(2013) 09 P&H CK 0528

In the Punjab And Haryana At Chandigarh

Case No : Central Excise Appeal No. 16 of 2013 (O&M)

Sudarshan Steel Re-Rolling Mills — APPELLANT

Vs

Union of India — RESPONDENT

Date of Decision : 03-09-2013

Acts Referred:

Citation : (2014) 305 ELT 362

Hon'ble Judges : Rajive Bhalla, J;Bharat Bhushan Parsoon, J

Bench : Division Bench

Judgement

Rajive Bhalla, J.—The appellant, challenges order dated 30-1-2013, passed the Customs, Excise and Service Tax Appellate Tribunal, dismissing his appeal, for failure to comply with an order of pre-deposit of tax, penalty, etc. Counsel for the appellant submits that an appeal filed u/s 35B of the Central Excise Act, 1944 (hereinafter referred to as ''the Act'') cannot be dismissed for failure of an assessee to comply with an order of pre-deposit, passed u/s 35F of the Act. The maintainability of an appeal, filed u/s. 35B of the Act, does not depend upon compliance with an order of pre-deposit. The Act does not enact any provision that empowers the Tribunal to dismiss an appeal for failure to comply with an order of pre-deposit, passed u/s 35F of the Act. It is further contended that as Section 35F of the Act commences with the words "Where in any appeal under this Chapter...". An order passed u/s 35F of the Act is passed in an already pending appeal, and mere failure to comply with an order of pre-deposit, passed u/s 35F of the Act, does not empower a Tribunal, to dismiss an appeal, filed u/s 35B of the Act. It is further contended that the only affect of failure to comply with an order of pre-deposit is that stay shall stand declined. In support of his arguments, counsel for the appellant relies upon the following judgments:-

(i) Promising Exports Limited and Another Vs. Union of India (UOI) and Others,

(ii) Kishori Pujari Granite Pvt. Ltd. Vs. Union of India (UOI),

(iii) B.D. Steel and Traders Vs. Union of India, : B.D. Steel and Traders Vs. Union of India,

2. Counsel for the respondents relies upon Bhavya Apparels Private Limited and Another Vs. Union of India (UOI) and Another, decided by the Hon''ble Supreme Court in Civil Appeal No. 4340 of 2007, on 18-9-2007 to contend that while considering, Section 129 of the Customs Act, 1962, it was held that non-deposit of duty or penalty or failure to comply with an order of pre-deposit, would entail dismissal of the appeal. The provisions of the Act are pari materia to provisions of the Customs Act, 1962 and, therefore, judgment of the Hon''ble Supreme Court in Navinchandra Chotelal Vs. Central Board of Excise and Customs and Others, cover the controversy against the appellant.

3. We have heard learned counsel for the parties, perused Sections 35B and 35F of the Act and have no hesitation in holding that failure to comply with an order of pre-deposit, passed u/s 35F of the Act would entail dismissal of the appeal. Sections 35B and 35F of the Act read as follows:-

Section 35B. Appeals to the Appellate Tribunal. - (1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order-

(a) a decision or order passed by the Commissioner of Central Excise as an adjudicating authority;

(b) an order passed by the Commissioner (Appeals) u/s 35A;

(c) an order passed by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) (hereafter in this Chapter referred to as the Board) or the Appellate Commissioner of Central Excise u/s 35, as it stood immediately before the appointed day;

(d) an order passed by the Board or the Commissioner of Central Excise either before or after the appointed day, u/s 35A, as it stood immediately before that day:

Provided that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to,-

(a) a case of loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse;

(b) a rebate of duty of excise on goods, exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India;

(c) goods exported outside India (except to Nepal or Bhutan) without payment of duty;

(d) credit of any duty allowed to be utilised towards payment of excise duty on final products under the provisions of this Act or the rules made thereunder and such order is passed by the Commissioner (Appeals) on or after the date appointed u/s 109 of the Finance (No. 2) Act, 1998.

Section 35F. Deposit, pending appeal, of duty demanded or penalty levied. - Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of Central Excise authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied:

Provided that where in any particular case, the Commissioner (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue:

Provided further that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so, decide such application within thirty days from the date of its filing.

4. Section 35B provides for appellate for a against orders passed under the Act but Section 35F of the Act places an obligation upon an appellant, "desirous of appealing" against tax or penalty to deposit the amount demanded. The proviso to Section 35F, however, empowers the Commissioner (Appeals) and Tribunal to dispense with the precondition of deposit, subject to such terms and conditions as they may deem appropriate. The use of the words "Where in any appeal under this Chapter..." in section 35F of the Act cannot be construed to raise an inference that the appeal cannot be dismissed for failure to comply with an order of pre-deposit. The words and expressions used in Section 35F and the proviso thereto have to be read together. The expressions "the person desirous of appealing" and "where in any appeal under this Chapter...." have to be read in conjunction, with the former expression requiring a person "desirous of filing an appeal" to pre-deposit the amount of duty subject, however, to any order passed reducing the duty etc. An appeal may, therefore, be filed u/s 35B of the Act but can only be entertained and said to be properly constituted for adjudication on merits, if the person "desirous of filing an appeal", has deposited the amount of duty demanded or penalty levied, subject, however, to any relief that may be granted by the Tribunal, in terms of the proviso to Section 35F of the Act. The judgments relied by the appellant namely Promising Exports Limited (supra), Kishori Pujari Granite Pvt. Ltd. (supra) and, B.D. Steel and Traders (supra), by other Hon''ble High Court have not taken into consideration the expression "the person desirous of appealing." We, therefore, express our respectful inability to

follow the ratio laid down in these judgments and hold that failure of an assessee to comply with an order of pre-deposit, passed u/s 35F of the Act, would entail dismissal of his appeal.

5. A reference would be required to judgments in Navin Chandra Chhotelal (supra) and Bhavya Apparels Private Limited (supra) wherein while interpreting similar provisions of the Customs Act, 1962, the Hon''ble Supreme Court held that failure to deposit quantum of duty, etc., would entail dismissal of the appeal. In view of what has been stated above, the appeal is dismissed with no order as to costs.