(2015) 02 BOM CK 0266

In the Bombay High Court

Case No : Central Excise Appeal No. 149 of 2014

Godrej and Boyce Mfg. Co. Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 02-02-2015

Acts Referred:

Citation : (2015) 39 STR 723

Hon'ble Judges : S.C. Dharmadhikari, J;N.W. Sambre, J

Bench : Division Bench

Advocate : A. Hidayatullah, Senior Advocate, M. Joshi and S. Kher, i/b. India Law Alliance, for the Appellant; Pradeep S. Jetly and Jitendra B. Mishra, Advocates for the Respondent

Judgement

1. This appeal challenges an interim order passed by the Customs, Excise and Service Tax Appellate Tribunal, West Regional Bench at Mumbai dated 27th May, 2014/13th June, 2014 [2015 (38) S.T.R. 431 (Tri.-Mum.)] wherein the appellant-assessee on an application for dispensing with the condition of pre-deposit and stay of recovery has been directed to make a pre-deposit of 50% of the credit disallowed within a period of eight weeks and report compliance. Mr. Hidayatullah, learned senior counsel appearing on behalf of the appellant would submit that the Tribunal was considering an application of the assessee seeking dispensation of the condition of pre-deposit and stay of recovery during the pendency of the appeal. The appeal challenging the order passed by the Commissioner raised arguable points. A demand of Rs. 4,24,52,646/- along with interest and equivalent penalty was passed on 29th November, 2013. The facts have been noted by the Tribunal. The show cause notice alleged that the credit availed was ineligible. That was between January to March, 2008, 2008-09, 2009-10, 2010-11 as trading was not a taxable service at all during the period. If that was not a taxable service there was no question of any Cenvat credit being availed of.

2. Mr. Hidayatullah would submit that the issue which was raised in the show

cause-cum-demand notice was debatable simply because the Legislature had to be step in later on so as to effect an amendment in the Rules. The only period under dispute was one prior to the amendment. Whether that amendment could have any impact on the prior period or not was thus an issue and which requires an answer. The Tribunal in Paras 5.1 and 5.4 has rendered conclusive findings. The Tribunal has finally decided the issue as to whether prior to 1st April, 2011 trading was an exempted service. The Tribunal relied upon an order passed by it in the case of Mercedes Benz Pvt. Ltd. [reported in 2014-TIOL-476-CESTAT-MUM = 2014 (36) S.T.R. 704 (T)] which has been stated to be on the same issue. If trading was not an exempt service prior to 1st April, 2011 and the amended provision will not have a retrospective effect, the Tribunal, then, commented as to how the demand fell within the four corners of law.

3. Mr. Hidayatullah also addressed us on the approach of the Tribunal and insofar as invocation of the extension period of limitation/time. The Tribunal''s finding that knowledge/awareness of the Department is not a relevant factor while considering the plea of absence of willful suppression raises substantial question of law, according to Mr. Hidayatullah.

4. The sum and substance of his argument is that the issues raised before the Tribunal were debatable and arguable. A reasonable condition imposed would have met the ends of justice. Ordinarily in such circumstances and when a strong prima facie case is made out the Tribunal dispenses with the condition of pre-deposit totally. But in the instant case it was possible for the Tribunal not to have non-suited the appellant and imposed some reasonable condition. That having not been imposed this Court should admit this appeal, is the submission of the counsel.

5. Mr. Jetly appearing on behalf of the Revenue would support the order of the Tribunal by urging that in the case of Mercedes Benz (supra) the Tribunal has already taken a view on law. It merely referred to that view and beyond that it had nothing to say which can allegedly conclude the matter. The Tribunal did hold that it is a arguable point and issue but found it fit not to dispense with the condition of pre-deposit totally. That condition was not totally waived and for the reasons assigned by the Tribunal. The order is thus fair and just and does not require any interference in our further appellate jurisdiction.

6. With the assistance of the counsel appearing for the parties we have perused the paperbook and the annexures thereto including the impugned order. We find that the appeal does raise a substantial question of law. The appeal is therefore, admitted on the following substantial questions of law:

(i) Whether, in the facts and circumstances of the case, and in law, the Tribunal is justified in calling upon the appellants to pre-deposit 50% of Cenvat credit disallowed when the demand/denial of Cenvat credit raised in the impugned notice issued by the Commissioner of Central Excise, Mumbai-II Commissionerate, was totally without jurisdiction?

(ii) Whether, in the facts and circumstances of the case, and in law, the Tribunal is justified in calling upon the appellants to pre-deposit 50% of Cenvat credit disallowed when there are conflicting views on the issue involved in the instant case?

7. Since the order of the Tribunal is passed on an application seeking waiver of the condition of pre-deposit and stay, we do not deem it fit to keep this appeal pending. With the consent of the advocates, we dispose it of finally.

8. There is some substance in the complaint of Mr. Hidayatullah that the Tribunal has expressed itself and rather conclusively on the main issue or point raised in the appeal. If the activities which are stated to be trading in goods are the basis on which the show cause-cum-demand notice was issued, then, whether that constituted an exempted service or a service on which tax was leviable is the focal or principal issue. The position prevailing prior to the amendment, namely, 1st April, 2011 and thereafter would thus require an in-depth consideration. The Tribunal was not expected to express itself finally on such debatable issues. Suffice to it to note that once the Tribunal has found that it is required to go into such great length, then, the Tribunal at an interlocutory stage, then, it should have balanced the rights and equities of the parties. While protecting the interest of the Revenue and not dispensing with the condition of pre-deposit totally the Tribunal should have passed a fair and just order. We find that not only on the main issue but also on the peripheral issues of limitation the Tribunal has finally expressed itself. It is referring and extensively to its earlier orders and legal provisions and that would denote that the said findings are rendered because of some elaborate arguments being canvassed. In all such matters where detailed and elaborate arguments are canvassed it is not that the Tribunal must express itself on every single point or debatable issue. It must reserve all such for the final disposal of the appeal. So long as any tentative and prima facie finding will suffice for disposal of such interim applications, the Tribunal must be careful and render only them and nothing more. We find that not just absence of a word "prima facie" but otherwise as well the findings cannot be termed as tentative. In these circumstances, we are of the opinion that we should not express any view on the debatable issue and on merits. Rather we should only interfere with that part of the Tribunal''s order where it has imposed conditions of deposit. Taking an overall view of the matter we are of the opinion that interest of justice would be served if the appellant deposits a sum equivalent to 25% of the confirmed demand and if that deposit is made within a period of eight weeks from the date of receipt of a copy of this order, the Tribunal shall hear the appeal on merits and according to law. Non-compliance of the above by the appellant shall visit the appellant with all consequences as permissible in law. The Tribunal shall decide the matter uninfluenced by any of the findings and which have been rendered from Paras 5.2 to 5.4 of the impugned order. Equally we clarify that our interference shall not be taken as any expression of our views and on the merits of the controversy. All contentions of both sides are kept open. The appeal is disposed of in these terms. No costs.