(2013) 02 MAD CK 0192

In the Madras High Court

Case No : Writ Petition No. 2847 of 2012 and M.P. No. 1 of 2012

S and S Power Switchgear Ltd. APPELLANT

Vs

Superintendent of C. Ex. RESPONDENT

Date of Decision : 05-02-2013

Acts Referred:

Citation : (2014) 302 ELT 537

Hon'ble Judges : V. Dhanapalan, J

Bench : Single Bench

Judgement

V. Dhanapalan, J.—The first respondent, namely, Superintendent of Central Excise, Maduravoyal Division, by referring to the latter of the Chief Commissioner (Tax Arrears Recovery), Customs, Central Excise & Service Tax, New Delhi in C. No. CC(TAR)90/2011/19177, dated 14-12-2011, wherein the judgment of the High Court of Andhra Pradesh in M/s. Chaitanya Educational Committee v. CCE, Guntur (2011-TIOL-800-HC-AP-ST) was communicated, if passed the impugned order in O.C. No. 21/2011-12, dated 27-1-2012, directing the petitioner to pay the arrears of Rs. 3.92 crores arising out of the subject Order-in-Appeal No. 30/2010, dated 23-4-2010 of the Commissioner (Appeals), inasmuch as the arrears is not stayed. Questioning the impugned order, the petitioner has filed the writ petition seeking to quash the same. According to the petitioner, it had manufactured isolators in their factory at Porur during the period from 1-10-1993 to 28-2-1997, classified them under Chapter 85.35 of the Central Excise Tariff Act, 1985 and cleared them at the rate of 10% ad valorem. However, the Deputy Commissioner of Central Excise, Chennai-II Division, issued show cause notices, proposing to classify the isolators as only parts of isolators falling under Chapter 85.38 of the Tariff Act, for which, the petitioner submitted its objections. Not satisfied with the objections, the Deputy Commissioner of Central Excise, Chennai-II Division, by an Order-in-Original No. 30/2002, dated 29-8-2002, confirmed the show cause proposals and passed a single adjudication order for the entire period in question, imposing a differential duty of Rs. 3,90,89,657/- and a penalty of Rs. 1,00,000/- under Rule 173Q of the Central Excise Rules, 1944 (in short, ''the Rules''). Aggrieved by the same, the petitioner preferred an appeal before the Commissioner of Central Excise (Appeals) in A. No. 162/2002(M-II) and the same was subsequently renumbered as A. No. 162/2008(M-IV). Along with the appeal, the petitioner had also filed applications for waiver of pre-deposit and for stay of recovery proceedings. The First Appellate Authority, by an order dated 28-8-2003, directed the petitioner to pre-deposit a sum of Rs. 1,50,00,000/- on or before 15-10-2003. Though the petitioner sought for a modification of the order dated 15-10-2003, it did not succeed. Aggrieved by the same, the petitioner preferred a writ petition in W.P. No. 34350 of 2003 and this Court, by order dated 22-2-2010, allowed the writ petition with a direction to the Commissioner of Central Excise (Appeals) to dispose of the appeal within eight weeks without any requirement of pre-deposit. Accordingly, the Commissioner (Appeals), by an order dated 23-4-2010 vide Order-in-Appeal No. 30, rejected the appeal. Aggrieved further, the petitioner preferred a second appeal before the second respondent-CESTAT along with an application for waiver of pre-deposit-cum-stay on 12-7-2010. As there was no regular sitting of the Bench, the appeal along with waiver-cum-stay application is still pending before the second respondent. Pending appeal, the first respondent has passed the impugned order, directing the petitioner to pay the arrears of Rs. 3.92 crores on the ground that there is no stay of recovery proceedings. Aggrieved by the same, the petitioner has preferred the present writ petition,

2. The first respondent has filed a counter-affidavit, wherein it is stated that the petitioner had manufactured and cleared isolators under Chapter 85.35 of the Tariff Act, from their Porur Factory from 1-10-1993 to 28-2-1997 by paying 10% ad valorem. However, the Deputy Commissioner of Central Excise, Chennai-II Division, issued show cause notices, proposing to classify the isolators under Chapter 85.38 of the Tariff Act and passed an Order-in-Original No. 30/2002, dated 29-8-2002, imposing a differential duty of Rs. 3,90,89,657/- and a penalty of Rs. 1,00,000/- under Rule 173Q of the Rules. It is further stated that the appeal preferred by the petitioner was ultimately rejected by the Commissioner of Central Excise (Appeals) in its order dated 23-4-2010. It is also stated that the petitioner preferred an appeal before the second respondent along with waiver of pre-deposit-cum-stay petition on 12-7-2010 and during the course of hearing on 20-12-2010, the second respondent directed the Department Representative to ascertain whether any appeal had been filed by the Department in the case of M/s. Hivelm Industries in Order-in-Appeal No. 71/2009(MIV), dated 3-12-2009 and thereafter, the case has not been heard since there was no sitting of the Bench and the case was adjourned to 4-4-2012. It is further stated that the first respondent issued a letter dated 13-6-2011, directing the petitioner to pay the duty and penalty, for which the petitioner approached the second respondent on 20-6-2011, who, in turn, directed the Department Representative to issue appropriate directions to the concerned authorities not to resort to any recovery steps during the pendency of waiver and stay petition and the same was intimated to the first-respondent. The judgment of the High Court of Andhra

Pradesh in Chaitanya Educational Committee v. Commissioner of Customs & Central Excise was referred to in the counter, wherein it is held that the pendency of an appeal before CESTAT or before High Court does not in any manner whittle down the powers u/s 87(c) of the Finance Act, 1994 and the High Court has pronounced that the powers of Central Excise Officers to detain any movable and immovable properties until the amount payable is paid was not circumscribed by any condition. It is also stated that the first respondent based on the instructions issued by the Chief Commissioner (TAR) at C.B.E. & C, New Delhi, communicated through the Chief Commissioner, Chennai, passed the impugned order, directing the petitioner to comply with the demand contained in the Order-in-Original No. 30/2002, dated 29-8-2002. Therefore, the impugned order is sustainable and the writ petition is liable to be quashed.

3. Mr. N. Sriprakash, learned counsel appearing for the petitioner, would make a consistent plea that when the appeal along with the application for waiver/stay is pending for consideration before the competent authority and as there was no regular sitting of the Bench, the first respondent cannot take advantage of the judgment of the Andhra Pradesh High Court in Chaitanya''s case and proceed further, as if there was no legal impediment for the competent authority, to recover the amount as per the original order on the ground that there was no stay of the Order-in-Appeal.

4. On the other hand, Mr. P. Mahadevan, learned Standing Counsel for the first respondent, would submit that the question of entertaining the appeal without pre-deposit is a matter for concern and that when there is an effective alternative remedy is available to the petitioner, it is not proper for it to come before this Court to challenge the impugned proceedings. It is also his contention that the first respondent had passed the impugned order based on the instructions issued by the Chief Commissioner (TAR) at C.B.E. & C, New Delhi communicated through the Chief Commissioner, Chennai. He has also relied on the decision of the Andhra Pradesh High Court in Chaitanya''s case (cited supra) in support of his contention that in the absence of any stay of the order-in-appeal, the Central Excise Officers can proceed with the recovery proceedings. Therefore, the writ petition is devoid of merits and the same is liable to be dismissed.

5. Admittedly, the dispute is with regard to the classification of isolators. While the petitioner classified them under Chapter 85.35, chargeable with duty at 5% or 10%, the Deputy Commissioner of Central Excise, Chennai-H Division claimed that they should be classified under Chapter 85.38, attracting a higher duty. Ultimately, the adjudicating authority passed the order dated 29-8-2002, imposing a differential duty of Rs. 3,90,89,657/- and a penalty of Rs. 1,00,000/- under [Rule] 173Q of the Rules. The petitioner filed an appeal before the Commissioner (Appeals) and also for waiver of pre-deposit and stay of recovery of the demands. The Commissioner (Appeals) by order dated 28-8-2003 directed the petitioner to pre-deposit a sum of Rs. 1,50,00,000/- on or before

15-10-2003, which was not complied with. Pursuant to the order of this Court dated 22-2-2010, passed in Writ Petition No. 34350 of 2003, directing the Commissioner of Central Excise (Appeals) to decide the appeal on merits within the stipulated period, the appeal was ultimately rejected by the Commissioner of Central Excise (Appeals) in its order dated 23-4-2010.

6. The second appeal with the waiver-cum-stay petition filed by the petitioner before the second respondent. Tribunal is still pending consideration, as there was no continuous sitting of the Bench. In the meanwhile, the first respondent had passed the impugned order. It is the submission of the learned counsel for the petitioner that the first respondent has no right to pass the impugned order when the waiver-cum-stay petition is pending before the Tribunal and it may defeat the very object of the waiver petition. But, the petitioner having failed to comply with the condition of pre-deposit of Rs. 1,50,00,000/- imposed by the Commissioner (Appeals), it cannot find fault with the first respondent''s action in passing the impugned order. It is settled law that when there is no stay of the proceedings, it is always open to the authorities to initiate appropriate recovery proceedings. However, the first respondent, in the light of the directions issued by this Court in Writ Petition No. 34350 of 2003, ought to have considered the case of the petitioner.

7. During the course of arguments, it is reported that there is now regular sitting of the Bench and if the second respondent is directed to dispose of the waiver-cum-stay petition filed by the petitioner within a stipulated period, the entire grievance of the petitioner would be redressed. In the light of the above submission, the writ petition is disposed of with a direction to the second respondent-CESTAT to hear the waiver-cum-stay petition filed by the petitioner and dispose of the same in accordance with law within four weeks from the date of receipt of a copy of this order. Till such time, the first respondent shall not proceed with the recovery proceedings. There shall be no order as to costs. Consequently, M.P. No. 1 of 2012 is closed.