* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on: 13.02.2015
% Judgment delivered on: 20.07.2015

\+ **CEAC 61/2014**

COMMISSIONER OF SERVICE TAX ....Petitioner

Versus

JAPAN AIRLINES INTERNATIONAL CO. LTD. .....Respondent

ADVOCATES WHO APPEARED IN THIS CASE:

For the Petitioner : Ms. Sonia Sharma, Sr. Standing Counsel with Mr. Vijay Chandra Jha, Advocate
For the Respondent : Mr. J.K. Mittal and Mr. Rajveer Singh, Advocates

CORAM :-
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J

1. A Division Bench of this court vide order dated 15.12.2014 referred the two questions of law for consideration by a larger bench in order to, broadly, resolve the apparent conflict between the views taken by two separate Division Benches of this court in ***Commissioner of Service Tax Vs. L.R. Sharma, 2014 (4) AD (Delhi) 733*** (hereinafter referred to as ***LR Sharma-I***) and ***Commissioner of Central Excise, Delhi-1 Vs. Kundalia Industries, 2012 (279) E.L.T. 351 (Del)***.

1.1 Accordingly, a larger bench was constituted. The questions of law, referred to us for consideration, are extracted hereinbelow for the sake of convenience :-

> "..(1). Whether the Custom, Excise and Service Tax Appellate Tribunal (CESTAT) in an appeal under Sub-Section (2) and (2A) of Section 86 of the Finance Act, 1994 read with applicable provisions of the Central Excise Act, 1944, can examine and go into the question of application of mind on merits by the Committee of Chief Commissioners or Commissioners?
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> (2). In case the aforesaid question is answered in affirmative, i.e., against the Revenue and in favour of the assessee, then, whether the decision of the Committee of the Chief Commissioners or Commissioners should be treated as null and void if they have appended signatures to the elaborated notes and objections prepared by the subordinate officers, before the file is put to the Chief Commissioners or Commissioners for examination?.."

2. The reference made to the larger bench arises in the background of the following broad facts :-

2.1 The Revenue, being aggrieved by the order dated 18.09.2013, passed by the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as the Tribunal), preferred an appeal to this court under Section 35 G of the Central Excise Act, 1944 (in short the C.E. Act).

2.2 The grievance of the Revenue emanated from the fact that the Tribunal had rejected its appeal, albeit erroneously, on the ground of maintainability, and not, on merits.

2.3 The Tribunal, evidently, took the view that the decision taken to institute the appeal before it, by the Committee of commissioners, was taken, without due application of mind. While coming to this conclusion, the Tribunal noted that the "...twin requirements of the decision making process, namely the due

consideration of material pertaining to the adjudication / the appellate order and the appropriateness / desirability of preferring an appeal were not met..."

2.4 The Tribunal thus, came around to the view that the decision arrived at to review, and thereupon, prefer an appeal did not measure up to the standards spelt out in its earlier judgments.

2.5 We may only note that in paragraph 3 of the order dated 18.09.2013, there is a reference by the Tribunal to a judgment of its own Division Bench in ***CST Delhi Vs. L.R. Sharma and Co.***, reported in 2013 –TIOL -944-CESTAT-DEL (final order No.56165/2013 dated 26.04.2013), which in turn, relied upon the judgment of the Division Bench of this court in ***Kundalia Industries***' case.

2.6 Thus, the grievance of the Revenue in so far as the order of the Tribunal is concerned, is limited to the aforesaid aspect.

2.7 However, the appeal before the Tribunal was preferred by the Revenue against the adjudication order i.e. order-in- original dated 31.12.2012. These proceedings arose in the background of the following facts; a brief narration of these facts is necessary to understand the context, in which, the Revenue took the decision to file an appeal before the Tribunal.

2.8 The respondent / assessee, was issued a demand-cum-show cause notice dated 16.04.2010, pursuant to a service tax audit conducted between 08.09.2009 to 10.09.2009, in which, allegations levelled were of the following nature : (i). that it had not complied with the provisions of Rule 6(3) of CENVAT Credit Rules, 2004 (in short the CENVAT Rules) during the period 2008-2009; (ii). that it had wrongly availed CENVAT Credit on services which were not used for providing taxable output services; (iii). there was non-payment of service tax on excess baggage; and (iv). lastly, it had failed to

provide information and data with respect to value of air tickets purchased prior to 01.05.2006 which, in fact, were used on or after 01.05.2006.

2.9 The said show cause notice was adjudicated upon by Commissioner of Service Tax, Delhi vide order dated 28.12.2012. A copy of which was despatched, it appears, to the respondent /assessee on 31.12.2012.

3. The adjudication order dated 31/28.12.2012 was reviewed, according to the Revenue, by the Committee of Chief Commissioners, as mandated under the provisions of Section 86(2) of the Finance Act, 1994 (in short the Finance Act). Post, the review, a decision was taken to file an appeal before the Tribunal.

4. Broadly, the grounds articulated by the Revenue, in the review notes, to establish reasons as to why an appeal was required to be instituted, were as follows:-

(i). First, the adjudicating authority had imposed a nominal penalty of Rs.5,000/- evenwhile returning a finding in its favour, to the effect, that the respondent / assessee had wrongfully availed of CENVAT credit amounting to Rs.1,09,70,221/- qua input services which were not taxable.

(i)(a). According to the Revenue, a minimum penalty of Rs.1,09,70,221/- was leviable on the respondent / assessee on this score alone. It is the revenue's case that the adjudicating authority having held that the extended period was applicable in this case as provided in the proviso to Section 73(1) of the Finance Act, it ought to have proceeded to impose penalty in terms of Section 78 of the said Act.

(ii). Second, that the demand raised (which included cess imposed) qua excess baggage though confirmed, was held to have been paid, without ascertaining,

as to whether the amount, towards this demand, was actually deposited by the respondent / assessee. According to the Revenue, the respondent / assessee was liable to penalty on this account, as well.

4. In this context and, at this stage, it would be relevant to note, the manner, in which, the decision taken, to file the appeal before the Tribunal evolved.

4.1 In the first instance, the Inspector (Review) in the concerned department of the Revenue prepared a note on 11.03.2013, which was, put up before the Superintendent (Review) on the same date. The said note articulated, in detail, the grounds for challenging the order of the adjudicating authority. The Superintendent (Review), appears to have seen and appended his signatures to the said note, as indicated above on 11.03.2013, itself.

4.2 The said note was put up before the Deputy Chief Commissioner in the Chief Commissioner's unit. The note placed before the Deputy Chief Commissioner clearly spelt out, amongst other aspects, the issue pertaining to the purported failure of the adjudicating officer to impose a minimum penalty of Rs.1,09,70,221/- in respect of wrongful credit of CENVAT by the respondent / assesse.

4.3 This note was put up before the Additional Deputy Commissioner on 11.04.2013 who, independently, came to a similar view, which is, that the adjudication order had to be reviewed for reasons stated therein.

4.4 Based on the notes prepared by the subordinate officers, which was also countersigned by AC (Review), on 22.04.2013, Mr. P.S. Pruthi, the Chief Commissioner, Central Excise (Chandigarh Zone), who was one of the members of the Committee of Commissioners, appended its signatures, on the note sheet, on 26.04.2013.

4.5 Apart from the above, there is on record, a Review Order no.24/2013 dated 26.04.2013. This is a typed note, which bears, the signatures of both Mr. B.K. Bansal, Chief commissioner of Central Excise (Delhi Zone) and Mr. P.S. Pruthi, Chief Commissioner of Central Excise (Chandigarh Zone). A copy of this note has been placed on record both by the Revenue as well as by the respondent/assesse.

5. Therefore, when the appeal was moved before the Tribunal, a preliminary objection was taken by the respondent / assessee that it was not maintainable, as there was no application of mind by the Committee of Chief Commissioners (which comprised of Mr. B.K. Bansal and Mr. P.S. Pruthi) in considering the draft review order, which recommended, institution of the appeal against the adjudication order.

6. As noted above, the Tribunal accepted the objections raised by the respondent / assessee even while recording that an elaborate note culminating in a recommendation for review, was prepared by subordinate officers, which was placed before the aforenamed Chief Commissioners, who were charged with the responsibility, to take a decision, as to whether an appeal ought to be preferred against the subject adjudication order.

7. It is in this background that we are called upon to answer the questions of law referred to us for consideration.

8. To assist us in the matter, the Revenue was represented by Ms. Sonia Sharma, Advocate, while the respondent/assesse was represented by Mr. J.K. Mittal, Advocate.

8.1 It was the submission of Ms. Sharma that the reference had to be answered in favour of the Revenue in as much as the Tribunal failed to appreciate that the

Committee of Commissioners, while taking a decision in the matter of filing the appeal before it had the benefit of the material placed before them, which included, the observations of all subordinate officers at various levels, who had diligently applied their mind to the errors which had crept in the adjudication order.

8.2 Ms. Sharma submitted that the Tribunal's observations to the effect that there was an absence of due consideration of the material, and the failure, to disclose as to whether or not it was appropriate / desirable to prefer an appeal, was erroneous, in as much as, every such aspect was reflected in the notes of the subordinate officers, which was placed before the Committee of Commissioners. The fact that the Committee of Commissioners appended their signatures to the note was, according to her, sufficient compliance of the provisions of Section 86(2) of the Finance Act. The learned counsel submitted that such an exercise implicitly recognized due application of mind by the Committee of Commissioners.

8.3 It was her contention that requiring Committee of Commissioners to replicate the reasons already on record, with which they concurred, in case, would make the procedure unnecessarily cumbersome and impracticable.

8.4 The reason advanced by the learned counsel, in support of the aforesaid contention, was that, in so far as the merits of the case were concerned, the Tribunal, in any event, would examine the same at the stage when the appeal is listed for hearing before it.

8.5 In support of her submissions, Ms. Sharma relied upon the following judgments :-

Collector of Central Excise, Calcutta Vs. Berger Paints India Ltd., (1990) 2 SCC 349; Commissioner of Central Excise Vs. Ufan Chemicals, 2012 Law Suit (All) 2539; Commissioner of Service Tax Vs. LR Sharma, 2014 (4) AD (Del) 733; LR Sharma Vs. Commissioner of Service Tax, SLP 14544/2014 and 14545/2014; LR Sharma Vs. Commissioner of Service Tax, Review Petition No.2521 and 2522/2014 and LR Sharma Vs. UOI, 2011 (22) STR 269

9. On the other hand, Mr. Mittal argued that the reference had to be answered against the Revenue. It was the submission of the learned counsel that, as rightly found by the Tribunal, the two Chief Commissioners, who formed the Committee (which had taken a decision to institute the appeal before the Tribunal), had never met.

9.1 The learned counsel submitted that there were in fact three separate review orders passed in the matter. According to the learned counsel, the first review order culminated with the signatures of the Chief Commissioner of Central Excise (Delhi Zone), who appended his signature on the note sheet on 15.04.2013. Similarly, the second review order, the learned counsel stated, culminated with the signatures of Mr. P.S. Pruthi, Chief Commissioner, Central Excise (Chandigarh Zone); who appended his signatures on 26.04.2013. The learned counsel contended that thereafter, a third review order was prepared. In so far as this review order was concerned, while it carried the signatures of both Mr. B.K. Bansal and Mr. P.S. Pruthi, the date on which the order was signed was not mentioned.

9.2 The learned counsel submitted that, in an RTI enquiry, the respondent/assessee had received a response dated 25.07.2013 which, revealed that not only the two Chief Commissioners had not met but that the review order no.24/2013, was signed by Mr. B.K. Bansal, Chief Commissioner,

Central Excise, on 15.04.2013 and, by Mr. P.S. Pruthi, Chief Commissioner, Central Excise (Chandigarh Zone), on 26.04.2013.

9.3 The learned counsel thus submitted that the facts clearly demonstrated that each Chief Commissioner had taken a decision independently of the other, and that, there was no inter-se consultation between the members of the Committee.

9.4 It was submitted that the function discharged by the Committee of Commissioners being a quasi-judicial function, it had to necessarily meet, consult and give reasons, as to why a decision had been taken to institute an appeal before the Tribunal against the subject adjudication order. In other words, the contention of the learned counsel was, that a mere exercise of signing the note sheet; albeit separately or even collectively, would not ensure due compliance with the obligations placed cast on the Committee of Commissioners, as mandated under the provisions of Section 86(2) of the Finance Act.

9.5 To support his contention that the duty discharged by the Committee of Commissioners was a quasi-judicial function, the learned counsel relied upon the Revenue's own instructions contained in circular dated 23.11.2012, issued by the Central Board of Excise and Customs (in short the Board). It was thus, contended by the learned counsel that, the circular, in any event, would be binding on the Revenue.

9.6 In context of the submissions made hereinabove, the learned counsel relied upon the following judgments :-

> ***CCE, Delhi-1 Vs. Kundalia Industries, 2012 (279) ELT 351 (Delhi); CCE, Delhi-III Vs. B.E. Office Automation Products Pvt. Ltd., 2010 (249) ELT 24 (P&H); CCE, Noida Vs. V.S. Exim Pvt. Ltd., 2012 (283) ELT 206 (Tri.-Delhi); CCE, Noida Vs.***

Super Cassettes Industries Ltd., 2013 (294) ELT 587 (Tri.-Del); UOI Vs. Arviva Industries (I) Ltd., 2007 (209) ELT 5 (SC); and Indian Oil Corporation Ltd. Vs. CCE, Baroda 2006 (202) ELT 37 (SC).

10. Before we proceed further, it may be relevant to extract the provisions of Section 86 (2) of the Finance Act, under which, the Committee of Commissioners, is said to have exercised its power to institute the appeal in the Tribunal.

> "..86. (1). Any assesse aggrieved by an order passed by a Commissioner of Central Excise under section 73 or section 83A or an order passed by a Commissioner of Central Excise (Appeals) under section 85, may appeal to the Appellate Tribunal against such order "within three months of receipt of the order"
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> (1A)(i). The Board may, by notification in the Official gazette, constitute such Committees as may be necessary for the purposes of this Chapter.
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> (ii). Every Committee constituted under clause (i) shall consist of two Chief Commissioners of Central Excise or two Commissioners of Central Excise, as the case may be.
>
> (2). The committee of Chief Commissioners of Central Excise may, if it objects to any order passed by the Commissioner of Central Excise under section 73 or section 83A, direct the commissioner of Central Excise to appeal to the Appellate Tribunal against the order.
>
> Provided that where the Committee of Chief Commissioners of Central Excise differs in its opinion against the order of the Commissioner of Central Excise, it shall state the point or points on which it differs and make a reference to the Board which shall, after considering the facts of the order, if is of the opinion that the order passed by the Commissioner of Central Excise is not legal or proper, direct the Commissioner of Central excise to appeal to the Appellate Tribunal against the Order.

(2A). The Committee of Commissioners may, if he objects to any order passed by the Commissioner of Central Excise (Appeals) under section 85, direct any Central Excise Officer to appeal on his behalf to the Appellate Tribunal against the order.

Provided that where the Committee of Commissioners differs in its opinion against the order of the Commissioner of Central Excise (Appeals), it shall state the point or points on which it differs and make a reference to the jurisdictional Chief Commissioner who shall, after considering the facts of the order, if is of the opinion that the order passed by the Commissioner of Central Excise (Appeals) is not legal or proper, direct any Central Excise Officer to appeal to the Appellate Tribunal against the order.

Explanation – For the purposes of this sub-section, "jurisdictional Chief Commissioner" means the Chief Commissioner having jurisdiction over the concerned adjudicating authority in the matter..."

10.1 A bare perusal of the aforesaid section would show that while sub-section (1) of Section 86 gives the assesse the right to appeal against any order passed by the Commissioner of Central Excise under Section 73 or Section 83 or even qua an order passed by the Commissioner, Central Excise (Appeals) under Section 85 of the Finance Act, in so far as the Revenue is concerned, the decision with regard to whether or not an appeal has to be filed can be taken, only by a Committee of Commissioners of Central Excise provided it has an objection to an order passed by Commissioner of Central Excise under Section 73 or Section 83A of the Finance Act. If, the Committee of Commissioners, comes to such a conclusion then, it is mandated to direct the Commissioner of Central Excise to prefer an appeal to the Tribunal.

10.2 Under sub-section (1A)(i), the Board is empowered by a notification published in the Official Gazette to constitute the Committee of Commissioners. Sub-clause (ii) of sub-section (1A) of Section 86 provides that

the Committee so constituted shall either comprise of two Chief Commissioners of Central Excise or two Commissioners of Central Excise, as the case may be.

10.3 Where, however, the Committee of Commissioners differs in its opinion qua the order of the Commissioner of the Central Excise, it is required to state the point or points of difference and place the same by way of a reference before the Board which, after considering the facts of the order, can direct, the Commissioner of Central Excise to prefer an appeal to the Tribunal if, it is of the opinion that the order of Commissioner of Central Excise, is not legal or proper.

10.4 Under sub-section (2A) of Section 86, an identical methodology is provided where the Committee of Commissioners objects to any order passed by the Commissioner of Central Excise (Appeals), under Section 85 of the Finance Act.

10.5 Beyond this, the Section does not state as to the manner in which Committee of Commissioners have to arrive at a decision as to whether an appeal should be preferred against the order of Commissioner of Central Excise. As is abundantly clear, the provision for constitution of Committee of Commissioners appears to have been incorporated in the Finance Act to exclude the possibility of institution of frivolous and / or futile appeals. Frivolous and / or futile appeals could be of various kinds including against those orders of the Commissioner of Central Excise, which concern, issues that stand already covered against the Revenue by virtue of decisions rendered by superior courts or involve aspects which, cannot even make out a statable case before the Tribunal.

10.6 Barring such cases the Revenue, ordinarily, should have the liberty to assail an adjudication order which, in its wisdom, is against its interest. We may, however, add a note of caution, which is that, our observation as to what could be a frivolous and/ or futile appeal is not exhaustive.

10.7 The submission made before us by Mr. Mittal that the Committee of Commissioners should not only meet and consult but should also give reasons for the decision arrived at by them, independently of what is already placed on record before them, loses a sight of the fact as to how the Revenue functions when it is tasked with administrative duties.

10.8 Before we get to this point, we must deal with the submission of Mr. Mittal that the instruction dated 23.11.2012, issued by the Board, is reflective of the fact that the duty discharged by the Committee of Commissioners under Section 86(2) of the Finance Act is a quasi-judicial function. We have read the instructions. The instructions merely highlight the manner in which decisions were being taken in the past by the Committee of Commissioners, it does not in any way convey that the function discharged by the Committee of Commissioners is imbued with attributes of a quasi-judicial process.

10.9 In our view, the duty discharged by the Committee of Commissioners is purely administrative and, cannot be, categorized as a quasi-judicial function since, it does not decide the lis between the parties, that is, the Revenue and the assessee. There is neither a *de novo* investigation of facts nor is a hearing required to be given by the committee. All that the Committee of Commissioners does is to ascertain as to whether or not the adjudication order is impregnated with aspects which go against the interest of the Revenue, and if so, whether or not they are already covered by decisions rendered by superior

courts. The decision rendered by the Committee of Commissioners, in our view, does not have the attributes of a quasi-judicial function.

10.10 Furthermore, the instruction issued by the Revenue, is largely pivoted on the decision of the Division Bench of this court rendered in ***Kundalia Industries's case***, which in any event, is the subject matter of the instant reference. For the reasons that we would give hereafter, it would be clear that the approach commended in ***Kundalia Industries*** case does not find favour with us.

11. Therefore, having regard to the above, which is, that in our opinion, the decision rendered by the Committee of Commissioners is an administrative function, it would, to our minds, therefore, not require the members of the Committee to meet, consult and give independent reasons, as contended before us by Mr. Mittal.

11.1 In our view, a meeting and / or consultation is not mandatory so long as each member of the Committee has the requisite material placed before him prior to a decision being taken as to whether or not an appeal is to be preferred. It may be a wholesome circumstance to have a meeting and consultation between the members of the Committee but, the absence of the same, cannot render a decision taken by them open to challenge as long as they concur with each other and, there is, material placed before them for reaching such a conclusion.

11.2 The facts of this case show that Mr. B.K. Bansal, Chief Commissioner of Central Excise (Delhi Zone), appended his signatures to the note sheet on 15.04.2013, the material placed before him had notes of the Inspector (Review); the Superintendent (Review); the Deputy Chief Commissioner; and

the Additional Deputy Commissioner. Similarly, prior to Mr. P.S. Pruthi, Chief Commissioner, Central Excise (Chandigarh Zone) signing the note, on 26.04.2013, he had before him a review note prepared by Superintendent (Review), which was countersigned by AC (Review), on 22.04.2013.

11.3 This apart, on record, there is a review order bearing no.24/2013, which bears the signatures of both, Mr. B.K. Bansal and Mr. P.S. Pruthi.

11.4 In our opinion, though, no inter se meeting, in the physical sense, was held by the two Chief Commissioners, there is sufficient material, on record, to establish, that there was, a convergence of views.

11.5 The question, which, thus arises, is this : would the absence of a physical meeting and / or a face-to-face consultation, render the decision taken on 26.04.2013, by the Committee of Commissioners, illegal? In our view, the answer has to be in the negative. As long as there is material on record, and an indication, as in this case, in the form of signatures of the two Commissioners, as to their decision in the matter, a physical meeting and / or consultation is not the requirement of Section 86(2) of the Finance Act.

12. Which brings us to the other issue, as to whether the members of the Committee ought to have given their independent reasons for reaching the conclusion to institute the appeal. There is no gainsaying that, as in the case, of quasi-judicial function carried out by statutory authorities, even in respect of administrative decision, reasons ought to be given. The purpose behind seeking reasons is not only to do away with the allegation that the conclusion reached is arbitrary and / or unfair but, is also insisted upon, to enable the aggrieved party, as also, a superior authority (which could be a statutory authority or court or Tribunal) to ascertain as to what weighed with a decision

making authority in reaching its conclusion. The principle has been summed up in the case of ***Alexander Machinery (Dudley) Ltd. Vs. Crabtree, 1974 LCR 120*** that the decision of an administrative, quasi- judicial or even a judicial authority should not represent an "***inscrutable face of a sphinx***".

12.1 Therefore, while one cannot but agree with the proposition that there should be material on record which reflects the reasons as to why the Revenue wishes to prefer an appeal, what does not flow from that, is that, the Committee of Commissioners should necessarily give their own reasons if they otherwise agree with the reasons already on record. In the facts of the case, the record itself shows, to which, we have made a reference above, as to why the Revenue was desirous of preferring an appeal. The reasons set out were cogent and substantial. As to whether the reasons recorded would finally persuade the Tribunal to hold in favour of the Revenue is not what concerns the Committee of Commissioners. This is so as it is an unilateral administrative decision of an aggrieved party i.e., the Revenue.

12.2 Therefore, having regard to the above, should the decision of the Committee of Commissioners be overturned merely on the ground that they did not give their own independent reasons, even if it meant replicating, what has already been set forth by the subordinate officers, on record?

12.3 In our view, the answer has to be in the negative. This is so, as the administrative decision of the kind involved, as indicated above, requires the Committee of Commissioners to look at errors of fact and / or law in the order passed by the adjudicating authority only from the point of view of the Revenue i.e. as to whether the revenue should prefer an appeal. At this stage, the Committee of Commissioners is, neither addressing nor adjudicating upon the stand taken by the respondent/assessee. While, the decision of the

Committee of Commissioners has consequences, in as much as, the adjudicating authority's order is put in jeopardy by institution of the appeal, it has no civil consequences which, if at all, arise only when, the appeal is entertained and adjudicated upon by the Tribunal.

12.4 Therefore, having regard to the nature of the administrative functions discharged by the Committee of Commissioners, in our view, there is no requirement whatsoever under the provisions of Section 86(2) of the Finance Act to give independent reasons for coming to a conclusion, which is, in consonance, with a view already on record that an appeal should be filed.

12.5 In order to appreciate this aspect of the matter, it may be relevant to note that even while discharging judicial functions, often, courts and/or tribunals reject an appeal against the order-in-original or even a review without giving reasons because it agrees with the underlying reasons. Such a decision of the appellate / reviewing forum, if challenged before a superior forum, may get set aside for reconsideration, not always on account of absence of reasons, but because, the matter, perhaps, requires deeper consideration qua issues which remained unaddressed in the underlying order.

12.6 Therefore, to conclude that every decision rendered by the Committee of Commissioners which does not bear independent reasons would lay it open to challenge, in our opinion, would be not only erroneous but would also render the exercise inefficacious and impractical. In our view, the limited scrutiny that the Tribunal may conduct when there is an objection raised as regards the maintainability of the appeal is, to examine, as to whether, a decision has been taken by the officers, who ought to form part of the Committee of Commissioners. Once, the record shows that a decision has been taken to file an appeal then, in our opinion, it is beyond the remit of the Tribunal to either

examine the sufficiency of the material or the "appropriateness / desirability of instituting the appeal"; as these are aspects with respect of which, responsibility has been placed on the Committee of Commissioners.

12.7 The Tribunal, while acting as an appellate authority, in our view, has no jurisdiction whatsoever to strike down a decision taken by the Committee of Commissioners on the administrative side. As indicated above, the only aspect that the Tribunal can examine is, as to whether or not there is on record a decision of the Committee of Commissioners to institute an appeal. Once, such a decision is shown to have been taken then, the Tribunal, will entertain the appeal and adjudicate upon the same on merits; albeit in accordance with law.

12.8 The view that we have taken above is also the view that has been taken by a Division Bench of this court in ***L.R. Sharma-1'***s case, of which, one of us (S. Ravindra Bhat, J.), was a member. The Division Bench in that case examined the issue threadbare and made the following observations in paragraphs 7 and 8.

> "..7. The Court has considered the submissions of the parties. The scope of enquiry of a Court into administrative acts is limited. This is all the more so when the act in question is neutral (i.e. the filing of an appeal), rather than an order placing a demand upon the assessee or otherwise prejudicial to the interests of the assessee. An order under Section 86(2) is for the filing of an appeal, which will be considered on merits by the CESTAT. Whilst there is a requirement for a meaningful procedure to be followed in all administrative acts, including the present one, the Court must view the deliberation by the concerned authority in context. In this case, the respective Superintendents of the two Chief Commissioners prepared detailed notes concerning the facts, law applicable and the need for a reconsideration of the order of the Commissioner. This is not disputed. Equally, it is not disputed that these notes were placed before the Chief Commissioners. The fact that this was done independently for the two Chief Commissioners, who did not

sit together, is, as indicated above, not in question and does not affect the legality of the impugned order. The Chief Commissioners endorsed these proposals, and thus, the appeal was filed. The fact that the Chief Commissioners did not, on the record, record independent reasons for concurring with their respective subordinates does not render the authorization void. There is no such requirement in Section 86(2), and this Court does not propose to add another layer to these administrative proceedings. Rather, it is important to view the proceedings as a whole - detailed notes considering the issue of appeal were prepared by those in the office of the Chief Commissioner delegated with such tasks, and the final decision or approval was taken by the Chief Commissioner. Short of requiring the Chief Commissioner himself to record independent reasons, there is no deficiency in the administrative action. Indeed, the rationale for Section 86(2) was considered by the Supreme Court in Collector of Central Excise v. Berger Paints, (1990) 2 SCC 439, in the following words:

> "6. Having regard to the purpose of these rules as we conceive it, namely, to ensure that there was an application of mind to the points in respect of which the question for filing an appeal arose and that the appeal was duly authorised by the Collector, and was filed by the person authorised by the Collector in order to ensure that frivolous and unnecessary appeals are not filed, we are of the opinion that in the present context and in view of the terms of the rules and the purpose intended to be served, the appeal was competent and was duly filed in compliance with the procedure as enjoined by the rules. It has to be borne in mind that the rules framed therein were to carry out the purposes of the Act. By reading the rules in the manner canvassed by Dr. Pal, counsel for the respondent, before us which had prevailed over the tribunal, in our opinion, would defeat the purposes of the rules. The language of the relevant Section and the rules as we have noticed, do not warrant such a strained construction."

8. The reason for the introduction of Section 86(2), rather than permitting the filing of appeals by lower officers themselves, is to ensure that frivolous and unnecessary appeals are not filed. Indeed,

in this case, as in all cases, the merits of the case will be decided by the CESTAT, and if there presents no reasonable argument from the Revenue, the matter will be dismissed. The assessee has every opportunity to contradict the case of the Revenue before the CESTAT. By allowing appeals such as the present one, and inquiring into minute details of the authorization provided under Section 86(2), the result is the addition of another layer of litigation in the matter on the legality of the authorization. This runs contrary to the very purpose of Section 86(2), if the authorization under that section - which is to remove additional litigation - is the cause of further disputes. Therefore, given the underlying rationale behind Section 86(2), unless the manner in which the authorization has been granted by the Committee of Chief Commissioners is arbitrary or based on irrelevant information, the Court ought not to interfere with the administrative functioning of the concerned authority, nor impose a new and onerous requirement of an independent detailed and personal consideration by the Chief Commissioners themselves, ignoring the context, i.e. the detailed consideration of the issue by the subordinate officers also involved in the process. The cases relied upon by the Respondent are of no assistance. Neither Kundalia (supra), which concerned authorization under Section 35 of the Central Excise Act, 1944 (requiring the Chief Commissioners to be of the opinion that the order in question is illegal and improper, as opposed to only objecting to the order under Section 86(2)), nor ITC Limited (supra), deal with the standards for review under Section 86(2) or the law as laid down in Berger (supra). In fact, recently in Commissioner of Central Excise v. Ufan Chemicals, 2013 (290) ELT 217 (All), the Allahabad High Court, while considering a similar issue, observed that the precise method and manner of obtaining authorization is not an issue, but only a limited inquiry was permitted to determine whether such authorization was given in accordance with law, which, as discussed, is clearly the case in these proceedings…"

12.9 As would be evident, the court considered not only the decision of the another Division Bench in the case of ***Kundalia Industries*** but also the decision of the Supreme court in the case of ***Collector of Central Excise Vs. Berger Paints***. It would be pertinent to note that against the decision rendered

by the Division Bench in ***LR Sharma-1***, the matter was carried to the Supreme Court, which dismissed the Special Leave Petition in limine vide order dated 07.07.2014, passed in SLP No.14544-14545/2014. As a matter of fact, a review petition bearing no.2521-2522/2014, was also preferred, which was dismissed, once again, in limine, on 27.11.2014.

13. As noticed above, in ***LR Sharma-1***'s case, a Division Bench of this court had noticed, inter alia, a decision rendered by another Division Bench of this court in ***Kundalia Industries***'s case as also the judgment of the Division Bench of the Allahabad High Court in ***Ufan Chemicals***. The decisions both in ***Kundalia Industries*** as well as ***Ufan Chemicals*** pertain to Section 35B(2) of the Central Excise Act, 1944 (in short the Central Excise Act). The two decisions have taken, a diametrically, opposite view. While in ***Kundalia Industries***'s case, the Revenue's appeal was rejected on the ground that the Committee of Commissioners had only appended their signatures to a note prepared by subordinate officers, which, articulated a need for filing an appeal before the Tribunal, the Division Bench of the Allahabad High Court, allowed the appeals of the Revenue despite the fact that the Committee of Commissioners had acted on the note prepared by the subordinate officers. The Division Bench of the Allahabad High Court in ***Ufan***'s case, applied the ratio set forth by the Supreme court in ***Berger Paints*** while allowing the appeals of the Revenue. Pertinently, the decision of the Supreme Court in the ***Berger Paints***'s case was not brought to the notice of the Division Bench in ***Kundalia Industries***'s case.

13.1 The examination of the aforementioned decisions immediately brings to fore the fact that the two decisions were rendered under the provisions of Section 35B(2) of the Central Excise Act. The language used in Section

35B(2) of the Central Excise Act though not identical, we must confess, is broadly, similar to the language used in Section 86(2) of the Finance Act. Having said that, what appeals to us, is the view taken by the Supreme Court in Berger Paint's case, which was rendered in the context of Rule 9 of the Customs, Excise and Gold (Control) Appellate Tribunal (Procedure) Rules, 1982 (in short the 1982 Rules). For the sake of reference the said Rule is extracted hereinbelow.

> "..**9. What to accompany memorandum of appeal?:** (1) Every Memorandum of appeal required to heard by a two-Member Bench shall be filed in quadruplicate and shall be accompanied by four copies, one of which shall be a certified copy of the order appealed against in the case of an appeal against the original order passed by the additional Commissioner or Commissioner of Excise or Customs and where such an order has been passed it appeal or revision, four copies (one of which shall be a certified copy) of the order passed in appeal or in revision and four copies of the order of the original authority.
>
> Explanation: "Copy for the purpose of this Rule shall mean a true copy certified by the appellant or appellant's representative to be a true copy.
>
> (2) In an appeal filed under the direction of the Collector or the Administrator or the Central Board of Excise and Customs, one of the copies of the order appealed against shall be an attested copy instead of a certified ...."

13.2 It would be noticed that Rule 9(2) of the 1982 Rules is, broadly, in consonance with the Section 86(2) of the Finance Act. In somewhat similar circumstances, where institution of an appeal, authorised by the Collector, based on a note placed before him, was assailed, the Supreme court repelled the challenge based on the rationale that such authority was given to the Collector to ensure that frivolous and unnecessary appeals were not filed. The

Supreme Court ruled, that as long as there was an application of mind (by which it did not mean separate reasons) in respect of the issue qua which the appeal arose and due authority was given by the Collector, the appeal was competent. On these grounds, the Supreme Court reversed the judgment and order of the Tribunal.

14. Having regard to the judgment rendered in ***Berger Paints***'s case (which has been followed by a Division Bench of this court in ***LR Sharma-1***'s case, as also, by the Division Bench of the Allahabad High Court in ***Ufan***'s case), we are bound to hold that the decision in ***Kundalia Industries'*** case is not consistent with a view taken by the Supreme Court.

14.1 It is for this very reason that we respectfully differ from the view taken by a Division Bench of the Punjab and Haryana High Court in : ***B.E. Office Automation Products Pvt. Ltd***. Accordingly, the two judgments of the Tribunal cited by Mr. Mittal i.e in ***V.S. Exim Pvt. Ltd.*** and ***Super Cassettes Industries Ltd.***, in our view, do not state, the correct position in law. As a matter of fact, the decision rendered by another Division Bench of the Allahabad High Court, in ***Devson Steels,*** accords, with a view taken by us.

15. Before we conclude, we may also refer to a decision dated 02.11.2012, rendered by a Division Bench of this court in : WP(C) 6918/2012, titled : ***LR Sharma and Co. Vs. Commissioner of Service Tax and Ors***. (hereafter referred to as LR Sharma-2).

15.1 As is obvious, this was a decision rendered in a writ petition by a Division Bench. By this decision, which is really in the nature of an order, the assessee had questioned the maintainability of the appeal pending before the Tribunal on the ground that a review of the order of the Committee of Commissioners did

not validly take place (by which we would understand that a meeting was not convened) in terms of Section 86(2) of the Finance Act. The Division Bench by a short order permitted the petitioner / assessee to raise the said objection by way of a preliminary issue before the Tribunal.

15.2 For the reasons given above, in our view, this approach is inconsistent with the purpose and the object for which Section 86(2) has been incorporated in the Finance Act. As articulated hereinabove, the role of the Tribunal is, limited to only ascertaining as to whether or not the Committee of Commissioners (comprising of duly authorised officers) has taken a decision to institute the appeal. Once, such satisfaction is reached in this behalf, the Tribunal cannot render the appeal incompetent, in particular, on the ground that no meeting took place, or that, there were no independent reasons recorded by the Committee of Commissioners.

16. Having regard to the aforesaid discussion, our decision, with respect to the two questions of law, referred to us, is as follows :-

(i). In so far as question no.1 is concerned, the same is answered in favour of the Revenue. The Tribunal, as indicated above, cannot examine the issue beyond the factum as to whether or not a decision has been taken by a Committee of Commissioners to institute the appeal.

(ii). In view of our answer rendered qua question no.1, question no.2 does not arise for consideration. In any event, in our discussion hereinabove, we have clearly indicated that the act of appending of signatures by the members of the Committee of Commissioners, would suffice, as long as, the record placed before them, contains the necessary material and the reasons for approving the action to institute the appeal.

17. The reference is, answered, accordingly by us. The matter be placed before the Roster Bench for decision in the appeal.

RAJIV SHAKDHER, J.

S. RAVINDRA BHAT, J.

SANJIV KHANNA, J.

JULY 20, 2015
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