(2016) 09 BOM CK 0085

In the Bombay High Court

Case No : Central Excise Appeal No. 77 of 2015

Colour Flair Powder Coating P. Ltd. APPELLANT

Vs

Commr. Of Cus. and C. Ex., Nashik RESPONDENT

Date of Decision : 26-09-2016

Acts Referred:

Citation : (2016) 342 ELT 111

Hon'ble Judges : S.C. Dharmadhikari and B.P. Colabawalla, JJ.

Bench : Division Bench

Advocate : Shri Sachin Chavan, Advocate, for the Appellant; Shri Swapnil Bangur with Ms. Ruju Thakkar, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

1. Having heard both sides and finding that the Tribunal should have, for genuine and bona fide reasons, as admitted before us, restored the appeal of the assessee to the file for being heard on merits, we quash and set aside the order of the Tribunal. However, at the instance of Mr. Bangur, we clarify that the restoration application filed by the assessee was in fact granted.

2. The appeal was dismissed on 16th October, 2012 for non-prosecution. On a restoration application, the Tribunal restored it to file on the condition of deposit of Rs. 6 lacs. That condition remains. We do not modify that condition, but we only set aside the direction to dismiss the appeal for non-prosecution or non-compliance of the provisions of Section 35F of the Central Excise Act, 1944. The impugned order was passed by the Tribunal on 24th September, 2013. Section 35F of the Central Excise Act, 1944 on the date of the dismissal of the appeal stood thus :-

"35F. Deposit, pending appeal of duty demanded or penalty levied. - Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of central excise authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied :

Provided that where in any particular case, the Commissioner (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interest of revenue :

Provided further that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so, decide such application within thirty days from the date of its filling.

Explanation. - For the purposes of this section "duty demanded" shall include, -

(i) amount determined under Section 11-D;

(ii) amount of erroneous Cenvat credit taken;

(iii) amount payable under Rule 57-CC of Central Excise Rules, 1944;

(iv) amount payable under Rule 6 of Cenvat Credit Rules, 2001 or Cenvat Credit Rules, 2002 or Cenvat Credit Rules, 2004;

(v) interest payable under the provisions of this Act or the rules made thereunder."

3. In the light of the wording of the provision and when that provision did not empower the Tribunal to dismiss the appeal without adjudication on merits that we have set aside the impugned order to the extent it dismisses the appeal without adjudication on merits.

4. However, before the Tribunal, the assessee/appellant before us cannot have a luxury of litigation without complying with the order of the Tribunal on the restoration application. The assessee has never challenged that order nor the condition incorporated therein. In these circumstances, if the appellant/assessee before the Tribunal now desires that Appeal No. E-841 of 2012 should be heard on merits and in accordance with law, then, it must deposit a sum of Rs. 6 lacs within a period of two weeks from today. If that condition is complied with and compliance is reported, the Tribunal shall restore the appeal of the assessee to its file and decide it in accordance with law. In the event this condition is not complied with, the Tribunal''s order stands and the assessee will not have any opportunity of hearing of the appeal on merits.

5. With the aforesaid directions, the appeal is disposed of. Since Mr. Chavan has prayed that the assessee''s financial position is not good, we do not impose any costs.

