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(2009) 10 GUJ CK 0130

In the Gujarat High Court

Case No : Special Civil Application No. 10498 of 2009

Larson and Toubro Limited — APPELLANT

Vs

Union of India (UOI) — RESPONDENT

Date of Decision : 01-10-2009

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35F
Finance Act, 1994 — Section 83

Citation : (2011) 30 STT 280

Hon'ble Judges : K.A. Puj, J;A.L. Dave, J

Bench : Division Bench

Advocate : Naresh Thakkar and Hardik P. Modh, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

A.L. Dave, J.—The petitioner herein is aggrieved by the order passed by the Commissioner (Appeals-IV), Central Excise, Ahmedabad, on 14-9-2009, in Stay Order No. 38(ST)/2009, requiring the petitioner to pre-deposit an amount of Rs. 30,00,000/- (Rupees Thirty Lakhs only), u/s 35F of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994. The order further requires the petitioner to deposit the amount and produce the proof thereof, within a period of three weeks from the date of receipt of the order. The remaining amount of service tax, amount of interest charged and penalties imposed under the order impugned before the Commissioner (Appeals) were waived and stay against the recovery was granted till the final decision, on the aforesaid conditions.

2. We have heard learned advocate Mr. Naresh Thakker appearing with learned advocate Mr. Hardik Modh for the petitioner.

3. Mr. Thakker submitted that the impugned order is passed without application of mind and without considering the submissions made before the Commissioner (Appeals). He submitted that the Commissioner (Appeals) has not considered the question, whether Notification No. 25/2004 would apply prospectively or

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retrospectively, though it was argued. He submitted further that a contention was raised regarding limitation on the action for the reason that it is not a case of suppression and, therefore, the action ought to have been initiated within one year; whereas the action is initiated beyond the period of one year, as if there is suppression. These two aspects have not been considered by the Commissioner (Appeals) and the order is passed in a mechanical manner and, therefore, the same may be set aside. By way of an alternative submission, he submitted that while setting aside the order, this Court may direct the Commissioner (Appeals) to consider the case of the petitioner on the grounds indicated in the earlier part of the order. Lastly, Mr. Thakker submitted that if the Court is not inclined to entertain this petition; the Court may permit the petitioner to furnish bank guarantee instead of depositing the amount. Mr. Thakker has relied on the decision in the case of Sunrise Polymers Industries (India) Ltd. v. Union of India 2005 (191) E.L.T. 46 (Guj.) and the decision in the case of Benara Valves Ltd. and Others Vs. Commissioner of Central Excise and Another, in support of his submissions.

4. We have considered the submissions made on behalf of the petitioner. We have also examined the order passed by the Commissioner (Appeals) impugned in this petition.

5. At the outset, we may observe that the order impugned in this petition is an interim/interlocutory order, and the submissions made on behalf of the petitioner are incorporated in the order. However, the submissions, on which the learned advocate seeks findings, may be relevant at the time of final hearing of the appeal. If they are considered at the interim stage, it may amount to preempting the final decision at the interlocutory stage and, therefore, we are of the view that the order impugned cannot be considered as an order without application of mind. The Commissioner (Appeals) was justified in not giving any verdict on the question as to whether Notification No. 25/2004 would have prospective or retrospective application, for the reason that it would require him to examine several other aspects of the case. The same would be the situation on the question of limitation. The Commissioner (Appeals) would be required to go into the question, whether there is suppression or not and which period of limitation would apply; whether one year or five years. This would again amount to entering into the merits of the case. The Commissioner (Appeals) was conscious about this situation and, therefore, he has, in terms, observed that the case is required to be discussed in detail on merits at the time of hearing of the main appeal. He has also observed that the appellants have not made out a prima facie case for complete waiver of pre-deposit.

6. Now, there is a question, whether this Court should exercise its extraordinary jurisdiction for interfering with a discretionary order passed by the Commissioner (Appeals). Such powers are normally to be exercised where an order is passed without jurisdiction, or which would shock the conscience of the Court, which is not the case here. The service-tax assessed is around Rs. 42 Lakhs with the

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similar amount of penalty added to which would be the amount of interest. As against that amount, an amount of Rs. 30 Lakhs is ordered to be deposited and we would not feel it justifiable to interfere with such an order.

7. Lastly, it was canvassed that the petitioner may be permitted to furnish bank guarantee in place of deposit of amount. We do not make any observation on this aspect leaving it open to the petitioner to approach the Commissioner (Appeals) with a similar request. If such a request is made, it would be considered by the Commissioner (Appeals), without being influenced by our not granting such a relief.

8. In view of the foregoing discussion, we do not find any merits in the petition. The petition, therefore, must fail and stands rejected.

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