(2007) 07 MAD CK 0001

In the Madras High Court

Case No : C.M.A. No. 1652 of 2007 and M.P. No. 1 of 2007

Commissioner of Service Tax APPELLANT

Vs

Lumax Samlip Industries Ltd. and Custom, Excise and Service Tax Appellate Tribunal, South Zonal Bench RESPONDENT

Date of Decision : 26-07-2007

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35G
Finance Act, 1994 — Section 83, 84, 85, 86, 86(1)

Citation : (2007) 212 CTR 62 : (2007) 121 ECC 259 : (2007) ECR 259 : (2007) 8 STR 113 : (2007) 8 VST 791

Hon'ble Judges : P.P.S. Janarthana Raja, J;K. Raviraja Pandian, J

Bench : Division Bench

Advocate : T.S. Sivagnanam, SCGSC, for the Appellant;

Final Decision : Dismissed

Judgement

K. Raviraja Pandian, J.—This appeal is filed u/s 35G of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 by

formulating the following Substantial Questions of law for consideration.

i) Whether statutory powers of Commissioner to file appeal against an order in appeal before the Appellate Tribunal u/s 86(2A) of the Finance

Act, 1994 can be denied for the reason that Commissioner had once accepted the order in appeal ?

ii) Whether acceptance of Order-in-Appeal by the Commissioner becomes final and binding on the Department and whether the Commissioner

can re-examine the order and file appeal u/s 86(2A) of the Finance Act, 1994 before the CESTAT ?

iii) Whether the Tribunal is right in rejecting the Department''s appeal as being one without cause of action, without considering the merits of the matter?

2. On the face of the question of law so far formulated, we wonder whether such questions of law arise in this case for resolution by this Court as

the order passed by the Customs Excise and Service Tax Appellate Tribunal, Chennai Bench, Chennai (hereinafter referred to as "" the CESTAT""),

which is impugned in this appeal is nothing but an order made in an application filed for condoning the delay of 350 days in filing an appeal against

the order in Appeal Nos. 8 and 9 of 2005, dated 28.3.2005 passed by the Commissioner of Central Excise (Appeals), Chennai non-suiting the

appellants for the relief sought for. The reasons stated by the appellant was rejected by the Appellate Tribunal by giving reasons. The reasons are

that the order dated 28.3.2005 made in Appeal Nos. 8 & 9 of 2005 was received by the Commissioner of Service Tax, Chennai on 20.4.2005

and the appeal was filed on 29.5.2006. In those circumstances of the cases, the appellant herein filed an application to condone the delay of 350

days. The reason for the delay according to the appellant is stated as follows:

Date of receipt of Order-in-Appeal

No. 8&9/2005 dt 28.3.2005 20.4.2005

Order-in-appeal No. 8&9/2005

dt 28.3.2005 accepted by the Commissioner 10.6.2005

Date of receipt of Chief Commissioner''s

(letter C. No. IV/ 16.238/2005-CZO dt 17.4.2006)

direction to file appeal before CESTAT 18.4.2006

Order issued u/s 86(2A) of the

Finance Act, 1994 for filing appeal against

OIA No. 8&9 dt 28.3.2005 by the Commissioner

to the Assistant Commissioner of Service Tax,

Division-II 19.5.2006

Date of filing of appeal against OIA No. 8&9

dt 28.3.2005 before CESTAT by the Assistant

Commissioner of Service Tax, Division-II 29.5.2006

3. The reasons for delayed filing of the appeal was explained by saying that the

issue similar to the one involved in the present appeal was pending

before the Supreme Court as well as the High Court of Mumbai, which fact was not known to the Commissioner when the Commissioner

accepted the impugned order on 10.6.2005. The said fact was made known only on 18.4.2006 from the letter of Chief Commissioner, Chennai

with an advise to the Commissioner to keep the issue pending by filing an appeal against their relevant order. It is also submitted before the

CESTAT, that only on the basis of the letter of the Chief Commissioner dated 18.4.2006, the appellant issued direction to the Assistant

Commissioner on 19.5.2006 for filing an appeal against the order in Appeal dated 28.3.2005. Accordingly, the appeal was filed on 29.5.2006

with an application for condoning the delay. The said request was seriously opposed by the respondents herein by referring to the decision in CCE,

Madurai v. Ramalinga Mills Ltd.

4. After considering the materials placed on record and the arguments advanced by the counsel on either side, the Appellate Tribunal non-suited

the appellant for the relief of condonation by taking into consideration of the sequence of event stated by the appellant and recording the fact that if

the reasoning stated is accepted that would amount to reviewing a decision already reviewed by the Commissioner as early as 10.6.2005. The

Finance Act, 1994 contains no provision empowering the Commissioner to do this kind of review, once the order of the Appellate Commissioner

was accepted by the Commissioner concerned in accordance with the provision of the review u/s 86 of the Finance Act, 1994. Further, the

CESTAT also found as a matter of fact, the decision taken by the Appellate Commissioner on 19.5.2006 for accepting the Appellate

Commissioner''s order was not disturbed and the same has become final in that case. When the Chief Commissioner''s order requiring the

Commissioner has to file an appeal was received by the Commissioner, there was no issue pending for adjudication as it has been already

accepted in the order made in Appeal Nos. 8 & 9 of 2005 by the Commissioner and a quietus was given. For the reasonings stated above, the

tribunal non-suited the appellant.

5. Mr. T.S.Sivaganam, learned standing counsel appearing for the respondents very strenuously contended that there is no provision whatsoever

u/s 86 of the Finance Act to the effect that the Commissioner has to accept the order passed by the Commissioner of Central Excise (Appeals)

and once it is accepted that could not be reviewed for any purpose particularly for the purpose of filing appeal. To impress upon this point, he

referred to the provision u/s 86 of the Finance Act, which provides for appeal, which reads as follows:

Section 86. Appeals to Appellate Tribunal- (1) Any assessee aggrieved by an order passed by a [Commissioner] of Central Excise u/s 84, or an

order passed by a [Commissioner] of Central Excise (Appeals) u/s 85, may appeal to the Appellate Tribunal against such order.

[(2) The Board may, if it objects to any order passed by the Commissioner of Central Excise u/s 84, direct the Commissioner of Central Excise to

appeal to the Appellate Tribunal against the order.

(2A) The Commissioner of Central Excise may, if he objects to any order passed by the Commissioner of Central Excise (Appeals) u/s 85, direct

the Assistant Commissioner of Central Excise or, as the case may be, Deputy Commissioner of Central Excise to appeal to the Appellate Tribunal

against the order.]

(3) Every appeal under Sub-section (1) [or Sub-section (2) or Sub-section (2A)] shall be filed within three months of the date on which the order

sought to be appealed against is received by the assessee, the Board or by the [Commissioner] of Central Excise, as the case may be.

6. Hence, it is contended by Mr. T.S. Sivagnanam that the order has to be set aside as it has given a finding that there is no cause of action for the

Commissioner to agitate the matter. he appeal is correct or not.

7. We heard the learned Counsel for the petitioner and perused the materials available on record and with reference to the statutory provisions.

8. From the conjoint reading of all sub-clause of Section 86, it is clear that if the assessee is aggrieved by the Commissioner passed u/s 84, he

could file an appeal before the Tribunal. Likewise, if the Board objects to the order of the Commissioner passed u/s 84, it may direct the

Commissioner to file an appeal under Sub-clause 2 of Section 86. If the Commissioner of Central Excise objects to the order of the Commissioner

of Appeals made u/s 85, he may direct the Assistant or Deputy Commissioner, as the case may be, to file an appeal. On taking such decision, the appeal has to be filed within the time stipulated under the subsequent clause of Section 86. That time limit has been fixed only to take a decision

whether the order of Commissioner of Central Excise, which went against the department could be taken on appeal and if so on what ground.

Here in this case, it has been found that the Commissioner has accepted the order of Commissioner of Appeals on 10.6.2005. Thereupon, the

matter has not been precipitated further. That shows a quietus has been given to the issue by accepting the order of the Commissioner of Central

Excise (Appeals). Thereupon, as found from the reasons stated by the appellant herein in their application for condoning the delay, the matter has

been once again reconsidered as per the letter of the Chief Commissioner dated 17.4.2006 on the sole ground that the connected issue is pending

before the Supreme Court and in the High Court of Mumbai. The time limit fixed for filing an appeal is in order to give a finality to the proceedings.

If an appeal has not been filed within the time limit stipulated in the appeal provision, a legal right is accrued to the other side on the ground that

because of non-filing of the appeal, the order passed in favour of other side would have been accepted by the department and reached its finality.

Such accrued legal right cannot be simply brushed aside by filing an application after one year and to condone the delay on the ground that similar

issue is stated to be pending before the Supreme Court. It is also well settled and established legal principle of law that in fiscal statute, every

assessment year or every clearance is a unit by itself and a separate cause of action. For each cause of action, the parties can seek remedy

notwithstanding the decisions rendered on an identical set of facts in the earlier years. Useful reference can be had to the judgment of the Supreme

Court in the case of Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others, . Hence, we are of the view that an ultimate

decision rendered by the CESTAT cannot be complained of by the petitioner, though certain argument has been made about the observation

contained in the body of the order as unwarranted. We hereby make it clear that the observation made in the body of the order of the CESTAT

need not be taken as a finding rendered on the basis of an adjudicated order.

9. With this observation, the civil miscellaneous appeal is dismissed. Consequently, connected miscellaneous petition is also dismissed. No costs.