involved in the decision, or it appears to the Supreme Court that the point is one which ought to be considered by that Court."

45. It is after an examination of the aforesaid two provisions that the Supreme Court held that section 31 would take primacy over the provisions of section 30 and, therefore, an appeal will lie to the Supreme Court only in accordance with the provisions of section 31 of the Armed Forces Tribunal Act. The relevant observations made by the Supreme Court are as follow:

"3. A plain reading of Section 30 would show that the same starts with the expression "subject to the provision of Section 31". Given their ordinary meaning there is no gainsaying that an appeal shall lie to this Court only in accordance with the provisions of Section 31.

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6. A conjoint reading of Sections 30 and 31 can lead to only one conclusion viz. there is no vested right of appeal against a final order or decision of the Tribunal to this Court other than those falling under Section 30(2) of the Act. The only mode to bring up the matter to this Court in appeal is either by way of certificate obtained from the Tribunal that decided the matter or by obtaining leave of this Court under Section 31 for filing an appeal depending upon whether this

Court considers the point involved in the case to be one that ought to be considered by this Court.

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11. There is in the light of the above decisions no gainsaying that Section 30 of the Act is by reason of the use of the words "subject to the provisions of Section 31" made subordinate to the provisions of Section 31. The question whether an appeal would lie and if so in what circumstances cannot, therefore, be answered without looking into Section 31 and giving it primacy over the provisions of Section 30. That is precisely the object which the expression "subject to the provisions of Section 31" appearing in Section 30(1) intends to achieve."

(emphasis supplied)

46. Thus, subject to the provisions of Chapter V of the Finance Act, would mean that if there are any provisions concerning the exercise of powers and the procedure to be followed by the Commissioner (Appeals) in Chapter V of the Finance Act, then they will prevail over the powers and the procedure to be followed by the Commissioner (Appeals) under the Excise Act. It also means that if there is a conflict or inconsistency between the two, the provisions of Chapter V of the Finance Act shall prevail.

47. It is keeping in mind the aforesaid discussion, that the relevant provisions of the Finance Act would have to be examined.

48. Sub-section (4) of section 85 of the Finance Act comprehensively deals with the powers of the Commissioner (Appeals) in hearing appeals and making orders. The provisions of sub-section (5) of section 85 of the Finance Act are subject to the provisions of Chapter V of the Finance Act, which would include sub-section (4) of section 85. In such a situation, when comprehensive

powers have been given to the Commissioner (Appeals) under sub-section (4) of section 85 of the Finance Act, the Commissioner (Appeals) would not have the power to issue a notice contemplated under section 73(1) of the Finance Act. This finds support from the judgments of Courts which have dealt with the provisions of sub-sections (4) and (5) of the Finance Act and section 35A (3) of the Excise Act, while examining the powers of the Commissioner (Appeals) under sub-section (4) of section 85, though in a different context relating to the power of remand to be exercised by the Commissioner (Appeals).

49. The Gujarat High Court in **Commissioner of Service Tax versus Associated Hotels Ltd.**²¹ examined the provisions of sub-sections (4) and (5) of the Finance Act as also sub-section (3) of section 35A of the Excise Act and observed that though sub-section (5) of section 85 of the Finance Act may require the Commissioner (Appeals) to follow the same procedure and exercise the same powers in making orders under section 85(4) of the Finance Act as under the Excise Act in appeals, but as sub-section (5) starts with the expression "subject to the provision of this Chapter" and sub-section (4) of section 85 of the Finance Act itself contains the width of the powers of the Commissioner (Appeals) in hearing the appeal under section 85, the scope of such power cannot be curtailed by reference to section 85 (5) of the Finance Act.

²¹15. We, however, cannot accept the argument of Ms. Mandavia that by virtue of sub-section (5) of Section 85, the same limitation on the Commissioner (Appeals) to remand a proceeding contained in Section 35A(3) of the Central Excise Act, 1944 must apply in the appeals under Section 85 of the Finance Act, 1994

21. 2015 (37) S.T.R. 723 (Guj.)

also. This is so because, sub-section (5) of Section 85 though requires the Commissioner (Appeals) to follow the same procedure and exercise same powers in making orders under Section 85, as he does in the Central Excise Act, 1944 in appeals, this sub-section itself starts with the expression "subject to the provisions of this Chapter". Sub-section (4) of Section 85 itself contains the width of the power of the Commissioner (Appeals) in hearing the proceedings of appeal under Section 85. The scope of such powers flowing from sub-section 85(4) therefore cannot be curtailed by any reference to sub-section (5) of Section 85 of the Finance Act, 1994."

50. The Madras High Court in **A. S. Babu Sah Designs** also examined the provision of sub-sections (4) and (5) of section 85 of the Finance Act and section 35A (3) of the Excise Act. The issue that was raised was as to whether the Commissioner (Appeals) could, under section 85 of the Finance Act, remand the matter. It was sought to be contended that in view of the provisions of sub-section (5) of section 85 of the Finance Act, the Commissioner (Appeals) would have no power to remand since such a power of remand had been excluded from the provisions of section 35A (3) of the Excise Act, after an amendment was made on 11.05.2001. It is in this context that the Madras High Court observed that sub-section (3) of the 35A of the Excise Act cannot be superimposed into sub-section (5) of 85 of the Finance Act, as sub-section (4) of 85 Finance Act provides for the manner in which the Commissioner (Appeals) shall hear and determine the appeal and this only states that he can pass such orders as he thinks fit. The relevant portion of the judgment is reproduced below:

"18. The argument of the Learned Counsel for the petitioner is that prior to 2001, Section 35A(3) specifically provided that the Commissioner

(Appeals) may pass such order as he thinks fit confirming, modifying or annulling the decision or order appealed against, or **may refer the case back to the adjudicating authority for such directions for a fresh adjudication or decision and those power was taken away when Section 35A(3) was substituted by Finance Act, dated 11-5-2001** and since sub-section (5) of Section 85 of the Finance Act directs the Commissioner of Central Excise (Appeals) to follow the procedures under the Central Excise Act **and on the date when the impugned order was passed, the Central Excise Act did not confer the power to remand the matter to the adjudicating authority** and therefore, the impugned orders are bad in law.

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20. Though at the first blush, the arguments advanced by the Learned Counsel for the petitioner appears to be impressive, but, on a closer observation, it proves otherwise. **In my considered view, sub-section (5) does not specifically state the provisions of Section 35A of the Central Excise Act, has to be read into the provisions of the Finance Act. In fact, Section 83 of the Finance Act, enumerates the Sections, under the Central Excise Act, 1944, which would apply to the matters relating to the Service Tax and it does not include Section 35A of the Central Excise Act. This is a clear indication that the said provision cannot be superimposed into Section 85 of the Finance Act.**

21. Assuming for the sake of argument that the contentions advanced by the Learned Counsel for the petitioner is sustainable, **sub-section (5) of Section 85 only speaks about the procedure to be followed while hearing the appeal and making orders and the procedures to be followed under the Central Excise Act. Thus, sub-section (3) of Section 35A of the Central Excise Act cannot be superimposed into sub-section (5) of Section 85 of the Finance Act. What is crucial to note is that sub-section (4) of Section 85 provides the manner in which the Commissioner (Appeals) shall hear and determine an appeal and it only**

states that he can pass orders as he thinks deem fit. This provision is in pari materia to Section 128(2) of the Customs Act, which was considered by the Hon'ble Supreme Court in Union of India v. Umesh Dhaimode (supra) and it was held that the said provisions would include the power to remand. Therefore, the argument advanced by the Learned Counsel for the petitioner by reading into sub-section (5) of Section 85, the provisions of Section 35A(3) is an incorrect interpretation."

(emphasis supplied)

51. The aforesaid two decisions in **Associated Hotels** and **A.S. Babu Sah** emphasise that sub-section (3) of section 35A of the Excise Act cannot be superimposed on sub-section (5) of section 85 of the Finance Act. If the intention of the legislature was to confer upon the Commissioner (Appeals), while hearing an appeal under sub-section (4) of section 85 of the Finance Act, all the powers of the Commissioner (Appeals) while exercising powers under 35A of the Excise Act, section 35A could have been inserted in section 83 of the Finance Act. The exclusion of section 35A of the Excise Act in section 83 of the Finance Act and making the provisions of section 85(5) of the Finance Act subject to the provision of Chapter V of the Finance Act also support the contention advanced by the learned counsel for the appellant that the Commissioner (Appeals), while hearing an appeal under sub-section (4) of section 85 of the Finance Act, would not have the power to issue a notice under section 73 (1) of the Finance Act.

52. What, therefore, transpires is that only such provisions of the Excise Act dealing with hearing appeals and making orders would be available to a Commissioner (Appeals) under sub-section (4) of section 85 which are not in conflict or inconsistent with any of the

provisions of Chapter V of the Finance Act. To enumerate some of such powers, which may be available to Commissioner (Appeals), reference can be made to sub-sections (1), (2), (4), (4A) and (5) of section 35A of the Excise Act which provide that the Commissioner (Appeals) shall give an opportunity to the appellant to be heard, if he so desires; allow an appellant to go into any ground of appeal not specified in the grounds of appeal, if the Commissioner (Appeals) is satisfied that the omission of that ground from the grounds of appeal was not willful or unreasonable; the order of the Commissioner (Appeals) disposing of the appeal shall be in writing and shall state the points for determination; the decision thereon and the reasons for the decision; and to decide the appeal, where it is possible to do so, within a period of six months from the date on which it is filed and on disposal of the appeal communicate the order passed by him to the appellant, the adjudicating authority and others.

53. The inevitable conclusion that follows from the aforesaid discussion is that the Commissioner (Appeals) did not have the power to issue the notice under section 73(1) of the Finance Act. The notice dated 29.12.2020, therefore, that was issued by the Commissioner (Appeals) under section 73(1) of the Finance Act was without jurisdiction and consequently the order passed by the Commissioner (Appeals) confirming the demand proposed in the said notice would also be without jurisdiction. The order dated 31.03.2021 passed by the Commissioner (Appeals), therefore, deserves to be set aside on this ground alone.

54. It would, therefore, not be necessary to examine the other issues raised by learned counsel for the appellant for setting aside the order passed by the Commissioner (Appeals).

55. It transpires from the order dated 31.03.2021 that the Commissioner (Appeals) has confined the order to the notice dated 29.12.2020 that was issued by him and has confirmed the proposed demand. The confirmation of the proposed demand, raised in the show cause notice dated 07.09.2017 by the Additional Commissioner has not been considered at all by the Commissioner (Appeals). The matter would, therefore, have to be remitted to the Commissioner (Appeals) to pass a fresh order by confining his decision to the order dated 19.03.2018 passed by the Additional Commissioner confirming the demand raised in the show cause notice dated 07.09.2017.

56. The order dated 31.03.2021 passed by the Commissioner (Appeals) is, therefore, set aside and the matter is remitted to the Commissioner (Appeals) to pass a fresh order by restricting his decision to the order dated 19.03.2018 passed by the Additional Commissioner confirming the demand proposed in the show cause notice dated 07.09.2017. The appeal is, accordingly, allowed to the extent indicated above.

(Order pronounced on **06.01.2023**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)