(2012) 04 BOM CK 0175

In the Bombay High Court

Case No : Central Excise Appeal No. 125 of 2011

Fidelity Magnetics — APPELLANT

Vs

Commissioner of Central Excise — RESPONDENT

Date of Decision : 24-04-2012

Acts Referred:
Central Excises and Salt Act, 1944 — Section 35C(1)

Citation : (2012) 27 STR 4

Hon'ble Judges : M.S. Sanklecha, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : Vipin Jain with Rajeev Ravi and P.K. Shetty, for the Appellant; Pradeep S. Jetly with J.B. Mishra, for the Respondent

Judgement

J.P. Devadhar, J.—This appeal was admitted on 14-3-2012 on the following question of law. Whether in terms of Section 35C(1), CESTAT can remand the matter back with direction to the appellant to first pre-deposit a part of the duty even though the Act does not provide for the same? The appellant-assessee is engaged in the manufacture of recorded audio cassettes on job work basis for various music companies.

2. By a show cause notice dated 30-9-1999 the assessee was called upon to show cause as to why the clearances effected during the period from 1-3-1997 to 1-6-1998 should not be held to be under valued and duty amounting to Rs. 17,89,015/- should not be recovered with interest and penalty. The assessee opposed the claim in the show cause notice. However, by order in original dated 8-3-2002 the duty demand was confirmed with interest and penalty.

3. On appeal filed by the assessee the Commissioner of Central Excise (Appeals) by his order dated 28-5-2003 directed the assessee to make pre-deposit of the entire amount of duty by relying upon the Circular No. 619/2002 dated 19-2-2002. As the amount was not deposited as per the order dated 28-5-2003, the Commissioner of Central Excise (Appeals) by his order dated 28-8-2003 dismissed the appeal for non compliance of the pre-deposit order.

4. Challenging the aforesaid order the assessee filed further appeal before the CESTAT with an application seeking waiver of pre-deposit. By an order dated 18-3-2004, the Tribunal by following its decision in the case of 2001 (127) ELT 204 waived the pre-deposit. Subsequently, the Tribunal by the impugned order dated 1-3-2011 set aside the order of Commissioner (Appeals) and restored the matter to the file of Commissioner (Appeals) with a direction to pass fresh order on merits as the issue was highly debatable and highly arguable. However, the Tribunal further directed that the order of the Tribunal in restoring the appeal before the Commissioner (Appeals) shall be subject to the condition that the assessee shall deposit 50% of the amount involved within the time stipulated therein. Challenging the aforesaid order the present appeal is filed.

5. It is contended oh behalf of the appellant that once the application for waiver of pre-deposit is allowed by the Tribunal and the matter was heard on merits, the Tribunal while setting aside the order of Commissioner (Appeals) and restoring the matter to the file of Commissioner (Appeals) could not have directed the assessee to make pre-deposit.

6. In the present case the Commissioner of Central Excise (Appeals) had directed the assessee to make pre-deposit by relying upon the Circular No. 619/2002. Similarly the Tribunal by following its decision in the case of Vijayata Audio World and Ors. (supra) had granted full waiver of pre-deposit. However, while disposing of the appeal, the Tribunal has neither considered the applicability of the Circular No. 619/2002 nor the non-applicability of the order of the Tribunal in the case of Vijayata Audio World (supra). In any event having granted full waiver of pre-deposit, the Tribunal in the absence of any special circumstances ought not to have ordered pre-deposit. In these circumstances, since the issue in the present case relates to the period 1-3-1997 to 1-6-1998, in our opinion, it would be just and proper to set aside the order passed by the Commissioner (Appeals) and also the order of CESTAT and direct the Commissioner of CESTAT (Appeals) to dispose of the appeal on merits without insisting pre-deposit.

7. Accordingly, without going into the question as to whether the Tribunal has power to direct pre-deposit u/s 35C(1) of the Central Excise Act 1944, we dispose of the appeal in terms stated herein above.

8. All contentions of both the parties are kept open. The appeal is disposed of accordingly with no order as to costs.

