(2018) 07 CAL CK 0134

In the Calcutta High Court

Case No : WP No.201 of 2013

Binay Opto Electronics Pvt Ltd & Anr. APPELLANT

Vs

Comm.Of Central Excise & Service Tax (Appeals-I), Kolkata & Anr. RESPONDENT

Date of Decision : 16-07-2018

Acts Referred:
Central Excise Act, 1944 — Section 35(F)

Citation : (2018) 07 CAL CK 0134

Hon'ble Judges : DEBANGSU BASAK, J

Bench : Single Bench

Advocate : J. P. Khaitan, Agnibesh Sengupta, Bhaskar Prasad Benrjee

Final Decision : Disposed Off

Judgement

Â The Court : The petitioners are before the Writ Court assailing an order passed by the appellate authority refusing to entertain an appeal as the

petitioners have failed to make a pre-deposit as directed.

Learned Senior Advocate appearing for the petitioners draws the attention of the Court to the fact that the petitioners have secured an amount of

Rs.32 lakh, being the amount which the appellate authority wanted as pre-deposit, to consider the appeal, by way of a bank guarantee. Such bank

guarantee is live till November 30, 2018. He seeks a direction upon the appellate authority to consider and decide the appeal on merits.

Learned Senior Advocate appearing for the petitioners draws the attention of the Court to Section 35(F) of the Central Excise Act, 1944 and submits

that, an appeal can be entertained by the appellate authority upon the assessee depositing a sum equivalent to 7Â½% of the tax in dispute. He seeks

leave of the Court to put in such amount with the appellate authority in accordance with the provisions of Section 35(F) of the Act, 1944 for the appeal

to be heard and disposed of on merits.

Learned Advocate appearing for the respondents submits that, the amendment introduced to Section 35(F) of the Act, 1944 was not available when

the impugned order was passed. Therefore, no interference is called for.

It appears that, by the order in original a sum in excess of Rs.64 lakh was demanded against the petitioners. The petitioners being entitled to prefer an

appeal therefrom, had preferred an appeal. Such appeal was refused to be entertained upon the petitionersâ?? failing to deposit a sum of Rs.32 lakhs

which was required to be made in terms of Section 35(F) of the Act of 1944. True, the amendments of the Act of 1944 were introduced to Section

35(F) of 1944 came later than the impugned order. However, the amendments of Section 35(F) of 1944 introduced subsequently allows an appeal to

be admitted, heard and disposed of on merits upon the appellant depositing 7Â½% of the sum found due from the appellant under the order in original.

In the present case, the demand against the petitioners is in excess of Rs.64 lakhs. It has secured a sum of Rs.32 lakh by way of bank guarantee

which is valid till November 30, 2018. Experience of the Court has shown that, a person, may refuse to extend the validity period of the bank

guarantee once the purpose of furnishing the bank guarantee stands secured. In a given case, if the appeal is directed to be heard out on merits on the

basis of a bank guarantee, there is every likelihood that the person concerned may not keep the bank guarantee live till the disposal of the appeal.

Moreover, in Revenue matters, securing the claim of the Revenue by way of bank guarantee has been frowned upon.

In the circumstances, in view of the subsequent amendment to Section 35(F) of the Act of 1944 requiring a pre-deposit of 7Â½% of the amount of

duty claimed, it would be appropriate to direct the petitioners to deposit 10% of the amount claimed against it, with the appropriate authorities within

four weeks from date. In the event, such deposit is made, the appellate authorities were requested to hear and consider the appeal in accordance with

law. The impugned order dated January 28, 2013 dismissing the appeal on the ground of failure of the petitioners to make the predeposit is set aside.

Upon the deposit being made, the petitioners are at liberty to withdraw the bank guarantee furnished. If the deposit as directed herein is not made, the

Registrar, Original Side will encash the bank guarantee and make over the proceeds thereof, after deducing the poundage and fees admissible in law,

from the proceeds thereof, to the Revenue authorities, in accordance with law. The petitioner will inform the Registrar, Original Side as to the deposit

of the sum as directed in this order by way of a writing with cogent evidence within six weeks from date. In the event of the petitioners not doing so,

Registrar, Original Side will proceed to encash the bank guarantee and act in accordance with directions contained therein.

WP No.201 of 2013 is disposed of.

There will, however, be no order as to costs.