(2005) 08 MAD CK 0096

In the Madras High Court

Case No : Reference Case Petition No. 49 of 2002

Commissioner of Central Excise APPELLANT

Vs

Customs, Excise and Gold (Control) Appellate Tribunal, South Zonal Bench and Addison and Co. RESPONDENT

Date of Decision : 09-08-2005

Acts Referred:
Central Excises and Salt Act, 1944 — Section 35C, 35G, 35G(3), 35H, 35H(1)
Income Tax Act, 1961 — Section 256, 260(1)

Citation : (2005) 08 MAD CK 0096

Hon'ble Judges : Markandey Katju, C.J;F.M. Ibrahim Kalifulla, J

Bench : Division Bench

Advocate : K. Veeraraghavan, SCGSC, for the Appellant; Krishna Srinivasan and Ramasubramaniam Associates, for the Respondent

Final Decision : Dismissed

Judgement

Markandey Katju, C.J.—This Reference Case Petition by the Commissioner of Central Excise, Chennai-II purports to have been filed u/s 35H(1) of the Central Excise Act, 1944 (hereinafter referred to as the ''Act'').

2. We have heard the learned counsel for the parties and perused the record.

3. In our opinion, this Reference Case Petition is totally misconceived and is liable to be rejected.

4. It may be mentioned that in this case the Customs, Excise and Gold (Control) Appellate Tribunal decided the assessee''s appeal by order dated 7.12.1996 u/s 35C of the Act. Against that order, the assessee filed a Reference Application u/s 35G(3) of the Act which was decided in the assessee''s favour by the High Court on 23.11.2000 in R.C.No.1 of 1999. The consequential order was then passed by the Tribunal u/s 35K of the Act on 5.2.2002 in conformity with the opinion of the High Court dated 23.11.2000. It is against this order u/s 35K of the Act that the Department has filed this Reference Case Petition.

5. It may be mentioned that when the High Court passes an order u/s 35K of the Act, this order is not really the final order, rather it is the opinion or advice which the High Court gives to the Tribunal under its advisory jurisdiction. The Tribunal is bound to follow this advice and then pass a final order in accordance with the advice or opinion of the High Court.

6. The position is analogous to that of the Income Tax Act, in which, on a reference u/s 256 of the Income Tax Act,1961 the High Court gives its opinion or advice, but thereafter, the matter goes back to the Income Tax Appellate Tribunal and the Tribunal passes a final order u/s 260(1) of the Income Tax Act which is to be in conformity with the opinion or advice given by the High Court.

7. Though the High Court''s advice or opinion has to be complied with by the Tribunal, such advice or opinion is not the final order rather it is the subsequent order of the Tribunal which is the final order. 8. u/s 35L of the Act, the assessee can file an appeal to the Supreme Court against the advisory opinion of the High Court in the reference made u/s 35G or 35H of the Act. The reference u/s 35G is against the order of the Tribunal passed u/s 35C but not the order u/s 35K. Thus, there is no provision for making a reference against an order of the Tribunal u/s 35K of the Act. We are informed that against the opinion of the High Court given in the reference u/s 35G of the Act, an appeal has already been filed u/s 35L before the Supreme Court which is pending. Of course if the Supreme Court reverses the opinion of the High Court in the reference then the Tribunal will have to pass another consequential order in conformity with the decision of the Supreme Court, but this reference petition is totally misconceived. It is accordingly dismissed.