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**(2013) 10 AHC CK 0065**

**In the Allahabad High Court**

**Case No :** Central Excise Appeal No. 25 of 2013

Globe Private Detective Bureau APPELLANT

Vs

Commr. of C. Ex. and S.T., Lucknow RESPONDENT

**Date of Decision :** 03-10-2013

**Acts Referred:**

**Citation :** (2014) 43 GST 84 : (2013) 32 STR 699

**Hon'ble Judges :** Satish Chandra, J;Rajiv Sharma, J

**Bench :** Division Bench

**Advocate :** A.P. Mathur and R.C. Pathak, for the Appellant; Rajesh Singh Chauhan, Counsel, for the Respondent

## Judgement

1. Heard Sri A.P. Mathur, learned counsel for the appellant and Sri Rajesh Singh Chauhan, learned counsel for the respondents. The present appeal has been filed by the appellant u/s 35G of Central Excise Act, 1944, assailing the order dated 10-6-2013, passed on an application for modification of stay order bearing Service Tax Misc. Application No. 56359 of 2013 in Service Tax Appeal No. 3998 of 2012.

2. The short controversy involved in this appeal is with regard to the condition of pre-deposit for hearing the appeal by the Tribunal and rejection of appeal for non-compliance of order for pre-deposit.

3. Undisputed facts are that Service Tax has been levied upon the appellant and being aggrieved thereof, the appellant has preferred an appeal before the appellate authority along with an application for waiver of the amount of tax levied. On the date, when the application for interim relief for waiver was fixed, nobody responded on behalf of the appellant and as such, the Tribunal proceeded and after perusal of the record and hearing the Departmental representative, rejected the application for waiver by means of order dated 10-6-2013 and directed the appellant to deposit Rs. 39,00,000/- within seven days after receipt of the order and make compliance of the order dated 25-2-2013. As the

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aforesaid order was passed in absence of the appellant, an application dated 1-1-2013 for modification was preferred, which was heard by a Bench comprising of the President of the Tribunal along with Mr. Sahab Singh, Member (Technical) and the said Bench rejected the application vide order dated 10-6-2013 and directed the appellant to make compliance of the orders dated 1-1-2013 by 26-6-2013. By the order dated 25-6-2013, the appeal was rejected in terms of the order dated 10-6-2013.

4. Being aggrieved, the instant appeal has been filed inter alia on the following substantial questions of law:-

(i) Whether the Hon''ble Tribunal is justified to deal with the application for modification of the order dated 1-1-2013 without listing the same before the Hon''ble Bench who passed the order dated 1-1-2013?

(ii) Whether the Hon''ble Tribunal was justified in dismissing the Misc. Application holding that the Modification Application is in the nature of an application seeking review of the order dated 1-1-2013 on merits. We find no authority for review of the order dated 1-1-2013. In spite of the fact that the modification of the order has been sought on account of the non-consideration of the facts of the case and the grounds taken in support of the stay cum waiver application?

(iii) Whether the Hon''ble Tribunal was justified in ignoring the fact that the stay cum waiver application was listed for hearing for the first time on 1-1-2013 and the counsel could not appear as his train was late by six hours which was beyond his control and the fact was conveyed to the Hon''ble Bench during the course of hearing of the Misc. Application for modification of the order dated 1-1-2013?

5. It has been vehemently argued by the counsel for the appellant that the application for modification of the order has to be heard by the same Bench in view of the provisions of Rule 31A of Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982, which on reproduction reads as under:-

Rules 31A. Same Bench to hear applications for rectification of mistakes. - An application for rectification of a mistake apparent from the record, under sub-section (2) of Section 129B of the Customs Act, or sub-section (2) of Section 35C of the [Central Excise Act, 1944], or sub-section (2) of Section 81A of the Gold (Control) Act, shall be heard by a Bench consisting of the Members who heard the appeal giving rise to the application, unless the President directs otherwise.

6. In view of the above, it has been argued that the impugned orders dated 10-6-2013 and 25-6-2013 are non est in the eyes of law.

7. It has also been contended that the Service Tax has wrongly been levied upon the appellant and the amount already deposited by the appellant towards the Service Tax has not been taken into consideration. According to him, the actual liability of Service Tax, as mentioned in the application for modification dated 12-2-2013, is only Rs. 36,47,961/-.

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8. On careful sifting of the matter, we find that the appellant filed an appeal against the order passed by the Commissioner, Central Excise and Service Tax, Lucknow confirming the show cause notice. The appellant along with the appeal preferred an application for waiver u/s 35F of the Central Excise Act, 1944 together with an application for stay. On 1-1-2013, when the case was taken up by the Tribunal, no one was present on behalf of the appellant. The Tribunal after examining the matter passed the order directing the appellant to deposit Rs. 39 lacs within four weeks and stayed the realization of balance amount. Thereafter, the applicant moved an application dated 12-2-2013 for modification of the stay order dated 1-1-2013. This application was considered by the Bench presided over by the President of the Tribunal. While rejecting the application vide order dated 10-6-2013, the Tribunal observed that the modification application is in the nature of an application seeking review of the order dated 1-1-2013 and directed to comply with the order dated 1-1-2013 by depositing Rs. 39 lacs within seven days, else the appeal would be dismissed, without further reference to the Tribunal. Thereafter, the appeal came up for orders on 25-6-2013 and the same was rejected in terms of the order dated 10-6-2013.

9. It has been submitted by the Counsel for the appellant that in the order dated 25-6-2013, it has wrongly been observed that the appellant stated that he has preferred an appeal before the High Court against the requirement of pre-deposit to the extent of Rs. 39 lacs. As a matter of fact, the Counsel for the appellant has stated before the Tribunal that his client intends to challenge the stay order passed by the Tribunal.

10. It has also been contended that very purpose of filing the appeal has been frustrated as the same has been dismissed on technicalities without touching the merit of the case causing serious prejudice to the appellant.

11. The first contention of the appellant that the same bench would have disposed of the application for modification appears to be misconceived as a perusal of Rule 31A makes it abundantly clear that application for rectification of a mistake is to be heard by the same bench which had heard the appeal or otherwise as directed by the President. In the instant case, the order of which modification has been sought, has disposed of the application and not the appeal. Thus, the order has been passed by the Bench presided over by the President is fully within its competence and it is incorrect to say that it travelled beyond its jurisdiction.

12. As regard the other contention, it is true that the appellant has not deposited the amount as directed by the Tribunal vide order dated 1-1-2013, the date on which none was present on behalf of the appellant. The appellant has stated that non-presence before the Tribunal was for the reason that the train reached late to New Delhi. It is also true that the appeal has been rejected in terms of the order dated 10-6-2013 whereby the application for modification was rejected.

13. Before proceeding further, it may be noted that Section 35F is not a condition

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precedent for filing an appeal, but it is certainly a condition precedent for hearing the appeal on merits. Statutory right of appeal subject to condition of deposit shall be treated as a valuable right of the assessee and the Tribunal should not be very harsh on the appellant while exercising the discretionary powers u/s 35F.

14. We find force in the submissions advanced by the counsel for the appellant that there was some misunderstanding in noting the submissions as the appellant had never filed any appeal against the requirement of pre-deposit before the High Court, but as stated that he intends to file an appeal before the High Court against the stay order. Therefore, there was no occasion for the appellant to produce copy of any order passed by the High Court as mentioned in the order dated 25-6-2013. The fact remains that the appeal of the appellant has been dismissed for not complying the earlier orders of the Tribunal without touching the merit.

15. Taking holistic view of the matter, we are of the view that interest of justice would suffice, if the appeal preferred by the appellant before the Tribunal is restored and decided on merits provided appellant deposits Rs. 29 lacs within three weeks from the date of receipt of a certified copy of this order. It may be clarified that we have ordered for deposit of Rs. 29 lacs in view of the fact that the appellant had already deposited Rs. 10 lacs towards Service Tax, as indicated in the application for modification. In case, the amount is not deposited within the time stipulated above, the order of dismissal of appeal by the Tribunal would operate. The appeal stands disposed of accordingly.

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