(1991) 01 CAL CK 0001

In the Calcutta High Court

Case No : Matter

Prabir Kumar Majumdar APPELLANT

Vs

Assistant Collector, Central Excise RESPONDENT

Date of Decision : 18-01-1991

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35G, 35N
Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 265

Citation : (1992) 60 ELT 533

Hon'ble Judges : Ruma Pal, J

Bench : Single Bench

Judgement

Ruma Pal, J.—Subsequent to the passing of the order yesterday, it was pointed out by the petitioners that the bank guarantee had been kept renewed. As such I recall the order and dispose of the writ petition on merits. The writ petitioner has challenged a demand of the respondent No. 1 for excise duty in respect of the goods manufactured by him. An order dated 16-4-1985 passed by the Respondent No. 1 directing payment of excise duty was challenged by the petitioner in an appeal to the Collector. During the pendency of the said appeal, the petitioner moved an application under Article 226 of the Constitution before this Court. An order was passed staying realisation of the duty claimed pending the said appeal subject to the petitioner depositing a sum of Rs. 50,0007-and furnishing a bank guarantee for the amount claimed. The said appeal was dismissed and the demand as contained in the order dated 16-4-1985 was upheld by the Collector. The petitioner thereafter filed an appeal from the order of the Collector to the Customs, Excise & Gold (Control) Appellate Tribunal. The petitioner''s appeal was rejected by the Tribunal. The petitioner thereafter made an application u/s 35G of the Central Excises & Salt Act, 1944 to this Court. The reference application was heard and an order was passed by the Reference Bench of this Court directing the Tribunal to state a case. The questions framed in the reference relate to the liability of the petitioner to pay excise duty in respect of the said goods manufactured by him.

2. The Excise authorities are now seeking to recover the dues amounting to Rs. 1,03,715.82 arising out of the order dated 16-4-1985. The petitioner contends that pending the hearing of the case by the High Court u/s 35K, the recovery proceedings should be stayed.

3. Section 35N of the Central Excises & Salt Act, 1944 provides inter alia that notwithstanding that a reference has been made to the High Court, sums due to the Government as a result of an order of an Appellate Tribunal shall be payable. This section corresponds to Section 265 of the Income Tax Act, 1961. Therefore the general principles governing the question of grant of stay of recovery proceeding should be the same.

4. Like references under the Income Tax Act, the Courts in exercising jurisdiction u/s 35G of the Central Excises & Salt Act, 1944 exercise an advisory or consultative jurisdiction. In directing the Tribunal to state a case, the matter is still kept pending before the Tribunal.

5. In the case of Commissioner of Income Tax Vs. Bansi Dhar and Sons, the Supreme Court held that an appeal is kept pending before the Appellate Tribunal until the High Court answers the questions referred to it. The appellate jurisdiction is retained by the Tribunal to dispose of the appeal in accordance with the opinion expressed or answer given by the High Court. While the appeals are thus pending before the Tribunal, nothing should be implied as detracting from the jurisdiction of the Tribunal. The power to grant stay is Incidental and ancillary to the appellate jurisdiction, and is retained by the Tribunal pending the reference before the High Court.

The Supreme Court further held -

"In an appropriate case, if the assessee feels that a stay of recovery pending disposal of the reference is necessary or is in the interest of justice, then the assessee is entitled to apply before the appellate authority to grant stay until disposal of the reference by the High Court or until such time as the appellate authority thought fit."

6. It does not appear from the writ petition that the petitioner has approached the Tribunal for stay of the recovery proceedings.

7. As such I am of the view that this application is premature. The petitioner will be at liberty to approach the Tribunal for stay of the recovery proceedings.

8. It will be open to the petitioner to agitate all points raised in the writ petition before the Tribunal in such stay application. The Tribunal will hear and dispose of the said application in accordance with law.

9. The writ application is thus disposed of. As no affidavit has been filed by the respondents it is recorded that the allegations contained in the writ petition are not admitted by them.

10. All parties to act on a signed copy of the operative part of the judgment on usual undertaking.