(2010) 03 BOM CK 0110

In the Bombay High Court

Case No : Writ Petition No. 3344 of 2009

Indoworth India Ltd. APPELLANT

Vs

Customs, Excise and Service Tax Appellate Tribunal and Commissioner of Customs and Central Excise RESPONDENT

Date of Decision : 25-03-2010

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

Citation : (2010) 112 BOMLR 2074 : (2010) 175 ECR 260 : (2010) 253 ELT 364 : (2011) 21 STR 688

Hon'ble Judges : S.A. Bobde, J;P.D. Kode, J

Bench : Division Bench

Advocate : Sunil Manohar and R.E. Moharir, for the Appellant; S.K. Mishra, Assistant Solicitor General, for the Respondent

Final Decision : Dismissed

Judgement

S.A. Bobde, J.—Heard.

2. Rule. Returnable forthwith. Heard finally by consent of parties.

3. The petitioner has challenged the order passed by the Appellate Tribunal u/s 35F of the Central Excise Act, 1944 directing the petitioner to deposit about half of the amount of the duty i.e. to deposit an amount of Rs. 4 corers. Mr. Mishra, learned Assistant Solicitor General has raised a preliminary objection to the tenability of this petition on the ground that the appeal to this Court is provided u/s 35G "from every order passed in appeal by the Appellate Tribunal". Mr. Mishra relies on the judgment of the Division Bench of the Madras High Court in Nivaram Pharma Pvt. Ltd. Vs. The customs, Excise and Gold (Control) Appellate Tribunal, South Regional Bench, The Commissioner of Central Excise (Appeals) and The Assistant Commissioner of Central Excise, Madras IV Division, wherein Mr. Justice Markandey Katju, Chief Justice as he then was took a view that the writ petition ought not to be entertained if it results in short circuiting the statutory remedies of appeal, revision etc.

4. Mr. Manohar, learned Counsel for the petitioner submits that though an appeal lies to this Court from every order passed in appeal by the Appellate Tribunal u/s 35G, the order directing the appellant to make a deposit of the duty demanded is not an order passed in appeal because such an order operates as a pre-condition before preferring of appeal and, therefore, it cannot be said that it is an order made in appeal. Section 35G(1) of the Central Excise Act, 1944 reads as follows:

35G. Appeal to High Court

(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law.

Section 35F under which the order for deposit has been directed to be made reads as follows:

35F. Deposit, pending appeal, of duty demanded or penalty levied--

Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of Central Excise authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied:

Provided....

Now considering aforesaid two provisions the question arises as to whether the order directing a party to deposit the amount before the Appellate Tribunal is an order made in appeal and if the answer is in the affirmative, whether an appeal lies u/s 35G of the Central Excise Act, 1944. We have no hesitation in holding that an order directing the deposit of the amount is an order made in appeal. Section 35F opens with the words "where in any appeal under this Chapter". The order of deposit is thus an order made in appeal. In fact there is no other proceeding pending before the appellate authority. In fact there are no separate proceedings which deals with the issue of deposit. Any order for deposit must be said to have been made in an appeal only. Therefore, where such an order is made, it will be an order from which the appeal will lie u/s 35G of the Central Excise Act.

5. In the circumstances, we are of the view that the petitioner has an alternate remedy against the impugned order. We accordingly decline to entertain this petition. The writ petition is dismissed. We direct that the petitioner''s appeal filed before the CEGAT shall not be dismissed for a period of two weeks from today.

