(2016) 02 MAD CK 0213

In the Madras High Court

Case No : Writ Appeal (MD) No. 82 of 2015 and M.P. (MD) No. 1 of 2015

Sesa Sterlite Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 18-02-2016

Acts Referred:

Citation : (2016) 337 ELT 366

Hon'ble Judges : S. Manikumar and C.T. Selvam, JJ.

Bench : Division Bench

Advocate : S/Shri AR.L. Sundaresan, SC, for Y. Prakash, Advocate, for the Appellant; S/Shri R. Murugappan, SCGC and R. Aravindan, SSC, for the Respondent

Final Decision : Allowed

Judgement

S. Manikumar, J.—Challenge in this writ appeal is to the order, dated 5-2-2015, passed in W.P. (MD) No. 1409 of 2015, dismissing the writ petition filed by the appellant praying to quash the Order-in-Original No. 03/CE/COMMR/2014, dated 21-11-2014, passed by the 3rd respondent.

2. While entertaining the writ appeal, this Court passed the following order, dated 13-2-2015, in M.P. (MD) No. 1 of 2015 in W.A. (MD) No. 82 of 2015.

"This petition has been filed under Section 151 of the Code of Civil Procedure, read with Article 226 of the Constitution of India, seeking an order in the nature of stay of operation of the Order-in-Original No. 03/CE/COMMR/2014, dated 21-11-2014, passed by the 3rd respondent, till the disposal of the writ appeal.

2. Heard the learned Senior Counsel appearing for the petitioner/appellant and the learned Standing Counsel for Excise Department, appearing for the respondents.

3. Mr. A.R.L. Sundaresan, learned Senior Counsel appearing for the petitioner/appellant, drew the attention of this Court to the proceedings of the Department

of Revenue, Office of the Commissioner of Central Excise, Tirunelveli-7, dated 22-5-2013, made in C. No. V/71/15/84/2012.Adjn., and submitted that an amount of Rs. 73,38,26,035/- was paid by the petitioner/appellant herein to the Commissioner of Central Excise, Vapi. The learned Senior Counsel also drew the attention of this Court to Para No. 5, which reads as follows :

"Contravention of Rules :

"5. As per Rule 3(1) of Cenvat Credit Rules, 2004, an assessee can take Cenvat credit of specified duties paid on inputs. In this case, the assessee had taken Cenvat credit on the duty paid on exempted goods, i.e. Anode Slime and utilised the same for payment of duty. However, duty paid on exempted anode slime is not at all duty in terms of Central Excise Act, 1944, and therefore it appears that the assessee have contravened Rule 3(1) and Rule 3(4) of Cenvat Credit Rules, 2004 and they are liable to pay an amount of Rs. 73,38,26,035/- on the ineligible Cenvat credit taken and availed by them, since any duty paid without the authority of law contravenes Article 265 of the Constitution of India."

4. As contended by the learned Senior Counsel for the petitioner, it has been admitted that the aforesaid amount was received by the Commissioner of Central Excise, Vapi, from the petitioner/appellant, though he was not bound to pay the amount. Subsequently, the 3rd respondent, who is entitled/empowered to get tax, demanded payment of duty, for which the petitioner/appellant submitted that the amount already collected by the Commissioner of Central Excise, Vapi, of the very same Department, Government of India, be adjusted towards the payment to be made to the 3rd respondent. However, it was replied that the amount already wrongly received by the Commissioner of Central Excise, Vapi, would not be adjusted.

5. As contended by the learned senior counsel, it is a wrong payment made. It was further submitted that under a compelling circumstances, the petitioner/appellant was made to make the payment, otherwise the petitioner could not have been allowed to clear the goods and later on it was brought to the notice of the said authority, who received the money against the provisions of law, however that was not returned to the petitioner. On the facts and circumstances, either the money could have been returned or adjusted by the respondents.

6. In the instant case, since the 3rd respondent and the Commissioner of Central Excise, Vapi, are the same department coming under the Ministry of Finance, Government of India, they have to adjust the same. Further, after receiving the amount, the third respondent is not entitled to demand unreasonably further amount. Having considered the submissions, we are of the view that the petitioner/appellant has made out a prima facie case and the balance of convenience is in favour of the petitioner/appellant and it was argued on the side of the petitioner that if interim order is not granted, it will lead to irreparable injury.

7. In the aforesaid circumstances, we find it just and reasonable to grant interim

stay against the 3rd respondent''s order, dated 21-11-2014, till 4-3-2015."

3. Counter affidavit, dated Nil-3-2015, has been filed opposing the prayer sought for.

4. On this day, when the matter came up for hearing, on the basis of the clarification issued by the Central Board of Excise & Customs, in F. No. 71/4/2012/CX.1, dated 14-7-2015, Mr. AR.L. Sundaresan, learned senior counsel, appearing for the appellant submitted that the order-in-original does not survive. Whereas, Mr. R. Aravindan, learned Standing Counsel for the Revenue, insisted that an appeal ought to have filed against the order-in-original.

5. In view of the clarification issued by the Central Board of Excise & Customs, in Circular No. F. No. 71/4/2012/CX.1, dated 14-7-2015, we are not inclined to accept the contention of the Revenue. Hence, the impugned order-in-Original No. 03/CE/COMMR/2014, dated 21-11-2014, are set aside. It is left to the Revenue to proceed further, in accordance with law, if there is any requirement.

6. The writ appeal is allowed, as indicated above. No order as to costs. Connected miscellaneous petition is closed.

