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

% **DECIDED ON: 20.03.2014**

\+ CEAC 20/2014

COMMISSIONER SERVICE TAX ..... Petitioner
Through: Ms. Sonia Sharma, Sr. Standing Counsel.

versus

L.R. Sharma ..... Respondent
Through: Mr. J.K. Mittal with Mr. Vipul Dubey, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

1. This is an appeal against an order of the Central Excise and Service Tax Appellate Tribunal ("*CESTAT*"), which accepted the assessee's objections to an order authorizing the filing of an appeal under Section 86(2) of the Finance Act, 1994 ("*the Act*"). Section 86 introduced the facility of an appeal to the CESTAT, stating:

> **"*Appeals to Appellate Tribunal.***
> ***86.*** *(1) Any assessee 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.*

(1A)(i) The Board may, by notification in the Official Gazette, constitute such Committees as may be necessary for the purposes of this Chapter.

(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 …"

2. The Committee of the Chief Commissioners may – under Section 86 (2) - direct that an order passed under Sections 73 or 83A be appealed to the CESTAT. The present case, involves the legality of the exercise of this power. The Respondent (LR Sharma) provides services relating to replacement of water pipelines for the Delhi Metro Rail Corporation, Delhi Jal Board and other entities, but was not paying service tax according to the provisions of Section 65(39a) of the Finance Act, 1994. On 15.10.2010, the Commissioner of Service Tax ("*the Commissioner*") issued a show cause notice to the Respondent asking why an amount of ₹22,60,09,148, leviable under Sections 66, 67 and 68, of the Act should not be recovered on account of services provided by the Respondent. Other demands too were made in the show-cause notice. The show-cause notice was adjudicated subsequently by the Commissioner, who, by an order dated 24.4.2012, dropped the proceedings and discharged

the Respondent. A review order was then passed by the Committee of Chief Commissioners under Section 86(2) of the Act, to file appeal the matter to the CESTAT.

3. The legality of the order deciding to file an appeal, was questioned before the CESTAT, which held that the discretion vested in the Committee under Section 86(2) (hereafter "the Committee") had been improperly exercised, and therefore the appeal required dismissal. The Revenue today impugns this order of the CESTAT, on the legality of the order under Section 86(2), independent of the merits of the case.

4. The assessee had argued before the CESTAT that the order under Section 86(2) was bad in law because (a) there was no meeting between members of the Committee; (b) the order was prepared by the subordinate officers to which the concerned Chief Commissioners merely appended their signatures without independently considering the matter, or deliberating upon the issue. The CESTAT dismissed the first objection on the strength of the decisions in *Commissioner of Central Excise* v. *ITC Limited*, 2008 (221) ELT 331 (Kar.) and *Commissioner of Central Excise* v. *Kundalia Industries*, 2012 (279) ELT 351 (Del), holding that there is no statutory requirement of a physical meeting, but only a consensus *ad idem* on the issue. However, the CESTAT held in favour of the Respondent on the second issue, holding that there was no application of mind. The findings of the CESTAT on this issue were as follows:

"*14. There is however another aspect. The question is whether the two Chief Commissioners applied their mind and have recorded an informed conclusion / decision for preferring an appeal. As already noticed, the Chief Commissioner, Delhi on 14.07.2012 and the Chief Commissioner, Chandigarh on 23.07.2012 merely signed the note put up by the respective subordinate officers setting out a summary of facts; a summary of the adjudication order; an analysis of the circumstances; and recommendation that this is a fit case for preferring an appeal. The respective notes were signed by the respective Chief Commissioners without anything to indicate independent consideration of the relevant issues and of agreement with the administrative analysis at lower levels, as to the appropriateness of preferring an appeal to the Tribunal. In identical circumstances, the Delhi High Court in Kundalia Industries (paragraph 5 and 6) and this Tribunal in V.S. Exim Pvt. Ltd. have held that mere appending of signatures by the Commissioners comprising the committee on note sheets drawn up by subordinate officers is no compliance of the statutory provision. Shri Amresh Jain, ld. DR would exert to point out a distinction between Section 35B(1A)(2) of the Central Excise Act, 1944 and Section 86(2) of the Act. According to the ld. DR under the Central Excise Act, the committee if of the opinion that an adjudication order or an appellate order is not legal and proper may direct preferring of an appeal to the Tribunal. Section 86(2) of the Act enjoins that the committee, if it objects to an adjudication order, may direct an appeal to be preferred to the Tribunal. In view of the difference in the language of the two distinct provision conferring discretion on the committee under the different enactments, even if Chief Commissioners (DZ & CZ) in the present case had merely appended their signatures (on 14.07.2012 and 23.07.2012) the respective office notes, there is sufficient compliance of Section 86(2), is the contention.*

15. The above contention does not commend acceptance. As pointed out by this Tribunal in V.S. Exim and by the Delhi High Court in Kundalia Industries, mere appending of signature on the departmental note file in a mechanical fashion does not constitute sufficient compliance with the clearly implied statutory obligation of due application of mind by the Commissioners comprising the committee, to the relevant twin components of the decision;

(a) a rational consideration of the relevant material pertaining to the adjudication order/ appellate order against which the appeal to this Tribunal is to be preferred; and

(b) the appropriateness / desirability of preferring an appeal.

16. In the facts and circumstances of this case, since the Chief Commissioner (DZ) and Chief Commissioner (CZ) merely appended their signatures on 14.07.2012 and 23.07.2012 to the respective note sheets and memorandum of facts and analysis, drawn up by the respective subordinate officers and the record neither records nor discloses due application of mind, the authorisation to prefer the appeal is unsustainable. We note that the Board has issued a memorandum of instructions dated 23.11.2012 pointing out that the notes in the file and other relevant records should disclose meaningful consideration and application of mind by the committee.

17. As a consequence of the unsustainable authorization, the appeal must fail and is accordingly dismissed ..."

5. The appeal before the Court is only with respect to the second issue as to the legality of the satisfaction recorded. The Revenue impugns the finding of the CESTAT and argues that the authorization by the Committee is an administrative act, in

which the power of the CESTAT to review is limited. Moreover, it is argued that the administrative act was given shape by the respective subordinate officers through a process of analysis of law and facts. The detailed analysis conducted by them has not been impugned, and indeed, cannot be faulted. It is argued that the Chief Commissioners appended their signatures after a consideration of the notes, which were both comprehensive and detailed in their analysis of the facts and the position adopted by the Commissioner in the order under the consideration. In such a case, what is required of the Chief Commissioners is to consider the material prepared, and if an endorsement is provided, the scope of the review of the CESTAT ought to end there. The entire exercise ought to be seen together, such that the opinions prepared by the subordinate officers and the endorsement of the Chief Commissioner are part of the same exercise, and thus, once the approval has been granted, it cannot be faulted on the ground that the Chief Commissioner did not independently record any reasons.

6. On the other hand, learned counsel for the Respondent argues that there is a minimum threshold for the application of mind in such cases. The Chief Commissioner is mandated by Section 86(2) to consider the various factors before filing an appeal, and such consideration by the Chief Commissioner (and not his subordinates) must appear from the record. It is argued that since in this case there is no independent appraisal of the facts

by the Chief Commissioners, the application of mind envisaged in any administrative proceeding is lacking. For this, learned counsel relies upon the decisions in *Indian Oil Corporation* v. *Collector Central Excise*, 2006 (202) ELT 37 (SC) and *Commissioner of Central Excise* v. *Kundalia Industries*, 2012 (279) ELT 351, for the proposition that there should be a meaningful consideration which should be reflected on the note sheets in order to comply with the requirement of Section 35(2) of the Central Excise Act, 1944, which is analogous to Section 86(2) of the Finance Act, 1994.

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.

9. For the above reasons, this Court is of the opinion that the Tribunal fell into error in holding that the appeal was not maintainable since the satisfaction as required by Section 86 had not been appropriately recorded. The impugned order is accordingly set aside. The CESTAT shall consider the appeal on its merits after issuing notice and giving hearing to the

parties. The appeal accordingly succeeds with costs quantified at ₹30,000/- to be paid to the appellant by the respondent within four weeks.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

MARCH 20, 2014