(2015) 07 DEL CK 0081

In the Delhi High Court

Case No : CEAC No. 27 of 2015

Commissioner of Central Excise, Delhi — APPELLANT

Vs

Brew Force Machine Pvt. Ltd. — RESPONDENT

Date of Decision : 10-07-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35C(2A)
Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 254(2A)

Citation : (2015) 07 DEL CK 0081

Hon'ble Judges : S. Muralidhar, J;Vibhu Bakhru, J

Bench : Division Bench

Advocate : Satish Kumar, Senior Standing Counsel, for the Appellant; Seema Jain, Ajay K. Jain and Dushyant K. Mahant, Advocates for the Respondent

Judgement

CM No. 11834/2015 For Exemption

1. Exemption allowed subject to all just exceptions.

2. The application is disposed of.

CEAC No. 27/2015

3. The challenge in this appeal by the Commissioner of Central Excise (CCE), Delhi is to an order dated 5th January 2015 passed by the Customs, Excise and Service Tax Appellate Tribunal (''CESTAT'') whereby the Miscellaneous Applications for stay were allowed following the decision of the larger Bench of the CESTAT in Haldiram India Pvt. Ltd. v. CCE, Delhi 2014 TIOL 1965 (CESTAT DEL LB) . The view taken by the CESTAT in the said decision was that where delay in disposal of the appeal is not attributable to the Appellant then the extension of stay beyond 365 days can be granted notwithstanding third proviso to Section 35C(2A) of the Central Excise Act, 1944 (''Act'').

4. The CCE filed in this Court an appeal against the aforementioned decision of the larger Bench of the CESTAT in Haldiram India Pvt. Ltd. The said appeal, being

CEAC No. 18/2015, was disposed of by a Division Bench of this Court by an order dated 5th May 2015 which reads as under:

"The Revenue challenges an order of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) whereby it directed extension of the interim order granted in respect of the respondent assessee. It is brought to the notice of this Court at the outset that in a similar situation, where an identically phrased amendment to the Income Tax Act, 1961, denying the power and jurisdiction to extend the interim order beyond 365 days was involved, the Court in Commissioner of Income Tax-II Vs. M/s. Maruti Suzuki (India) Limited, (2014) 6 AD 183 : (2014) 266 CTR 337 : (2014) 305 ELT 199 : (2014) 362 ITR 215 : (2014) 35 STR 284 held that the Tribunal is bound by the provision and that the power to extend such interim orders is dependent on the exercise of discretion by the High Court under Article 226 of the Constitution. In these circumstances, the impugned order cannot be sustained. However, the appellant Revenue is restrained from taking any coercive action against the respondent/assessee for four weeks to enable the latter to move this Court under Article 226 of the Constitution of India, if so advised.

The appeal is disposed of in the above terms."

5. Learned counsel for the Respondent submitted that the observation of the Court in the above order to the effect that there was "an identically phrased amendment" to the Income Tax Act, 1961 (IT Act) was perhaps not correct in view of the additional words "even if the delay in disposing of the appeal is not attributable to the assessee" is not to be found in the third proviso to Section 35C(2A) of the Act. She drew attention of the Court to a judgment dated 19th May 2015 of another Division Bench of this Court in Writ Petition (C) No. 1334/2015 and batch (Pepsi Foods Pvt. Ltd. v. Assistant Commissioner of Income Tax) where the Court was concerned with the challenge to the constitutional validity of the third proviso to Section 254(2A) of the IT Act on the ground that it sought to obliterate the distinction between Assessees who contributed to the delay in disposal of an appeal and those who had not. By the said judgment the Division Bench allowed the writ petitions and struck down the third proviso to Section 254(2A) of the IT Act to the extent it obliterates the distinction. The coordinate Division Bench in Pepsi Foods expressed agreement with a judgment of the High Court of Bombay in Narang Overseas (P) Ltd. Vs. Income Tax Appellate Tribunal and Others, (2008) 2 BomCR 853 : (2007) 211 CTR 524 : (2007) 217 ELT 497 : (2007) 8 STR 117 and held that "where the delay in disposing of the appeal is not attributable to the Assessee, the Tribunal has the power to grant extension of stay beyond 365 days in deserving cases."

6. The decision in Pepsi Foods was delivered two weeks after the decision of the coordinate Division Bench of this Court in CCE v. Haldiram India Pvt. Ltd. In terms of the judgment in Pepsi Foods the CESTAT would, even in terms of the third proviso to Section 35C(2A) of the Act, not be denuded of the power to extend the stay beyond 365 days in deserving cases. This is however, contrary to

the judgment of the coordinate Division Bench in CCE v. Haldiram India Pvt. Ltd. This Court, being a coordinate Bench of equal strength is therefore constrained to refer to a larger Bench the question of correctness of the decision dated 5th May 2015 in CEAC No. 18/2015 (Commissioner of Central Excise v. Haldiram India Pvt. Ltd.)

7. The appeal be placed before the Hon''ble Chief Justice for constitution of a larger Bench to consider the aforementioned question.

CM No. 11833/2015 (for stay)

8. In view of the above reference of the appeal to the larger Bench, the application for stay is dismissed.

