

## Remanding of service tax refund claims : Appellate Commissioners find ingenious ways to beat Board Circular – Jan 22, 2011

CAN the Commissioner (Appeals) remand the cases back to the Adjudicating Authority? A billion dollar question, perhaps, given the fact that the Service Tax Department is sitting of thousands of crores of service tax refund due to exporters.

It is clear that the remanding powers of Appellate Commissioners have been withdrawn after 11-5-2001, after the amendment to Sections 35A(3) of the Central Excise Act/Section 128A(3) of the Customs Act.

I've reproduced, in verbatim, the Circular dated 18-2-2010 issued by the Board on the subject matter:

*Powers of Commissioner (Appeals) to remand cases (Instructions F.No. 275/34/2006- CX.8A dated 18-2-2010)*  
Section 35A(3) of the Central Excise Act, 1944 / Section 128A(3) of the Customs Act, 1962 as it existed before 11.5.2001 provided that Commissioner (Appeals) shall, after making such further enquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling decision or order appealed against or may refer the case back to the adjudicating **authority** with such direction as he may think fit for a fresh adjudication or decision as the case may be, after taking additional evidence, if necessary.

2. An amendment was brought out in the aforesaid sections vide Finance Act, 2001 w.e.f. 11.5.2001 deleting the phrase as mentioned in bold above with an intention to withdraw the powers to Commissioner (Appeals) to remand the cases for fresh adjudication to the original adjudication authorities . After the amendment in 2001, the said Sections read as follows:-

“ The Commissioner (Appeals) shall, after making such further enquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling the decision or order appealed against.”

3. The matter whether the Commissioner ( Appeals) continues to have powers to remand beyond 11.5.2001 came up before the Gujarat High Court in the case of M/s. Medico Lab. The Hon'ble High Court of Gujarat, vide order dated 21.9.2004 in the case of CCE, Ahmedabad-I Vs. Medico Lab, held that Commissioner( Appeals) continues to have the power to remand even after the amendment.

4. Hon'ble Punjab & Haryana High Court in the case of CC, Amritsar Vs. M/s. Enkay (India) Rubber Co. Pvt. Ltd. vide order dated 8.3.2007 ([2007-TIOL-152-HC-P&H-CUS](#)) and in the case of CCE, Jalandhar Vs. B.C. Kataria [2008(221)ELT.508 P&H] vide order dated 6.9.2007 had held that the Commissioner( Appeals) have been divested of the powers to remand the cases back to adjudicating authority after deletion of that power from Section 35A(3) of Central Excise Act vide amendment made in 2001. Hon'ble High Court has distinguished the judgement of the Gujarat High Court in the case of Medico Labs in this case and also stated that the reliance on the Hon'ble Supreme Court judgement in the case of Umesh Dhaimonde ([2002-TIOL-415-SC-CUS](#)) cannot be made as in that case Hon'ble Supreme Court was not dealing with the provisions where earlier power of remand was specifically conferred and subsequently taken away by amendment carried by Finance Act, 2001.

5. The Hon'ble Supreme Court in its judgement dated 1.3.2007 in Civil Appeal No. 6988/2005 in the case of MIL India Ltd. ([2007-TIOL-30-SC-CX](#)) has observed that “in fact, the power of remand by the Commissioner( Appeals) has been taken away by amending Section 35A with effect from 11.5.2001 under the Finance Bill, 2001. Under **the Notes** to clause 122 of the said Bill it is stated that clause 122 seeks to amend Section 35A so as to withdraw the power of the Commissioner( A) to remand matters back to the adjudicating authority for fresh consideration.” The said decision of the Supreme Court was brought to the notice of CESTAT in the case of CCE, Jalandhar Vs. Hawkins Cookers Ltd. reported in 2007(8)RLT.7, but the Tribunal held that the Supreme Court in the said case had only noted the provisions of amended law whereas the specific issue whether Commissioner( A) has power to remand after amendment to provisions of Section 35A has been considered by the Hon'ble Gujarat High Court in the case of Medico Lab and the High Court has held that the Commissioner (A) has power to remand under the amended provisions also. The appeal (CEA No.29/2008) filed by the Commissioner of Central Excise, Jalandhar against the said order in the Hawkins Cookers case stating that the said observations as quoted above are part of the ratio decidendi of the decision of the Hon'ble Supreme Court, has been allowed by the Punjab & Haryana High Court vide order dated 14.7.2008 relying upon its own judgement in the case of CCE, Jalandhar Vs. B.C. Kataria [2008(221)ELT. 508].

6. In the light of the observations of Hon'ble Supreme Court in the case of MIL India Ltd. and the judgement of Hon'ble High Court of Punjab & Haryana in the case of M/s. Enkay (India) Rubber Co. Pvt. Ltd., M/s. B.C. Kataria and M/s. Hawkins Cookers Ltd., you are requested to issue suitable instructions to the Commissioners( A) working under your jurisdiction to follow the said judgments strictly. It may also be brought to their notice that Hon'ble Supreme Court in the case of MIL India Ltd., while noting that the powers of remand had been taken away, has also categorically stated that the Commissioner (A) continues to exercise the power of adjudicating authority in the matter of assessment and the Commissioner( A) can add or subtract certain items from the order of assessment made by the adjudicating authority and the order of Commissioner (A) could also be treated as an order of assessment. Board instructions dated 25.7.2008 ( copy enclosed ) may be referred in this regard.

7. The receipt of this instruction may please be acknowledged. A copy of the instruction issued to the Commissioners( Appeals) under your jurisdiction may also be endorsed to the Board. The issue may also be monitored at your level.

A simple reading of this Circular would make things clear, even to a lay man, that the Commissioner (Appeals) cannot remand cases back to the Adjudicating Authority. But, in actual practice, one comes across instances where some Appellate Commissioners do remand the cases, but, in a very smart manner, without actually using the word 'remand'. Cases where the Appellate Commissioner 'returns' the case back to the Adjudicating Authority with a direction to compute the refund claim in the light of the Board Circular No. 120/01/2010 are rampant. There are also some cases where the Appellate Commissioner sends the file back to the Adjudicating Authority, with a direction to re-examine the case after verifying the documents in the light of Board Circular No. 120/01/2010. It is plain and simple that, despite that the word 'remand' is not used in these cases, the issue is one of remanding of the case by the Appellate Commissioner, which is not allowed. While it is anybody's guess as to why the Board took nine long long years to come out with the Circular dated 18-2-2010, considering the fact that the law giving remanding powers to the Appellate Commissioners had been amended in 2001 itself, the least one expects now is for the Board Circular to get implemented, in letter and spirit.

I had earlier written in **TIOL** that the Board Circular No. 120/01/2000, which many of my colleagues regarded as manna from heaven for the hapless exporters, would actually be used to deny refunds rather than to, facilitate refunds. This is exactly what is happening now. The Adjudicating Officers are actually using the Circular to summarily reject refund claims by reading the Circular 'between lines'. In a recent rather amusing order, an Assistant Commissioner has rejected the refund claim stating that the certificate given by the exporter's auditor, a Big 4 firm, who had given an usual disclaimer, as meeting the requirements of the Circular.

**Here are some of the popular reasons which I've come across, for the Department rejecting claims, in toto, without considering the documents filed by the exporters:**

- ++ *Exporter does not have service tax registration certificate*
- ++ *Exporter's premises are not indicated in the registration certificate or that, he should have taken a centralized registration certificate*
- ++ *Exporter is to be treated as a different service provider, than the one mentioned in the registration certificate*
- ++ *Exporter has not provided 'adequate details' to prove that he has exported the services*
- ++ *The Foreign Inward Remittance Certificates submitted by the exporter do not contain the references of the export invoices*
- ++ *Exporter has not produced documents to prove the service tax payment by the service provider (rendering services to the exporter, in respect of whom, the refund is claimed)*
- ++ *Exporter has 'failed to establish' that he is covered by the Export of Services Rules*
- ++ *Exporter has 'failed to prove' that he is entitled for the refund claim.*
- ++ *Exporter has filed the refund claim beyond the one year period and consequently rejected in terms of Section 11B of the Central Excise Act*
- ++ *The certificate given by the exporter's auditor does not meet the requirements of Circular No. 120/01/2010.*

In these cases, when appeals are filed before the Commissioner (Appeals), one would expect the Appellate Commissioner to settle the issue once for all, by calling for the records from the Adjudication Authority and passing speaking orders. But, this seldom happens. Most Appellate Commissioners remand the cases back to the Adjudicating Authority, albeit indirectly, to examine the claim and pass orders in terms of Circular No. 120/01/2010. In most cases, where the hapless exporters have gone back to the Adjudicating Authority, fresh information is called for, based on which, refund claims are again rejected.

In some cases, the Department has also filed appeals before the Tribunal stating that the Commissioner (Appeals) cannot remand the cases. Of course, some of the hapless exporters have also approached the Tribunals for orders directing the Commissioner (Appeals) to pass orders without remanding the cases back to the Adjudicating Authority.

Be that as it may... the hapless exporter caught between the Department which is finding all kinds of reasons and excuses to summarily reject refund claims and the Appellate Commissioners finding ingenious ways to remand cases, in violation of the Board Circular dated 18-2-2010. In the ultimate analysis, preciously very little of service tax refunds are flowing to the exporters and it is reported that the accumulated quantum of service tax refund claims would run to a few thousands of crores of rupees.

**Before concluding...**

We've excellent Appellate Commissioners with a very good knowledge of the law. In fact, it's always been a pleasure to appear before the highly learned Appellate Commissioners. I am therefore surprised as to why, some Appellate Commissioners are remanding cases, despite the Board Circular. I can only think of the administrative issues for this menace, as, under the current dispensation where the Adjudicating Authorities are rejecting claims on technical grounds, every Appellate Commissioner would virtually get converted into an Adjudicating Authority if he is not allowed to remand the cases. But, this cannot be the reason for the blatant violation of the Board Circular by the Appellate Commissioners, especially when Tribunals are frowning upon the practice of remanding of cases by the Appellate Commissioners.

It's high time the Board woke up to this menace of Appellate Commissioners remanding cases, in whatever manner. In my view, any order in appeal which requires the appellant to go back to the Adjudicating Authority is a remand order, including an order in appeal which gives a partial relief.

Prior to Circular No. 120/01/2010, the Adjudicating Authorities were passing orders holding that certain input services were not used for providing output services which are exported. It was then easy to get favourable orders from the Appellate Commissioners. With the Adjudicating Authorities getting smarter now and rejecting claims on technical grounds even without going through the documents filed, the only hope for exporters lies with the Tribunal.

In terms of Board Circular No, 809/6/2005-CX dated 1-3-2005, the Assistant /Deputy Commissioners can pass refund orders without any monetary limit. However, as per this Circular, for claims of Rs 5 lakhs and above, there has to be pre-audit at the level of the jurisdictional Commissioner. I would wonder if the jurisdictional Commissioners are at all, doing this pre-audit, as refund claims are being rejected by the Assistant/Deputy Commissioners left, right and centre on purely technical grounds. It seems extremely ironic that, while an Assistant/Deputy Commissioner can issue a SCN and demand duty of only upto Rs 5 lakhs, in the case of a refund claim involving much much higher amounts (in some cases, these run to several crores of rupees), he can issue a SCN and summarily reject the refund claim. Is this an attempt by the learned jurisdictional Commissioners not to be seen as apparently violating the Board Circulars, at least, on a personal level?

Circular No. 120/01/2010 has been issued by the super bosses in Delhi, as we know, which is supposed to be binding on the lower level officers including the Chief Commissioners and the Commissioners. We see appeals being filed by the Department against orders passed, in some rarest of rare cases by the lower level Adjudicating Officers and in most other cases, by the Appellate Commissioners, in the Tribunal. This virtually amounts to questioning the validity of Circular No. 120/01/2010. In some cases, the Department Representatives also argue before the Tribunal, virtually questioning the validity of Circular No. 120/01/2010. Are these officers taking the requisite internal authorizations to question the circular issued by their own Delhi bosses, one wonders?

Be that as it may.... the fact to be reiterated remains that refunds are just not flowing to the exporters, despite the various circulars and notifications issued by the Board. It seems very clear that the Department is just not allowing refunds to flow, in utter disregard to the Board Circulars. It's high time, the Board understood that its Circulars have completely failed to achieve any tangible purpose whatsoever and are, in fact, being used by the Department to reject refund claims.

In a lighter vein.... the Board would do well to issue a circular giving the popular reasons based on which, the Department can summarily reject refund claims. And, remember to add that the all powerful Assistant / Deputy Commissioners can reject refund claims if they don't like the face of the exporter.....