

(2012) 05 KAR CK 0029

In the Karnataka High Court

Case No : Central Excise Appeal No. 38 of 2011

Canara Communications India P. Ltd.

APPELLANT

Vs

Commissioner of Central Excise

RESPONDENT

Date of Decision : 24-05-2012

Acts Referred:

Central Excise Act, 1944 — Section 35 G (2)
Finance Act, 1994 — Section 76, 78, 83

Citation : (2012) 55 VST 349

Hon'ble Judges : D.V. Shylendra Kumar, J;B. Sreenivase Gowda, J

Bench : Division Bench

Advocate : Cherian for M/s. AKB Associates, for the Appellant;

Final Decision : Dismissed

Judgement

D.V. Shylendra Kumar, J.—This appeal u/s 35G(2) of the Central Excise Act, 1944 (for short "the Act") read with section 83 of the Finance Act, 1994, is directed against the order dated November 15, 2010 passed by the Customs, Excise and Service Tax Appellate Tribunal (for short "Tribunal") and a further order dated April 8, 2011 passed by the Tribunal on an application for restoration, rejecting the application and affirming the earlier order dated November 15, 2010 dismissing the application for condonation of delay in preferring the appeal u/s 35C of the Act before the Tribunal and as a consequence dismissing the main appeal as also the application for stay, etc. The application for condonation of delay had come to be dismissed for non-prosecution with the absence of counsel for the appellant.

2. The appeal before the Tribunal was in turn directed against an order passed by the Commissioner of Central Excise (Appeals) affirming the original order of adjudication passed by the assessing authority on December 21, 2006 (copy at annexure-J) determining a liability as service tax of Rs. 5,12,318 under the provisions of the Finance Act, 1994 and also levying penalty of like sum in addition to penalty under sections 76 and 78 of the Finance Act, 1994.

3. Appearing on behalf of the appellant, submission of Sri Cherian, learned counsel is that the Tribunal has committed an error in dismissing the appeal for non-prosecution; that the Tribunal is bound to consider the appeal, preferred under the provisions of section 35C of, the Act on its merits and pass orders on the merits and dismissing the appeal for non-prosecution is not permitted for the Tribunal; that such is the view taken by the Supreme Court interpreting the word "thereon" occurring in section 35C of the Act which is a word which occurred in section 33(4) of the Indian income tax Act, 1922 in the case of CIT v. S. Chenniappa Mudaliar reported in [1969] 71 ITR [SN] 33 (SC) and therefore, submits that the order dismissing the appeal of the appellant before the Tribunal for non-prosecution is not an order sustainable in law and is liable to be set aside.

4. Mr. Cherian, learned counsel for the appellant has taken us through the order passed by the Tribunal in the first instance and subsequent order passed on the application for restoration.

5. On a perusal of these orders, we notice that the first order dismissing the appeal is only as a sequel to dismissing the application for condonation of delay in preferring the appeal and the appellant though had filed application seeking for condonation, that application was not prosecuted with diligence and therefore the Tribunal was left with no choice but to dismiss the application for condonation of delay and as a consequence dismissed the appeal and also the application for stay, etc.

6. We find that the order passed by the Tribunal is not per se one dismissing the main appeal for non-prosecution but is only a dismissal of the appeal as a consequence of dismissal of the application for condonation of delay.

7. Though Sri Cherian learned counsel for the appellant has made a passionate submission that the appellant was not really liable for the amount of tax as determined by the Commissioner as per the order-in-original and the levy of penalty is also not warranted as the appellant was entitled for claiming exemptions in terms of certain notifications, we are afraid we cannot examine such submissions for the purpose of the present appeal. The appeal u/s 35G of the Act can be entertained by the High Court provided the court is satisfied that the case involves substantial question of law.

8. In the present appeal, we find that the appeal of the appellant before the Tribunal has been dismissed though without going into the merits of the appeal, but not directly because of non-prosecution of the appeal, but as a sequel to the dismissal of the application for condonation of delay.

9. In such circumstances, we are afraid there was no valid or tenable appeal of the appellant which was an appeal which required or deserved attention u/s 35C of the Act. It would have become a valid appeal only if the appellant should have succeeded in its efforts to get the delay in preferring the appeal condoned and the appeal should have been entertained on merits and that stage having not been reached, the judgment on which the learned counsel for the appellant has

placed reliance cannot advance the case of the appellant.

10. Even otherwise, we find that the order passed by the Tribunal apart from being either not illegal or suffering from any want of jurisdiction, etc., is a reasonable order as can be found out from paragraph 2 of the order reading as under : 2. We find that the instant application stood posted for disposal on a few occasions earlier. On June 21, 2010, the matter was adjourned as the appellant was not represented. On July 2, 2010, hearing on the application was adjourned on the request of the appellant. Today, when the matter was called out we find that the appellant is not represented and there is no request for adjournment of the matter.

In any view of the matter, we do not find any occasion to admit this appeal and it is accordingly dismissed.