(2012) 10 MAD CK 0240

In the Madras High Court

Case No : Writ Appeal (MD) No''s. 483 and 564-568 of 2012

Madura Coats Ltd. APPELLANT

Vs

Asstt. Commissioner of C. Ex. RESPONDENT

Date of Decision : 29-10-2012

Acts Referred:

Citation : (2013) 291 ELT 172

Hon'ble Judges : P.P.S. Janarthana Raja, J;M. Duraiswamy, J

Bench : Division Bench

Advocate : T. Mohan for Ms. D. Geetha, for the Appellant; R. Aravindan, for the Respondent

Judgement

P.P.S. Janarthana, J.—By consent of the learned counsel on both the sides, the main writ appeals are taken up for final disposal. Since the issue involved in these writ appeals is one and the same, the same are taken up and being disposed of by a common judgment. The facts arising out of these writ appeals are as under:-

The appellant is engaged in the manufacture of cotton yarn, core spun yarn and 100% SSP (Staple Spun Polyester) multiple folded yarn falling under Chapters 52, 54 and 55 respectively, of the First Schedule to the Central Excise Tariff Act, 1985. There is a dispute between the appellant and the respondent in respect of dipped man-made fabrics falling under Chapter 59 of the Central Excise Tariff Act, 1985, which resulted in the demand of Rs. 1,12,87,214.26. The demand has been made by the Assistant Commissioner of Central Excise, Madurai, the above mentioned respondent. Aggrieved by that, the appellant filed an appeal before the Commissioner (Appeals). The said Commissioner (Appeals) dismissed the appeal and confirmed the order of the Assistant Commissioner of Central Excise, Madurai. Aggrieved by that, the appellant filed an appeal before the Customs, Excise and Service Tax Appellate Tribunal ("CESTAT" in short) in No. E/141/2009. Further, there was a demand by the respondent for a sum of Rs. 4,61,679/- against which the appellant filed an appeal before the First Appellate Authority, who confirmed the order of the Assistant Commissioner of Central Excise. Aggrieved by the same, the appellant filed a further appeal before the CESTAT in No. E/559/2009. Along with the appeals, the appellant also preferred stay petitions for waiver of pre-deposit of duty. The CESTAT, by order dated 20-4-2009 and 18-1-2010 granted waiver of pre-deposit and also granted stay on the ground that the appellant had already paid a sum of Rs. 43,00,000/- on account to the Revenue, way back in the year 1991. It is also staled that the interest generated over the years would certainly be in excess of the duty demanded. The CESTAT also fixed the case for final hearing on 11-6-2009. By virtue of the expiry of 6-months period as per the statute, the stay granted earlier automatically expired. Thereafter, the appellant preferred another petition for extension of stay and the CESTAT also granted extension of stay for a further period of six months. The said period of 6 months also expired. Thereafter, the Superintendent of Central Excise, City Range, Madurai-II issued a letter to the appellant asking to obtain extension of interim order or pay the demanded duty. Hence, the appellant once again moved the CESTAT on 15-4-2011. The CESTAT also extended the stay on 9-5-2011 for a further period of six months. The said period of 6 months expired on 9-11-2011. Thereafter, due to non-availability of members, there was no sitting and therefore, the appellant''s petition praying for further extension of stay is pending before the CESTAT. The respondent issued a letter dated 9-11-2011 asking the appellant to produce the CESTAT''s final order for extension of stay, within 10 days of expiry of the stay period mentioned in the CESTAT''s order or else, directed the appellant to make the payment. The said letter was received by the appellant on 18-11-2011. After receiving the letter, the appellant sent a reply letter dated 19-11-2011 stating that the stay application is pending before the CESTAT. It is also further stated in the letter that there is no regular sitting of the CESTAT and hence the appellant is unable to move the CESTAT. Further it is also stated that the appellant could not be found fault with, since there is no sitting due to administrative exigencies. The appellant also relied on the Circular No. 925/15/2010-CX., dated 26-5-2010 issued by the Central Board of Excise & Customs, which states that no coercive proceedings should be initiated if there is no fault on the part of the assessee, and also the decision of the Apex Court in the case of Commissioner of Customs & Central Excise, Ahmedabad v. Kumar Cotton Mills Pvt. Ltd., reported in 2005 (180) E.L.T. 434 (S.C.). It is also pertinent to note that the appellant claimed rebate and the Revenue also accepted the case of the appellant. Learned counsel for the appellant submitted that the total rebate granted to the appellant is to the extent of Rs. 29,42,034/-. In view of the availability of the rebate, the respondent adjusted the said rebate amount due to the appellant, against the demanded amount. Aggrieved by that, the appellant filed the writ petitions. After hearing the arguments advanced on the side of the appellant as well as the Revenue, the learned single Judge disposed of the writ petitions with an observation that there are disputed questions of fact involved in the writ petitions, and directed the appellants to approach the CESTAT for extension of stay in accordance with law. Aggrieved over the same, the appellant has filed the present writ appeals.

2. Learned counsel for the appellant vehemently contended that all along the appellant got stay orders whenever there was functioning of the CESTAT and only since there is no sitting of the CESTAT due to administrative reasons, the appellant is unable to get extension of stay and the same was also brought to the notice of the respondent. Further the counsel relied on the Apex Court judgment in the case of Commissioner of Customs & Central Excise, Ahmedabad v. Kumar Cotton Mills Pvt. Ltd., cited supra, and also relied on the Circular dated 26-5-2010 issued by the Central Board of Excise & Customs, which states that there should not be any coercive proceedings against the appellant if there is no fault on his part. It is also further submitted that there is no provision under the statute to adjust the rebate claimed against the demand and that no proper opportunity has been given to the appellant before the adjustment. Therefore, the counsel submitted that adjustment of rebate amount against the demand, is wrong, illegal and without any basis and justification.

3. Learned Standing Counsel appearing on behalf of the Revenue contended that the respondent is right in adjusting the rebate against the demand and as on the date of adjustment, there was no stay obtained by the appellant. Under the circumstances, the order passed by the learned single Judge is in accordance with law and the same should be confirmed.

4. Heard the learned counsel on either side and perused the materials available on record. The respondent issued the letter dated 9-11-2011 directing the appellant to produce the stay order within 10 days of expiry of the stay period mentioned in the CESTAT''s order. The CESTAT finally granted stay for a period of six months from 9-5-2011 which expired on 9-11-2011. The appellant was directed to get extension of stay within 10 days from the expiry date, i.e., from 9-11-2011. So, the last date for getting extension of stay is 19-11-2011. There is no stay obtained by the appellant during the relevant period as there is no sitting of the CESTAT due to administrative exigencies. Further, the said letter dated 9-11-2011 was received by the appellant only on 18-11-2011. There is no dispute that the respondent sent the letter dated 9-11-2011, which was received by the appellant only on 18-11-2011. It is also to be noted that on the same day, i.e., on 18-11-2011, the respondent passed two orders adjusting the amount and the remaining four orders were passed on 22-11-2011, 23-11-2011, 24-11-2011 and 25-11-2011. From these facts, it is clear that no sufficient time has been given to the appellant before even expiry of the 10 days period and also the letter sent by the respondent was received only on 18-11-2011. Before receiving the letter, the respondent passed two orders on 18-11-2011 to adjust the rebate against the demand amount, and also passed four orders on the dates as already stated above. The important factor that has to be taken into consideration is that there is no sitting of the CESTAT due to administrative reasons and also, there is no dispute that the appellant filed petition for extension of stay and the same is still pending. Learned counsel for the appellant relied on Circular No.

925/15/2010-CX., dated 26-5-2010 issued by the Central Board of Excise & Customs, which considered the scope regarding extension of stay. The relevant portion of the said Circular reads as follows:-

2. The above mentioned provision, brought in to effect from 11-5-2002, was examined by the Tribunal as well as the Supreme Court, in the case of 2004 (95) ECC 425), it was held by the Tribunal that the Tribunal has the powers to grant extension of stay beyond 180 days. In the case of 2003 (106) ECR 458 the Tribunal held that, in case of stay orders passed prior to 11-5-2002, the same would be valid till the disposal of the appeal and such stay would not be hit by the second proviso to Section 35C(2A). Further, where the order is made after 11-5-2002, the Tribunal''s powers to continue protection so given cannot be circumscribed and the Tribunal, on an application made by the party, would be competent to extend the period of stay.

(emphasis supplied).

3. The Apex Court has upheld both the above decisions of the Tribunal and observed that "The sub-section which was introduced in terrorem cannot be construed as punishing the assessees for matters which may be completely beyond their control. For example, many of the Tribunals arc not constituted and it is not possible for such Tribunals to dispose of matters. Occasionally by reason of other administrative exigencies for which the assesses cannot be held liable, the stay applications are not disposed within the time specified. The reasoning of the Tribunal expressed in the impugned order and as expressed in the Larger Bench matter, namely, IPCL V. Commissioner of Central Excise, Vadodara (supra) cannot be faulted. However, we should not be understood as holding that any latitude is given to the Tribunal to extend the period of stay except on good cause and only if the Tribunal is satisfied that the matter could not be heard and disposed of by reason of the fault of the Tribunal for reasons not attributable to the assessee" [2005 (180) E.L.T. 434 (S.C.)].

4. A harmonious reading of the statutory provision and judicial pronouncements in the matter would mean that while the Tribunals are expected to dispose of cases as stipulated in the above Section, nothing prevents them from granting stay beyond six months. However, the extension of stay has to be applied for by the party. Thus, the outcome of the above interpretation would be that, wherever stay period is over and final decision has not been pronounced, the Department may by a simple letter ask the party to pay and the party would be at liberty to go back to the Tribunal for seeking extension of stay. Coercive measures, without giving an opportunity to the party to seek further extension of stay should be avoided. This is not to say that applications filed for extension should not be contested. Also, in a case where the Commissionerate feels aggrieved by an order of the Tribunal granting stay indefinitely till disposal of appeal, the said Tribunal order could be challenged before the jurisdictional High Court, citing the amended provisions.

After going through the Circular, it is clear that in the present case, no proper opportunity was given to the appellant to enable the appellant to approach the CESTAT, and the said Circular is binding on the Revenue. It is well settled principle that whenever a Circular is issued by the Central Board of Excise & Customs, the same is binding on the Revenue. Further there is no sitting of the Tribunal due to unavoidable circumstances, which cannot be attributable to the appellant. Also, the Circular and the judgment of the Apex Court relied on by the counsel for the appellant are squarely applicable to the case on hand, in favour of the appellant

5. Under the circumstances, we are of the view that no proper opportunity has been given to the appellant. Further there was no sitting of the Tribunal during the period, and there is no dispute regarding the same. We cannot expect the appellant to perform an impossible task. Also, the Revenue had granted stay earlier after taking into consideration that the appellant had already deposited a sum of Rs. 43,00,000/- in the year 1991. So, taking into consideration of all these factors, we are of the view that the respondent has acted hastily and adjusted the amount without affording proper opportunity to the appellant. Under the circumstances, there is clear violation of the principles of natural justice. This aspect of the matter has not been taken note of by the learned single Judge. The learned single Judge, in paragraph-11 of the order, held as under:-

11. As this Court is not competent to decide the disputed questions of facts involved in these Writ Petitions and it is only the Tribunal, which is the appropriate forum to deal with the said questions and in seisin of the matters, the parties are directed to approach the Tribunal and put forth their contentions whenever the said Tribunal is constituted, for deciding the issues. It is made clear that the rebate claims disbursed to the petitioner are only by way of an interim measure and the same are subject to the outcome of the appeals before the Tribunal and that no coercive steps shall be taken by the respondent against the petitioner towards demands. The Tribunal shall decide the appeals on their own merits, untrammelled by any of the observations made in this order. It is needless to mention that until the appeals are taken up by the Tribunal, the interim stay, already granted by this Court on 25-11-2011, shall continue.

From a reading of the above extracted portion of the impugned order, it is clear that relevant factors have not been taken note of. Hence, the impugned order passed by the learned single Judge is set aside. Consequently, we are also setting aside the impugned orders passed by the respondent in C. No. V/54-55/18/49/2011 Rebate Order-in-Original No. 90/2011 dated 18-11-2011, V/54-55/18/51/2011 Order-in-Original 92 of 2011 (Rebate), dated 22-11-2011, V/54-55/18/50/2011 Order-in-Original 93 of 2011 (Rebate), dated 23-11-2011, V/54-55/18/52/2011 Order-in-Original 94 of 2011 (Rebate), dated 24-11-2011, V/54-55/18/53/2011 Order-in-Original 95 of 2011 (Rebate), dated 25-11-2011 and C. No. V/54-55/18/48/2011-Rebate Order-in-Original No. 91/2011 dated

18-11-2011, in respect of the adjustment of rebate amount alone, with a direction to the respondent to take up the matter, consider the case of the appellant and after giving opportunity to the appellant, decide the matter in accordance with law as expeditiously as possible, preferably within a period of four weeks from the date of receipt of a copy of this order. We once again make it clear that we are setting aside the above said impugned orders of the respondent only in respect of adjustment of rebate amount, and in all other aspects, the orders passed by the respondent shall remain unaltered.

The writ appeals are disposed of accordingly. No costs.

