

**1990 (1) G. L. H. 558**  
**A. P. RAVANI AND J. U. MEHTA, JJ.**

(M/s) Saraswati Dyeing & Printing Works and Another ... Petitioners  
Versus  
Union of India and Others ...Respondent

Special Civil Application No.1710 of 1977

D/- 12-9-1989\*

\*Application praying for appropriate writ to quash and set aside order of Assistant Collector and etc...

**(A) Central Excises & Salt Act, 1944 - S. 35 - In proceedings under S. 35, the Collector (Appeals) has powers to modify even that part of the order of Assistant Collector which is favourable to the assessee even though the department has not preferred any Appeal or filed cross objections in the matter.**

S. 35 of the Central Excise and Salt Act, 1944 under which the Collector of Central Excise, Customs (Appeals) decided the appeal empowered the Collector to make such further inquiry and pass such order as he thinks fit confirming, modifying or annulling the decision or order appealed against. In the case of *Babulal Nagar v. Shri Synthetics Ltd.* (AIR 1984 SC 1164) the Supreme Court held that the phrase 'as he thinks fit' confers a very wide jurisdiction enabling the authority to take an entirely different view on the same set of facts. The only limit on the power of the appellate authority under S. 35 of the Act as it then stood is that the order must be germane to the act and its purposes. The appellate authority cannot pass, an order de hors the provisions of the statute under which it exercises the power. The provisions of the statute which confers power itself determines the limit of its power though put in very wide language. Therefore, the contention that the Collector (Appeals) had no jurisdiction to pass any order by which the decision rendered by the Assistant Collector in favour of the petitioner has been reversed or modified to the interest adverse to the petitioner cannot be accepted. (Para 6 , 7 )

**(B) Administrative Law - Natural justice - Central Excises & Salts Act, 1944 - S. 35 - When an authority proposes to pass an order which is likely to be against the interest of a person, such person is required to be given an opportunity to be heard - When the ultimate order of Collector (Appeals) is likely to be against interest of the assessee, the assessee ought to be granted opportunity to be heard.**

The learned Counsel for the petitioners submits that it may be possible to say that the Collector (Appeals) had power to reverse the decision rendered by the Assistant Collector in favour of the petitioner even in the appeal filed by the petitioner. But in his alternative submission, while exercising this power, the Collector (Appeals) could not have passed the order without giving an opportunity of being heard to the petitioner. There is much substance in this argument. In the case of *Orient Paper Mills v. Union of India*, (AIR 1969 SC 48) the Supreme Court held that Collector (Appeals) exercises his quasi-judicial power while acting under the provisions of S. 35 of the Act. There is a lis between the parties. At the end of the adjudication the liability of the party is to be determined as to the reliability or otherwise of the excise duty. Such decision is likely to affect the rights of the parties. Therefore, even if the Collector (Appeals) has power to pass order as he thought fit, if the ultimate order is likely to be against the interest of the appellant, the appellant ought to have been granted an opportunity of being heard on the point. There is no dispute with regard to the fact that no opportunity of hearing has been afforded to the petitioners on this point. Hence the order passed by the Collector (Appeals) to this extent is in contravention of the principles of natural justice. Therefore this part of the order cannot be sustained. (Para 8) [*@page558*]

**Cases Referred:**

1. Union of India v. Bombay Tyre International Ltd., 1983 E.L.T. 1896 (SC).
2. Babulal Nagar v. Shree Synthetics Ltd., AIR 1984 SC 1164 ( Para 6 )
3. Raja Ram Mahadev Paranjyape v. Aba Maruti Mali AIR 1962 SC 753 ( Para 6 )
4. V. C. Rangadurai v. D. Gopalan & Ors. AIR 1973 SC 281 ( Para 6 )
5. Orient Paper Mills v. Union of India AIR 1969 SC 48 ( Para 8 )

**Appearances:**

Mr. K. S. Nanavati for the petitioner  
 Mr. J. D. Ajmera for the respondents

**PER RAVANI, J.:-**

1. Petitioner No. 1 is a partnership firm and is engaged in the business of processing Art Silk Fabrics after purchasing grey fabrics from the market. Petitioner No. 2 is a partner of petitioner No. 1 firm. The petitioner firm cleared the manufactured fabrics on payment of duty calculated on the basis of value declared under Section 4 of the Central Excise and Salt Act, 1944. On scrutiny of the relevant record, it was found by the department that the entire sale was made by petitioner No. 1 firm to M/s. Saraswati Silk Mills which, in turn, sold the goods in market. Therefore, the department held that the price charged by M/s. Saraswati Silk Mills while selling the same to dealers was the correct market price for the purpose of assessment and levy of the duty. The petitioner agreed to make the payment of the duty on the basis of the price charged by M/s. Saraswati Silk Mills to the dealers. However, the petitioner claimed certain deductions from the price charged by M/s Saraswati Silk Mills. The dispute centred round the deductions claimed by the petitioners.

2. The Assistant Collector heard the petitioner with regard to the disputes in question. The particulars of the disputes raised by the petitioner and the decision given by the Assistant Collector with respect to each item of dispute are mentioned here in below :

Sr. No.	Dispute raised by the petitioner	Rate at which the deduction is claimed	Dicision by the Asst. Collector
1.	Packing, labour & labelling charges	30 ps per mtre.	Allowed @ 25 per metre.
2.	Interest on capital investment for 90 days	4.5%	Allowed@ 4.5%
3.	Price load on sound fabrics on account of loss at lower price on fents, rags, chindies.	7%	Allowed 5%
4.	Price load on account of uniform discount allowed to dealers	3%	Allowed 3%

The petitioner felt aggrieved by the aforesaid order passed by the Assistant Collector and hence preferred appeal before the Appellate Collector, Central Excise, Customs (Appeals), Bombay. In appeal the Appellate Collector passed order, relevant operative portion of which is as follows :

"i. The deduction on account of packing labour charges, labelling charges is not permissible as these processes are parts of the processes for completion of manufactured goods.

ii. The interest on capital investment. The deduction of 4.5% allowed by the Assistant Collector is reasonable. The interest per metre should be worked out accordingly, i.e. 4.5% for a period of 90 days. As the interest is on percentage basis it is the same percentage for a quarter or year and it does not change the position. [ @page559]

iii. Deduction on account of loss in price due to sale at lower price of fents, rags, chindies. The deduction of 7% claimed by the appellants on this account is not permissible because the assessable value is based on the condition in which the goods are cleared from factory.

iv. 3% uniform discount allowed by the Assistant Collector is correct in law because M/s S. S. Silk Mills pass on the discount of 3% to the dealers. 6% discount claimed by the appellants cannot be allowed to be deducted from the price because the quantum of discount allowed to dealers uniformly, can only be allowed to be deducted."

3. The claim of the petitioner with regard to the deduction on account of packing, labour and labelling charges cannot be sustained. On this point that is inclusive of post manufacturing expenses in the assessee, i.e. the commodity, the decision given by the Appellate Collector is eminently just and proper. The controversy on this point has been decided by the Supreme Court in the case of *Union of India & Ors. v. Bombay Tyre International Ltd.* reported in 1983 E.L.T. 1896 (SC). In this view of the matter the learned counsel for the petitioner has not pressed the petition on this point.

4. As far as the interest on capital investment is concerned, deduction allowed at the rate of 4.5% by the Assistant Collector has been maintained by the Collector. Therefore, on this point also no grievance is made by the learned counsel for the petitioner.

5. As regards the deduction claimed on account of loss in price due to sale at lower price on fents, rags, chindies is concerned, the learned counsel for the petitioner contends that the Assistant Collector has granted deduction at the rate of 5% as against the claim of the petitioner of deduction at the rate of 7%. No appeal against this part of the order was filed by the department. Even so, the Collector (Appeals) not only rejected the further prayer of the petitioner to grant 7% deduction, but he even modified and reversed the order passed by the Assistant Collector which was in favour of the petitioner. In the opinion of the Collector, no deduction whatsoever was permissible on this account because the assessable value was based on the condition in which the goods were cleared from the factory.

6. In view of the above position, the learned counsel for the petitioners contends that since there was no appeal nor cross objections were filed by the revenue, in an appeal filed by the petitioner against the order of the Assistant Collector, the Collector (Appeals) had no jurisdiction to vary/modify or make any alteration whatsoever in the impugned order passed by the Assistant Collector so as to adversely affect the appellant-petitioner. The contention cannot be accepted. The Collector of Central Excise, Customs (Appeals) passed order on August 2, 1977. Section 35 of the Central Excises and Salt Act, 1944 under which he decided the appeal empowered the Collector to make such further inquiry and pass such order as he thinks fit confirming, modifying or annulling the decision or order appealed against. The phrase 'as he thinks fit' is very much important for determining the scope of powers of the appellate authority. In the case of *Babulal Nagar v. Shree Synthetics Ltd.* reported in AIR 1984 Supreme Court, page 1164, the phrase 'as he thinks fit' came up for consideration before the Supreme Court. The phrase occurred in Section 61 of the Madhya Pradesh Industrial Relations Act. While interpreting the phrase in paras 16 and 17 of the judgment, the Supreme Court has observed as follows:

"The main part of Sec.61 clearly spells out the jurisdiction of the Industrial Court to pass any order in reference to the case brought before it as it thinks fit. The expression 'as it thinks fit' confers a very wide jurisdiction enabling it to take an entirely different view on the same set of [ @page560] facts. The expression 'as it thinks fit' has the same connotation as unless context otherwise indicates, 'as he deems fit'."

In the case of *Raja Ram Mahadev Paranjyape v. Aba Maruti Mali & Ors.* reported in AIR 1962 Supreme Court, page 753, the phrase 'as he deems fit' occurring in Section 29(3) of the Bombay Tenancy and Agricultural Lands Act, 1948 came up for consideration. In para 14 of the judgment, the Supreme Court has observed as follows :

"The words 'as he deems fit' do not bestow a power to make any order on considerations de hors the statute which the authorities consider best according to their notions of justice."

Similar view is expressed by the Supreme Court in the case of *V.C. Rangadurai v. D. Gopalan & Others* reported in AIR 1979 Supreme Court, page 281. While interpreting the phrase 'as it deems fit' occurring in Section 37 of the Advocates Act (25 of 1961) the Supreme Court has observed that "wide as the power may be the order must be germane to the Act and its purposes, and latitude cannot transcend those limits".

7. Thus in view of the aforesaid decisions of the Supreme Court, the only limit on the power of the appellate authority under Section 35 of 'the Act' as it then is stood that the order must be germane to the act and its purposes. The appellate authority cannot pass an order de hors the provisions of the statute under which it exercises the power. The provisions of the statute which confers power itself determines the limit of its power though put in very wide language. Therefore, the contention that the Collector (Appeals) had no jurisdiction to pass any order by which the decision rendered by the Assistant Collector in favour of the petitioner has been reversed or modified to the interest adverse to the petitioner cannot be accepted. It is not shown nor it is argued even, that the order passed by the Collector (Appeals) is not germane to the Act and its purposes. Hence the contention fails.

8. The learned Counsel for the petitioners submits that having regard to the language of Section 35 as it then stood, it may be possible to say that the Collector (Appeals) had power to reverse the decision rendered by the Assistant Collector in favour of the petitioner even in the appeal filed by the petitioner. But in his alternative submission, while exercising this power, the Collector (Appeals) could not have passed the order without giving an opportunity of being heard to the petitioner. In short, it is submitted that the Collector could not have refused the deduction of any amount below 5% which was allowed by the Assistant Collector. If the Collector (Appeals), for whatever reasons thought that the deduction of 5% was required to be reduced further or to be cancelled completely, the petitioner should have been heard on this point. There is much substance in this argument raised by the learned counsel for the petitioners. In the case of *Orient Paper Mills v. Union of India*, reported in AIR 1969 Supreme Court, page 48, the provisions of Section 35 of the Act came up for consideration before the Supreme Court. The Supreme Court held that the Collector (Appeals) exercises his quasi-judicial power while acting under the provisions of Section 35 of the Act. There is a lis between the parties. At the end of the adjudication the liability of the party is to be determined as to the leviability or otherwise of the excise duty or as regards the quantum of excise duty payable by the party. Such decision is likely to affect the rights of the parties. Therefore, even if the Collector (Appeals) has power to pass order as he thought fit, if the ultimate order is likely to be against the interest of the appellant, the appellant ought to have been granted an opportunity of being heard on the point. As indicated here in above, there is no dispute with regard to the fact that no opportunity of hearing has [*@page561*] afforded to the petitioners on this point. Hence the order passed by the Collector (Appeals) to this extent is in contravention of the principles of natural justice. Therefore this part of the order cannot be sustained.

9. As far as 3% uniform discount allowed by the Assistant Collector is concerned, the Collector (Appeals) held that the order passed by the Assistant Collector was not required to be interfered with. He held that the discount claimed at the rate of 6% could not be allowed because quantum of discount allowed to dealers uniformly can only be allowed to be deducted. The learned Counsel for the petitioner submitted that on this point the decision rendered by the Collector (Appeals) is not correct. In his submission, even if the petitioner has given discount of 6% to bulk purchasers, that should have been taken into consideration and the same should have been allowed. However, the difficulty in the way of the petitioner is that on this point the petitioner has led no evidence before the Assistant Collector or before the Collector (Appeals). In absence of any material on this point, the decision arrived at by the Collector (Appeals) on this point cannot be interfered with while exercising powers under Articles 226/227 of the Constitution of India.

**10.** In above view of the matter, as far as the decision with regard to deduction on account of loss in price due to sale at lower price of fents, rags, chindies is concerned, it cannot be sustained as being in contravention of the principles of natural justice. To that extent, the order passed by the Collector (Appeals) is required to be reversed and set aside and hereby it is set aside to that limited extent only. The matter is remanded to the Appellate Collector, Central Excise, Customs (Appeals), Bombay for affording an opportunity of being heard to the petitioner on this point and decide the issue in accordance with law. Rest of the order passed by the Collector (Appeals) is not disturbed. Rule made absolute to the aforesaid extent, with no order as to costs.

(RPU)

Petition partly allowed. [*@page562*]