(2013) 06 MAD CK 0292

In the Madras High Court

Case No : Civil Miscellaneous Appeal No. 38 of 2013 and M.P. No. 1 of 2013

Southern Boilers and Equipments Pvt. Ltd. APPELLANT

Vs

Commr. of C. Ex., Chennai RESPONDENT

Date of Decision : 20-06-2013

Acts Referred:

Citation : (2014) 300 ELT 72 : (2014) 44 GST 688

Hon'ble Judges : K.B.K. Vasuki, J;Chitra Venkataraman, J

Bench : Division Bench

Advocate : Hari Radhakrishnan, for the Appellant; S. Xavier Felix, for the Respondent

Judgement

Chitra Venkataraman, J.—The assessee has filed this appeal as against the order of the CESTAT, dated 1-1-2003 in Miscellaneous Order No. 40001/2013 in Application No. E/Misc./289/2011 in Appeal No. E/95/2008, pending before the Tribunal raising the following substantial questions of law:

1. Whether the Honourable Tribunal was right in rejecting the application for extension of stay originally granted by its order dated 23-1-2009 in the light of the decision of the Honourable Apex Court in the case of 2005 (123) ECR 6 (SC)

2. Whether the Honourable Tribunal was right in ordering pre-deposit of duty in terms of Section 35F of the Central Excise Act, 1944 when the duty payable was not determined by the competent authority u/s 1A of the Central Excise Act, 1944?

The assessee is a manufacturer of steam boilers, thermic fluid heaters and hot water boilers falling under chapter Heading 8402.10 of the Central Excise Tariff, 1985, as it stood prior to 28-2-2005. The assessee claimed exemption from duty on the ground that they were agro waste conversion device producing heat energy. Based on views of the Divisional Preventive Unit, Chennai V division, who visited the unit on 17-11-2004 that the assessee was not eligible for exemption, two show cause notices were issued to the assessee, one for the period covering

2003-04 and the other covering the period 2004-05. The notices proposed levy of duty at Rs. 75,200/- and Rs. 13,02,087/- respectively.

2. After hearing the assessee, the Additional Commissioner of Central Excise passed an order on 29-11-2005 dropping the proceedings initiated under the two show cause notices. As against this order, the Revenue filed an appeal before the Commissioner of Central Excise (Appeals), whereby exemption granted was negatived and the adjudicating authority was directed to redo the assessment. As against this order, the assessee went on further appeal before the CESTAT along with the application seeking waiver of pre-deposit

3. Originally, the Tribunal passed an order on 14-5-2008 directing the appellant to make a pre-deposit of Rs. 5.00 lakhs within a period of four weeks and report compliance on 24-6-2008. This order was passed after holding that the assessee had not made out a prima facie case to dispense with the pre-deposit requirement. Thus, though the assessee pleaded financial hardship, there was no proof. In the circumstances, taking note of the status of the assessee as a small scale industrial unit, the Tribunal directed the assessee to pre-deposit part of the amount of duty demanded. The petition for modification filed by the assessee was again dismissed under order dated 2-7-2008 granting further two weeks time and report compliance on 22-7-2008. As against this order passed directing deposit of Rs. 5.00 lakhs, the assessee filed W.P. No. 16994 of 2008.

4. Although, on admission this Court granted interim stay of the order, it is seen from the order passed by this Court on 29-10-2008 in M.P. No. 1 of 2008 in W.P. No. 16994 of 2008 that the interim order originally granted by this Court in the writ proceedings was vacated having regard to the contention of the assessee that the amount had not been quantified and that there was no need to make payment. Hence, there was no necessity to pass any interim order. Based on this, we find from the endorsement made by the Tribunal on 23-1-2009 that in view of the High Court order dated 29-10-2008, no pre-deposit was required and the appeal was directed to be listed in its turn.

5. On 10-1-2011, when the Writ Petition was listed, the assessee sought for withdrawal of the Writ Petition, since the relief sought for in the Writ Petition had become infructuous. Thus, the Writ Petition was dismissed as withdrawn.

6. It may be pointed out that the Writ Petition itself was filed challenging the order passed by the Tribunal on 14-5-2008. It is a matter of record that the appeal was not taken up within six months from the date of the order originally passed. Thus, as per proviso to Section 35C(2A) of the Central Excise Act, 1944, as the stay granted had no force in view of the appeal not being disposed of within the stipulated period of 180 days, the assessee filed Miscellaneous Application for extension of stay in the matter of waiver of pre-deposit of duty. The Tribunal passed an order on 1-1-2013 rejecting the assessee''s prayer and called upon the assessee to deposit the amount within a period of seven days from the date of the order and report compliance on 10-1-2013. It is stated that

the assessee also filed an application for early hearing of the appeal, which was, however, rejected. In paragraph 2 of the order, the Tribunal pointed out that with the withdrawal of the Writ Petition filed challenging the order of the Tribunal on pre-deposit of Rs. 5.00 lakhs, the assessee had clearly acquiesced in the requirement of pre-deposit of the said amount of Rs. 5.00 lakhs. This would mean that the assessee was liable to make pre-deposit u/s 35F of the Central Excise Act. It further pointed out that the order passed on 23-1-2009 was on the ground that there was no duty quantified. However, after the dismissal of the Writ Petition and the duty quantified, the earlier order passed on 23-1-2009 would have no force. That apart, the stay order did not grant any stay of recovery either. Taking note of the totality of the circumstances, the application was dismissed and the assessee was directed to pre-deposit the amount of Rs. 5.00 lakhs. Aggrieved by this, the present appeal has been filed.

7. As already seen in the preceding paragraphs giving the facts of the case, when the assessee challenged the order passed by the Tribunal originally directing deposit of the amount of Rs. 5.00 lakhs, evidently, in the Writ Petition, it was subsequently vacated on the submissions made by the assessee that there was no need to make any payment, as the amount was not quantified. Thus, this Court held that there was no necessity to pass any interim order. Based on this order, the Tribunal stated that no pre-deposit was required. It is not clear under what circumstances the Tribunal by its order dated 23-1-2009 modified the order passed already on pre-deposit. Further, in the context of the fact that when the interim stay granted by this Court was vacated, the order of the Tribunal originally passed directing the assessee to make pre-deposit of Rs. 5.00 lakhs stood thereon for compliance. Leaving that aside, yet another fact is the withdrawal of the Writ Petition on 10-1-2011. It is rather perplexing to note the course of conduct adopted by the assessee. Whatever be the reasons, which compelled the assessee to withdraw the Writ Petition, conscious of the provisions u/s 35C(2A) of the Central Excise Act, the assessee once again moved the Tribunal for an order of extension of stay on the pre-deposit of the duty imposed for, by that time, the order on adjudication had come into force. Thus, the Tribunal had correctly analysed the facts and the conduct of the assessee and in exercise of its discretion, directed the assessee to make pre-deposit of Rs. 5.00 lakhs within a period of 7 days.

8. The Tribunal analysed the facts in a right perspective. We find no error in the reasoning of the Tribunal. In the circumstances, we do not find any question of law arising in this appeal to interfere with the order of the Tribunal. Accordingly, the Civil Miscellaneous Appeal stands dismissed. No costs. Consequently, M.P. No. 1 of 2013 is also dismissed. Considering the fact that the time granted by the Tribunal had already expired, we grant the assessee to deposit the said sum of Rs. 5.00 lakhs within a period of four weeks from today. On receipt of such payment, the Tribunal shall dispose of the appeal within a period of six weeks from the date of such deposit.