(2009) 10 P&H CK 0100

In the Punjab And Haryana At Chandigarh

Case No : CWP No''s. 15283 and 10646 of 2009 in CM No. 1515 of 2009

Modern Steels Ltd. APPELLANT

Vs

CIT (Appeals) RESPONDENT

Date of Decision : 12-10-2009

Acts Referred:
Central Excises and Salt Act, 1944 — Section 35F

Citation : (2010) 188 TAXMAN 184

Hon'ble Judges : Tirath Singh Thakur, C.J;Mahesh Grover, J

Bench : Division Bench

Final Decision : Allowed

Judgement

T.S. Thakur, CJ.—Aggrieved by an order of adjudication dated 8-10-2008 passed against it, the petitioner-company preferred appeal No. 733-CE/APPL/CHD./2008/2000 before the Commissioner (Appeals), Central Excise, Chandigarh. The appeal was accompanied by an application seeking waiver of pre-deposit required in terms of section 35F of Central Excise Act, 1944. That application was partly allowed by the Commissioner (Appeals) by an order dated 13-2-2009 directing the petitioner-company to deposit 50 per cent of the amount of duty as also the penalty as a condition precedent for hearing the appeal on merits. Aggrieved by the said order, the petitioner-company filed a Writ Petition No. 10646 of 2009 in this court which was allowed by this court by an order dated 30-7-2009, with a direction to the Commissioner (Appeals) to reconsider the matter in the light of the fresh material which became available to the petitioner company after the passing of the earlier order.

2. It so happened that the appeal preferred by the petitioner company was taken up on 28-7-2009 and dismissed on the ground that the pre-deposit directed in terms of orders dated 13-2-2009 and 6-7-2009 had not been made by the petitioner.

3. When the matter appears to have gone back to the Commissioner (Appeals)

pursuant to the direction issued by this Court, the Commissioner (Appeals) was of the view that the appeal having been already dismissed by him before passing of the order by this court dated 30-7-2009, he could not legally recall the dismissal order and comply with the direction issued by this court for reconsideration of the matter. He has accordingly filed Civil Misc. Application No. 15157 of 2009 for recalling of our order dated 30-7-2009 on the ground that since on the date of the order passed by this Court, the appeal already stood dismissed by the Commissioner (Appeals), no order of remand could have been made by this Court. The petitioner-company has at the same time filed Writ Petition No. 15283 of 2009 challenging the order of dismissal passed by the Commissioner on 28-7-2009.

4. It is argued on behalf of the petitioner company that orders dated 13-2-2009 and 6-7-2009 passed by the Commissioner (Appeals) on the applications for waiver of pre-deposit having been set aside by this court and the Commissioner having been directed to re-examine the matter afresh, the Commissioner (Appeals) ought to have recalled the order of dismissal of the appeal and reconsidered the matter in obedience to the order passed by this court and passed a fresh order in accordance with law instead of considering himself handicapped in the matter and seeking recall of order passed by this Court. Alternatively, it was contended that even if the Commissioner (Appeals) was right in holding that the order of dismissal of appeal could not be recalled, there was no impediment in quashing the order of dismissal of the appeal passed by the Commissioner (Appeals) having regard to the fact that the same was entirely based on the failure of the petitioner company to make a pre-deposit in terms of his orders dated 13-2-2009 and 6-72009.

5. We find considerable merit in both these submissions. It is true that as on the date this court passed its order on 30-7-2009, the Commissioner (Appeals) had already dismissed the appeal filed by the petitioner company, yet the Commissioner (Appeals) was not, in our opinion, in any way handicapped in recalling the said order of dismissal once this court had set aside the order on the applications for waiver of pre-deposit and directed passing of fresh orders upon reconsideration of the matter. The Commissioner (Appeals) appears to have taken a hyper technical view of the matter in considering himself powerless in recalling an order which was no longer sustainable in the light of the order passed by this Court. He appears to have overlooked the fact that the very basis on which the Commissioner (Appeals) had dismissed the appeal of the petitioner had become extinct with the order passed by this Court. Be that as it may, the fact that this court had found orders dated 13-2-2009 and 6-7-2009 to be unsustainable and set aside the same and directed reconsideration of the matter is sufficient for us to quash the order of dismissal of appeal passed by the Commissioner (Appeals) on 28-7-2009. We would have had no difficulty in doing so while passing our order dated 30-7-2009 only if it was brought to our notice at that stage that the Commissioner (Appeals) had already dismissed the appeal. We say so on a parity of reasoning that since the order of dismissal was entirely

based on the failure of the petitioner to make the pre-deposit which was found by us to be unsustainable, there was no reason why the order of dismissal should not be quashed.

6. We accordingly allow this writ petition, quash order dated 28-7-2009 passed by the Commissioner (Appeals) and direct that request of the petitioner for waiver of pre-deposit be considered afresh in the light of the earlier order passed by us on 30-7-2009. Consequently, CM No. 15157 of 2009 filed by the Commissioner (Appeals) seeking recall of our order dated 30-72009 fails and is hereby dismissed. Parties are left to bear their own costs.