(2013) 10 BOM CK 0065

In the Bombay High Court

Case No : Central Excise Appeal Lodging No. 268 of 2013

Niphad Sakhar Karkhana Ltd. APPELLANT

Vs

Commissioner of C. Ex., Nashik RESPONDENT

Date of Decision : 15-10-2013

Acts Referred:

Citation : (2014) 300 ELT 66

Hon'ble Judges : Mohit S. Shah, C.J;M.S. Sanklecha, J

Bench : Division Bench

Advocate : M.H. Patil and Ms. Aparna Hirandagi, for the Appellant; Pradeep S. Jetly and N.V. Kalantri, for the Respondent

Judgement

1. This appeal u/s 35G of the Central Excise Tax Act, 1944 ("the Act") challenges the order dated 22 July, 2013 of the Customs Excise and Service Tax Appellate Tribunal ("Tribunal"). By the above impugned order the appellant was directed to pre-deposit an amount of Rs. 1 crore out of the balance amount of Cenvat credit still payable of Rs. 1.14 crores for hearing the appellant''s appeal on merits. The following question of law is pressed as a substantial question of law in this appeal.

Whether on the facts and circumstances of the case, the Tribunal was correct in law in directing the appellant to deposit an amount of Rs. 1 crores for hearing the appellant''s appeal on merits when the issue in dispute is covered by the decisions of the Tribunal in the appellant''s favour?

2. The period involved in this appeal is April, 2007 to January, 2012.

3. The appellant is engaged in manufacture of Sugar, Molasses, Denatured Ethyl Alcohol and Ethyl Alcohol (rectified spirit). The appellant had taken Cenvat credit of duty paid on molasses used in the manufacture of its final products and utilized the same on payment of duty on Denatured Ethyl Alcohol and the credit could not be utilized for payment so far as Ethyl Alcohol was concerned as the same was not an excisable goods being covered under the State Excise and not under Central Excise levy.

4. The revenue was of the view that credit of duty on molasses could not be taken by the appellant to the extent it was used in manufacture of Ethyl Alcohol. This was on the basis that Ethyl Alcohol is non-excisable goods. Consequently the revenue sought to recover and demanded the credit so taken on the molasses used in manufacture of Ethyl Alcohol. The Adjudicating authority confirmed the demand holding that Ethyl Alcohol is not subject to Central Excise Levy but to State Excise levy and therefore is not an exempted excisable goods. Consequently the credit of duty paid on molasses is not available to the extent molasses is used in manufacture of Ethyl Alcohol.

5. Being aggrieved the appellant filed an appeal to the Tribunal and sought dispensation from pre-deposit of duty and penalty for the purpose of it appeal being heard on merits. However, by the impugned order the Tribunal directed the appellant to deposit a sum of Rs. 1 crore out of Rs. 1.14 crore which is still payable in accordance with the proviso to Section 35F of the Act.

6. Mr. Patil, learned Counsel for the appellant submits that the issue in appeal stands concluded in the appellant''s favour by a decision of the Tribunal in the matter of 2008 (127) ECC 39 . The Adjudicating Authority after noting the above submissions ignores the same on the ground that the decision of the Tribunal in Ugar Sugar Works Ltd. (supra) is sub silentio. The Tribunal in the impugned order incorrectly holds that the decision of the Tribunal in the matter of Ugar Sugar Works Ltd. (supra) erroneously disregards the same by holding that it deals with a period prior to 2005 i.e. when the tariff structure was different from that existing post 2005. This is not correct as according to Mr. Patil the above decision also covers a period post 2005. In any case Mr. Patil submits that the Tribunal has again in the matter of 2008 (127) ECC 39 has taken the same view when specifically dealing with the period post the restructuring of the Tariff in 2005. Therefore in these facts it is submitted that a complete waiver of pre-deposit was warranted.

7. Mr. Jetly, the learned Counsel for the revenue supports the impugned order and states that this deposit is only at the stage of hearing of stay application. The contentions of the appellant would be considered at the time of final hearing and no interference at this stage is warranted.

8. We find that in 2005 the Central Excise Tariff Act, 1985 was restructured. The case of the revenue is that prior to restructuring of the tariff, Ethyl Alcohol was an excisable goods as it found mention in the tariff but not after restructuring of the tariff. The Tribunal in the matter of Ugar Sugar Works Ltd. (supra) seems to have dealt with the period post 2005. In any case, in a subsequent case also in the matter of 2008 (127) ECC 39 the Tribunal has followed its earlier decision while dealing with the issue of Ethyl Alcohol manufactured using molasses as an input during the period from 1 July, 2005 to 31 March, 2006.

9. In view of the above, we set aside the impugned order and direct the Tribunal to decide the stay application afresh. However, while considering the stay

application both the decisions of the Tribunal in the matter of Ugar Sugar Works Ltd. referred to herein above would be considered to take a prima facie view whether the same is applicable to the facts of the present case before directing the amount of pre-deposit required to be made by the appellant for the purpose of entertaining its appeal on merits. All contentions of both parties are left open to be urged before the Tribunal. The appeal is disposed of with the above directions.