(2010) 04 KAR CK 0029

In the Karnataka High Court

Case No : Central Excise Appeal No. 11 of 2004

Commissioner of Central Excise APPELLANT

Vs

Millipore (I) P. Ltd. RESPONDENT

Date of Decision : 01-04-2010

Acts Referred:

Citation : (2013) 21 GSTR 398

Hon'ble Judges : K.L. Manjunath, J;B.V. Nagarathna, J

Bench : Division Bench

Advocate : Jeevan J. Neeralgi, for the Appellant; D.O. Kotresh and K. Parameshwaran, for the Respondent

Final Decision : Dismissed

Judgement

K.L. Manjunath, J.—The Revenue has come up in this appeal challenging the legality and correctness of the order passed by the CESTAT in Misc. Order No. 415 of 2004 in Appeal No. 101 of 1999 and in Final Order No. 970 of 2003 raising the following substantial questions of law:

(a) Whether the relevant date, for the purpose of appeal before the CESTAT u/s 35E of the Central Excise Act, 1944 is the date on which the review order passed or the date of issue of the said review order?

(b) Whether the date of review order is the relevant date for the purpose of appeal before the CESTAT u/s 35E of the Central Excise Act, 1944 in lieu of the CESTAT larger Bench''s decision in the case of CCE v. Standard Pencil P. Ltd.?

The facts leading to this case are as hereunder:

On the ground that the assessee without payment of duty was clearing the goods manufactured by it, a show-cause notice was issued demanding total duty of Rs. 1,16,76,805 and also to levy penalty. The show-cause notice was adjudicated by the Commissioner by his order dated October 21, 1997 wherein he confirmed the demand of duty for Rs. 5,01,730 and the remaining demand was dropped and the order of adjudication was passed by him on October 21, 1997. On the instructions of the Central Board of Excise and Customs, New Delhi, (for short "the Board") the matter was taken up for scrutiny u/s 35E of the Central Excise Act, 1944 (for short "the Act").

2. It was noticed by the Board that the order of adjudication made by the Commissioner was not legal and proper. The Board instructed the Commissioner to file an appeal before the Tribunal. Accordingly, the appeal was preferred before the Tribunal.

3. The Tribunal having found that the order of review to prefer an appeal was passed by the Board on December 7, 1998, rejected the appeal on the ground of limitation. Thereafter, an application for rectification was also filed by the Revenue and the said application also came to be rejected.

4. Challenging these two orders, the present appeal is filed raising the aforesaid two substantial questions of law.

5. We have heard learned counsel for the parties.

6. The main contention of the appellant before us is that even though the order of the Board was dated December 7, 1998 actually the Board has passed the order on September 30, 1998 and therefore the decision of the Board has to be treated as within one year from the date of adjudication by the Commissioner.

7. The Tribunal relying upon the decision of the Supreme Court has dismissed the appeal filed by the Revenue. The learned counsel for the appellant submits that as the order dated December 7, 1998 is only a formal one since the original order was passed earlier within time, the court has to allow the appeal.

8. Per contra, the learned counsel for the respondent contends that actually the order has been passed only on December 7, 1998 and there is nothing on record to show that the Board had taken a decision within one year of filing of the appeal and therefore the present appeal has to be dismissed on the merits.

9. Having heard learned counsel for the parties, we are of the view that the Tribunal is justified in rejecting the appeal of the Revenue and that we have to answer the questions of law framed in this appeal against the Revenue for the following reasons.

10. It is not in dispute that within one year from the date of the adjudication, the Board has to take a decision to direct the Commissioner to file an appeal before the Tribunal. Admittedly, the order of the Board is dated December 7, 1998 and no material is placed before the court to show that the Board, in fact had taken a decision within one year from the date of adjudication by the Commissioner. When no material is placed before this court to show that the Board had taken such a decision, this court cannot hold that the order passed by the Board on December 7, 1998 is well in time.

11. We are also of the opinion that there cannot be two orders to be passed by

the Board. If the Board had taken a decision to direct the Commissioner to file an appeal earlier, there was no necessity for the Board to pass one more order on December 7, 1998. Since the alleged earlier order prior to December 7, 1998 is not placed before this court, this court, on the facts has to answer the questions of law framed in this appeal against the Revenue and in favour of the assessee. Accordingly, the appeal is dismissed holding that the appeal filed by the Revenue before the Tribunal was barred by limitation u/s 35E(3) of the Act.

