

APPEAL – MAINTAINABLE AGAINST INTERIM ORDER OR MISC ORDER PASSED BY ADJUDICATING AUTHORITY.

By

Pradeep K Mittal, Advocate*
B.Com. LLB. FCS

In this Article, an attempt has been made to discuss and amplify the scope of filing an appeal before the Custom Excise and Service Tax Appellate Tribunal (hereinafter called Tribunal) against the Interim Order/ Misc. Orders passed by the Adjudicating Authority during the course of adjudicating proceedings.

- 2:** Invariably, in the Show Cause Notice, the Department rely upon –
- (a) Opinion of Expert;
 - (b) Report of Expert;
 - (c) Investigation Report;
 - (d) Statements of officers of assessee company whose statements have been recorded by the officers of Department and relied upon in the SCN.

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(e) Statements of outside parties whose statements have been recorded by the officers of Department and relied upon in the SCN to buttress their case.

(f) Relied upon documents/Non-Relied upon documents;.

3: Invariably, it has been seen that the Department, in order to buttress their case, is generally reluctant to supply the above documents and highly skeptical in allowing cross-examination as it is seriously apprehended by the Adjudicating Authority that in case, the cross-examination is allowed, it will uncover the fact that the statements have been recorded under duress, coercion and are involuntarily - in ultimate process, statement made by the witnesses during cross-examination will only demolish the case of the Department. Thus, under the fear and apprehension, neither cross-examination of any of the categories of persons are allowed nor the non-relied upon documents are supplied nor re-testing of samples are allowed. Consequently, an application is moved by the assessee for

(a) Supply of relied upon and non-relied upon documents;

(b) Providing copies of expert opinion; or

(c) Permitting cross-examination of Expert ; and

(d) Cross-examination of company's officers/independent witness/panchas.

However, such applications are routinely rejected without adducing any lawful, valid and justifiable reasons by the learned adjudicating authorities.

4: It is interesting to see the contentions of the Department that they are under no obligation to supply non-relied upon documents since these have not been relied upon. Curiously, the Department does not rely upon these documents as the Department consciously feels that these

documents will only demolish their case completely before Adjudicating Authority and, therefore, the Department does not rely upon these documents and consequently reluctant to supply the same in the fear that these documents will only bolster the case of the assessee and to their great prejudice and detriment.

5: The question then arises what is the remedy left in the hands of the assessee – One remedy could be filing of Writ Petition under Article 226 of the Constitution of India before the High Court, which having jurisdiction over adjudicating authority who is dealing with the SCN. However, the remedy of Writ Petition is expensive and at the same time, writ remedy is neither feasible nor unworkable. The other remedy could be by way of an appeal to the Customs, Excise and Service Tax Appellate Tribunal having jurisdiction.

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6: In this connection, a reference be made to Section 35B of the Central Excise Act, 1944, which, as is relevant for our purpose, is reproduced herein below:-

SECTION 35B: Appeals to the Appellate Tribunal – (1) Any person aggrieved by any of the following order may appeal to the Appellate Tribunal against such order –

- (a) a decision or order passed by the [Principal Commissioner of Central Excise or Commissioner of Central Excise] as an adjudicating authority;
- (b) an order passed by the [Commissioner(Appeals) under Section 35A;
- (c)
- (d)

7: In Section 35B the word appearing is “Order” and not the Final Order/judgment. To understand the meaning of the word “order” we may seek the help of Code of Civil Procedure and judgments delivered by the Hon’ble Courts.

'Order' has been defined in Section 2(14) CPC as under:

“Order” means the formal expression of any decision of a Civil Court which is not a decree.

Section 2(2) CPC defines 'decree' as follows:

"decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include-

- (a) any adjudication from which an appeal lies as an appeal from an order, or
- (b) any order of dismissal for default.

8: The Hon’ble Delhi High Court in the case of Satinder Singh Vs. Bhupinder Kaur MANU/DE/7354/2011 has observed as under:-

Even otherwise, a bare look at the Section 13(2)(iii) would manifest the intention of the legislature as two separate expressions have been used in the said Section i.e. 'decree' or 'order', which would necessarily mean either an interim or a final order.

8.1: The Division Bench of Madhya Pradesh High Court in the case of Mohd. Sadik Vs. Smt Sahida MANU/MP/0805/1996 has observed as under:-

From a bare look at the definition of 'Order' in Sub-section (14) of Section 2 of the Code, it is evident that order means a formal

expression, in the nature of any decision of a civil court which is not a decree as defined in Sub-section (2) of Section 2 of the Code. The expression 'Order' is used in contradistinction to decree and as such is distinguished from 'judgment'. The essence of distinction between 'Decree' and 'Order' is of the nature of the decision as the words "formal expression of an adjudication" appear in both the definitions. Against a decree an appeal lies under Section 96 and also a second appeal lies as provided under Section 100 of the Code.

9: The Hon'ble Tribunal in the case of R K Soap & Oil Traders Vs. Commissioner MANU/CE/ 0799/2012 = 2013 (294) ELT 463 (Tribunal) has clearly that an appeal is maintainable against the order of refusal of cross-examination by the Commissioner.

Under Section 129A(1)(a) Customs Act, 1962, any person aggrieved by a decision or order passed by Commissioner of Customs as an Adjudicating Authority can file appeal to the Appellate Tribunal. In this case, the Commissioner's letters addressed to the appellants refusing the cross-examination of certain witnesses are certainly the decisions taken by him as Adjudicating Authority. In view of this, I do not accept the Revenue's plea with the letters dated 2-8-2010 and 10-8-2010 of the Commissioner are not appealable decisions.

9.1: The Hon'ble Tribunal in the case of Steel Auto Industries Vs. CCE in the Final Order No.51181/2015 Ex(SM) in the Appeal No. E/50758/2015-Ex(SM) has entertained an appeal against the order of the Adjudicating Authority declining to allow (a) cross examination of witness produced by the Department (b) supply of non-relied upon documents. In the final order dated 09.04.2015, the Hon'ble Tribunal has directed the adjudicating authority to supply the file containing the non-relied upon documents and thereafter permit cross-examination of witnesses relied upon by the Department.

10: An appeal was filed after provisional assessment under Section 18 and 110A of the Customs Act, 1962, challenging the conditions imposed at the time of provisional assessment and such conditions were challenged by way of an appeal before the Hon'ble Tribunal, who, while entertaining an appeal, in the case of *Ridhi Sidhi Collection Vs. CCE* MANU/CE/0329/2014 = 2014 (310) ELT 618 (Tri) has held as under:-

At this stage, it cannot be decided that the appellant has resorted to undervaluation or not. Or the Revenue is correct to assess provisionally on the basis of the Load Port invoice. Therefore, the determination of value would be done at the time of final assessment/adjudication. In these circumstances, directing to execute bank guarantee or revenue deposit, for redemption fine or fine in the facts and circumstances is harsh. Therefore, impugned order is modified to the extent that the impugned goods be allowed to release provisionally on execution of provisional duty cum provisional release bond equal to the re-determined value as per Annexure and on payment of duty on declared value plus 20% of the duty on differential amount.

SUPPLY OF DOCUMENTS – RELIED/NON-RELIED UPON DOCUMENTS.

11: The Hon'ble Allahabad High Court in the case of *Novamet Industries Vs. Union of India* Manu/UP/0912/2007 has held as under:-

It is their case that in spite of repeated requests, the documents were not made available. They relied upon a government Circular dated 2.2.1996 issued by the Department of Revenue concerning seizure of books and records. The circular directs the officers of the Excise Department that the non-relied seized goods and documents should be released to the assessee, in cases where show cause notice is not issued, within six months from the date of the seizure. The circular further states that -

Once the show cause notice is issued to the party, the document/records which have not been relied upon may be returned to the party under proper receipt. The assessee may also be allowed to obtain photocopies of the documents relied upon. The above measures would help substantially reduced the time taken by the party for inspection of seized documents.

The petitioner also relied upon a subsequent circular of the Central Board of the Central Board of Excise and Customs, dated 08.09.2006, which states, in Clause 2 thereof, as follows:-

In this regard, your attention is invited to the Board's Circular No.42/88-CX, dated 24.5.1988 and No.48/88-CX.6, dated 10.06.1988. As per these circulars, the documents records which are not relied upon in the Show Cause Notices are required to be returned under proper receipt to the persons from whom they are seized. I wish to reiterate compliance of these instructions. In fact, the show cause notice itself may incorporate a clause that unrelieved upon records may be collected by the concerned persons within 30 days of receipt of the show cause notice. The designation and address of the officer responsible for returning the relied upon records should also be mentioned in the show cause notice.

12: In the case of Sanghi Textile Processors (P) Ltd. v. Collector of Central Excise [1993 (65) E.L.T. 357 (S.C.)] wherein the question arose was 'who is to bear the expenses involved in taking out photostat', the Supreme Court held that reasonable expenditure for copying whatever document the petitioner would ultimately find it reasonably necessary to take copies of, shall be reimbursed by the department to the Petitioners and relied upon Para 9(a) of the Departmental Instructions.

13: The Hon'ble Tribunal in the case of Selvi Paper Mills Ltd Vs. CCE MANU/CC/0085/2012 has observed as under:-

Considering the fact that the appellants were not supplied with the un-relied upon documents, in that situation, the adjudicating authority is directed to supply the remaining documents which were seized and not relied upon to the appellants, so that the appellants shall be able to reconcile their records and thereafter the adjudicating authority will do the fresh adjudication. In view of this observation, the matter is remanded to the adjudicating authority with the direction to supply the non-relied upon documents to the appellants and thereafter fix a date for final hearing of the matter.

14: It would be also be pertinent to note the observations of the Tribunal in the cases of Hindustan Dyeing & Printing Works Vs CCE MANU/CE/0444/2013 and Lekh Raj Vs. CCE MANU/CE/0509/2014 where the Department has been directed to supply non-relied upon documents to the assessee.

CROSS EXAMINATION OF EXPERT:

15: The Delhi High Court in the case of Directorate of Revenue Intelligence Vs. Vinod Kumar MANU/DE/1005/2004 has observed as under:-

The only right available to an accused is to rebut or demolish the said report by way of cross examination of expert or in the alternative, produce another expert to counter the opinion given in the report or rely upon the authoritative text books to challenge the opinion given by the expert. The Division Bench judgment of the Punjab & Haryana High Court in case Joginder Kaur, 1979 CCR 7 P&H 101 which was under the Opium Act squarely covers the issue as raised by the parties in this case inasmuch as the NDPS Act also does not confer any right upon an accused to send another representative

sample of the contraband to the same or other public analyst for analysis and report.

16: The Hon'ble Supreme Court in the case of Dr J J Merchant Vs. Shrinath Chaturvedi MANU/SC/0668/2002, while dealing with issue of cross-examination of a Doctor/Expert suggested that permission can be given to a party who intends to cross-examine an expert by putting certain questions in writing and the witness can be asked to reply those questions on affidavits. It further held that if stakes are very high and still the party intends to cross-examine, there can be video conference for asking questions by arranging telephone conferences. The court also found that if necessary a commission can be appointed and the Commissioner can examine the expert witness at the working place. The Apex Court has not held that the cross-examination of a party to the proceedings or his witnesses can also be made by affidavits.

16.1: Now, there are some of the following landmark judgments on the corss-examination of expert.

- (i) (Collector v. Kiran Overseas 1996 (88) E.L.T. A187 (SC) Expert report/opinion if disputed - Cross examination essential otherwise report to be ignored.
- (ii) MANU/GJ/0063/1985 Arunodaya Mills Ltd. And Anr. Cross examination of experts not allowed-assessment order quashed. Assistant Collector directed to decide the question afresh; according to law, after giving an opportunity to the petitioner to cross-examine the two experts as well as evidence on record.
- (iii)MANU/CE/0387/1983 Walker Anjaria and Sons Pvt. Ltd. Evidence-Cross Examination- Natural Justice violated if cross examination of experts so to their status and to rebut their opinion has been denied - Matter remanded for re-adjudication without either party being restricted to evidence already on record-Section 35C(1) of the Central Excises and Salt Act, 1944.

- (iv) MANU/CM/2330/2001 Carrara Marble and Granite Industries Expert's opinion-Cross-examination-Reputation and age of institution to which expert belong not enough to justify refusal of cross-examination of those who tested samples.
- (v) MANU/CC/0032/1993 Vijayalakshmi Industries: Adjudication-Natural justice-Cross-examination-Expert opinion relied on by department but expert not made available for cross-examination though requested-Principles of natural justice violated.
- (vi) MANU/CE/4100/2001 Ratgi Ispat Ltd. Evidence-Cross examination-Witnesses not made available by Commissioner for cross-examination-Evidentiary value of statements of such witnesses to be considered in accordance with law laid down by Supreme Court. No witness was summoned from among those named in the schedule of witnesses. What the Commissioner states on this respect is "Looking into the entire circumstances of the case, I find that the demand of cross-examination is not material and it has been that the limited purpose of dragging the proceedings". The Commissioner has relied on statement of these witnesses who were not made available for cross-examination. We are not in a position to comprehend the sense in which the Commissioner made the above quoted observation.
- (vii) MANU/CE/0259/2002 Commissioner of Cus., Jaipur Adjudication - Natural justice - Evidence - Disallowance of cross-examination of expert whose report on the subject matter did not give any clear opinion and on which the entire case of the Department was based, violated principles of natural justice.

RE-TESTING OF SAMPLES:

17: The Hon'ble Delhi High Court in the case of Nihal Khan Vs. State MANU/DE/7016/2007, while dealing with the issue of –retesting of samples, has observed as under:-

In the light of the aforesaid discussion and reasoning, it is clear that there is no bar for an accused under the NDPS Act to move an application for re-testing of samples. There is also no bar on the court allowing such an application. At the same time, it does not mean that every such application moved by any accused under the NDPS Act ought to automatically result in the court allowing the same. The court has the power to allow or not to allow such an application. It has to consider the facts and circumstances of the case and to see whether re-testing would be necessary to secure the ends of justice and to afford a fair trial to the accused. If the court, upon considering the totality of circumstances, comes to the conclusion that re-testing would be necessary, then it ought to allow such an application.

18: The Hon'ble Supreme Court in State of U.P. v. Munni Ram and others, MANU/SC/0900/2010 : 2012 (7) R.C.R. (Cri.) 2304 : (SC) 27 has reiterated the well known principle that if two views are possible on the evidence adduced, one pointing to the guilt of the accused and the other to the innocence, the view just favourable to the accused is normally to be adopted.

CROSS EXAMINATION OF WITNESS/PARTIES:

19: The Hon'ble Supreme Court in the case of Lakshman Exports Limited Vs. Collector of Central Excise MANU/SC/0548/2002 has held as under:-

We find that, in the reply to the show cause notice, the assessee had specifically asked to be allowed to cross-examine the representatives of these two concerns to establish that the goods in question had been

accounted for in their books of account and the appropriate amount of Central Excise Duty had been paid. The logic of such request is clear from what is stated therein.

20: The Hon'ble Madras High Court in the case of India Sales Corporation Vs. The Commissioner of Customs Manu/TN/0625/2013 has held as under:-

It is true that our system of jurisprudence is based on adversarial mechanism and in the case on non adversarial process the only difference is with regard to the burden of proof. But that does not dispense with the basic need to produce witness for cross examination if the statement of the witnesses has to be relied upon by the prosecution or by the department and it is also a fundamental principle that right to cross examine the witnesses whose statement is sought to be relied upon in any proceedings resulting in penal or civil consequences and such a right can be asserted only by challenging the denial of such right.

21: The Hon'ble High Court of Delhi in the case of Basudev Garg Vs. Commissioner of Customs Manu/DE/1876/2013 has held as under:-

In so far as the general propositions are concerned, there can be no denying that when any statement is used against the assessee, an opportunity of cross-examining the persons who made those statements ought to be given to the assessee. This is clear from the observations contained in Swadeshi Polytex Ltd. (2000) 122 ELT 641 (SC) and Laxman Exports Ltd. MANU/SC/0548/2002: (2002) 143 ELT 21 (SC).

22: It would be relevant to note the observations of Hon'ble Supreme Court and High Courts in the cases of C.C.E., Meerut-I v. Parmarth Iron Pvt. Ltd. reported in MANU/UP/2113/2010 : 2010 (260) E.L.T. 514 (All.), relying upon the judgments of Apex Court in the case of Arya Abhushan Bhandar v. Union of India reported in

MANU/SC/0552/2002 : 2002 (143) E.L.T. 25 (S.C.) and Swadeshi Polytex Ltd. v. C.C.E., Meerut reported in 2000 (122) E.L.T. 641 (S.C.) and also the judgment of Hon'ble Bombay High Court in the case of Cyan Chand Sant Lal Jain v. Union of India reported in 2001 (136) E.L.T. 9 (Bom.) wherein it has been repeatedly held that at the stage of adjudication, it is the right of an assessee to seek cross-examination of the witnesses, whose statements are sought to be relied upon by the Revenue and that the cross-examination is necessary so that it could be established as to whether the statements recorded from the said witnesses had been voluntarily given, or whether the same are based on personal knowledge or legal records or on hearsay.

23: The Hon'ble Delhi High Court in the case of New Decent Footwear Industries v. Union of India - MANU/DE/0821/2002 : 2002 (150) E.L.T. 71 (Del.) and of Hon'ble Punjab & Haryana High Court in the case of C.C.E. v. Hindustan Polyester Lines - 2009 (236) E.L.T. 44 (P & H), wherein Hon'ble High Courts have held that denial of cross-examination of the witnesses on whose evidence the allegation against the assessee is based, would amount to violation of principles of natural justice, that the Commissioner's reasoning that the cross-examination of Shri Rakesh Kumar cannot be allowed as in terms of Article 20(3) of the Indian Constitution, he cannot be compelled to be a witness against himself, is not correct, as in terms of provisions of Section 132 of Indian Evidence Act, 1872, a witness shall not be excused from answering any question as to any matter, relevant to the matter in issue in any suit or any civil or criminal proceedings on the ground that answer to such question will incriminate him, that when the Commissioner has relied upon the Chemical Examiner's report in support of the allegation that the goods are palm fatty acid distillate and their description has been mis-declared, the cross-examination of the Chemical Examiner should be allowed, that in view of this, the impugned decisions of the Commissioner disallowing cross-examination are not correct.

CROSS-EXAMINATION OF CHEMICAL EXAMINER.

24: The Hon'ble Supreme Court in the case of Commissioner of Customs v. Punjab Stainless Steel Industries MANU/SC/0402/2001 : 2001 (132) ELT10 (SC) has held that the cross-examination of the Chemical Examiner, whose report has been relied upon the Department, is permissible .

CROSS-EXAMINATION OF CO-NOTICEE:

25: The Hon'ble Tribunal in the cases of Anil Pannalal Sarogi v. CC 2009 (241) E.L.T. 219, Sai Kripa Exim (P) Ltd. v. CC, reported in MANU/CB/0048/2003 : 2003 (156) E.L.T. 225 (Tri.) has held that cross-examination of co-noticee, if requested, cannot be denied. The Hon'ble Tribunal further observed that judgment of Apex Court in the case of Kanungo & Co. v. CC - MANU/SC/0285/1972 : 1983 (13) E.L.T. 1486 (S.C.) is not applicable to the facts of this case since the appellant had given the reasons for seeking cross-examination of the witnesses and the Commissioner's order refusing the cross-examination does not deal with the same.

DEPARTEMENT RELIANCE ON AN OLD JUDGMENT OF HON'BLE SUPREME COURT.

26: The Department very often rely upon on very old judgment of the Hon'ble Supreme Court in the case of Kanungo Company - MANU/SC/0285/1972 : 1983 (13) E.L.T. 1486 (S.C.) and the Hon'ble High Court of Andhra Pradesh in the case of Shalini Steels Pvt. Ltd. Vs. CCE Hyderabad Union of India MANU/AP/0431/2011 have held that when the documents recovered from the employees of the assessee showing clearances of the goods and contents were accepted to be true and correct by the Managing Director of the assessee, the evidentiary value of documents would not be lost for non-production of the

employee for cross-examination and no prejudice was caused to the assessee. The above judgment of the Supreme Court has been taken note of in the subsequent judgments of the Supreme Court and virtually /implied overruled.

27: In this regard, the observation by the Hon'ble Apex Court in a recent case reported as Maria Margarida Sequeria Fernandes and Ors. v. Erasmojack Desequeria (Dead) through L.Rs MANU/SC/0225/2012 : 2012 AIR SCW 2162 at page. 2169 is relevant which reads as:

‘32. Truth alone has to be the foundation of justice. The entire judicial system has been created only to discern and find out the real truth. Judges at all levels have to seriously engage themselves in the journey of discovering the truth. That is their mandate, obligation and bounden duty.

‘33. Justice system will acquire credibility only when people will be convinced that justice is based on the foundation of the truth.

‘34. In Mohanlal Shamji Soni v. Union of India MANU/SC/0318/1991 : 1991 Supp (1) SCC 271: (AIR 1991 SC 1346), the Court observed that in such a situation a question that arises for consideration is whether the presiding officer of a Court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice? It is a well accepted and settled principle that a Court must discharge its statutory functions whether discretionary or obligatory according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done.

‘35. What people expect is that the Court should discharge its obligation to find out where in fact the truth lies, Right from

inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice.

28: In this Article, an attempt has been to consolidate and compile judgments on this very important topic – which may be useful to the learned readers of esteemed Excise Law Times.

