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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 13.02.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MR. JUSTICE R.KARUPPIAH

C.M.A. NO. 61 OF 2015

AND

M.P. NO. 1 OF 2015

M/s.Swathy Industry
rep. By its Managing Partner
Mr. M.Krishnakumar
No.3/50-B, Mettu Vellala Street
Kondalampatty, Salem.

.. Appellant/Appellant

- Vs -

1. Customs, Excise & Service
Tax Appellate Tribunal
South Zonal Bench
Haddows Road, Chennai 600 006.

2. The Commissioner of Central Excise
No.1, Foulks Road, Annai Medu
Salem 636 001.

.. Respondents/Respondents

Appeal filed under Section 35-G of the Central Excise Act against the order dated 7.6.10 passed by the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai, made in Final Order No.619/2010.

For Appellant : Mr. G.RM.Palaniappan

JUDGMENT

(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the order of the Tribunal in dismissing the appeal filed by it, appellant/assessee is before this Court by filing the present appeal by raising the following questions of law :-

"1) Whether the first respondent Tribunal is right in directing the appellant to pre-deposit a sum of Rs.1 Crore without considering the case of the appellant on merits?

2) Whether the first respondent Tribunal is right in rejecting the appellant's application for waiver of pre-deposit without considering "undue hardship", which is a relevant factor while exercising powers under Section 35-F of the Central Excise Act?"



2. The appellant, who is engaged in the manufacture of detergent cakes and washing powder, was issued with a show cause notice dated 25.2.08 alleging clandestine removal of goods. However, without offering sufficient opportunity, the 2nd respondent passed the adjudication order. Against the said order, the appellant pursued the matter before the Tribunal by filing an appeal along with an application for waiver of pre-deposit. The said appeal was considered in stay order Nos.70 to 75 of 2010 dated 1.2.2010 and the Tribunal passed the following order :-

"2. We do not see any prima facie merit in the submission of the assessee that it is Section 4A assessment that should have been resorted to instead of Section 4 assessment for the reason that the complete MRP for the entire period of dispute namely April, 2004 to September, 2007 was not available and the assessee furnished only the immediate MRPs - in the statement of Shri M.Krishna Kumar, Partner of M/s.Swathy Industry. The submission of the assessee that the demand takes into account not only goods manufactured by Swathy Industry but also other goods not manufactured by them, is also prima facie not tenable in the light of the statement of Shri Sundaram, dealer and proprietor of M/s.Adhavan Agency, who prepared the line sales report of Swathy Industry admitted that all the sales reflected in the reports were those of goods manufactured by Swathy Industry and by the statement of Shri Shanmugam, another dealer who also corroborated the statement of Shri Sundaram. In these circumstances, prima facie, the denial of the request of the assessee for cross-examination of Suresh Kumar, from whose residence the line sales report relied upon for the purpose of computing the demand, is not fatal to the case of the Department. The denial of the request for cross-examination of Shri Sanjeev Kumar Jain, supplier of acid slurry which is a necessary ingredient for manufacture of detergent cakes and powder is also prima facie not fatal to the case of the Department in view of the detailed statements of both dealers, Shri Shanmugam and Sundaram. Since no prima facie case for total waiver has been made out by the assessee, and having regard to the plea of financial hardship, we direct pre-deposit of a sum of Rs. One Crore by M/s.Swathy Industry within eight weeks from today and on such deposit, pre-deposit of the balance duty and penalty on the manufacturer as well as penalties on the two dealers as well as on Krishna Kumar and Muthuswamy, partners of Swathy Industry shall stand waived and recovery thereof stayed during the pendency of the appeals. E/S/247/2009 filed by Smt. S.Janaki is dismissed as she has not been penalized by the impugned order and the challenge in



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the application is to the levy of redemption fine which does not fall within the scope of the provisions of Section 35F of the Central Excise Act, 1944. Failure to comply with this direction shall result in vacation of stay and dismissal of the appeals without prior notice.

3. The compliance is to be reported on 26.4.2010."

3. This order of the Tribunal, however, was not complied with by the appellant and, accordingly, the appeal was dismissed. Thereafter, the appellant filed Misc. Application No.E/146/2010 seeking modification of the stay order, which came to be disposed of by the Tribunal holding that the very same argument is sought to be reargued and that the conditional order having not been complied with, therefore, the appeal got to be dismissed. The said order reads as under :-

"The applicants seek modification of Stay Order No.70-75/10 dated 01.02.2010 by which pre-deposit of Rs.1 Crore has been directed, on the ground that Section 4A assessment should have been resorted to by the authorities instead of Section 4 assessment.

2. We have heard both sides. We find that this very same argument had been raised during the hearing of the stay petition and has been considered in para 2 of the stay order. The applicants are now seeking to reargue the application which is not permissible in law. We, therefore, decline to modify the stay order supra. In response to the query from the Bench, as to whether the stay order would be complied with, if time for compliance is extended, learned counsel fairly states that the applicants would not be in a position to deposit the amount of Rs.1 Crore. We, therefore, dismiss the appeal for non-compliance with the statutory requirement of Section 35F of the Central Excise Act, 1944."

Aggrieved by the said order of the Tribunal, the present appeal is filed after much delay and the assessee/appellant wants to pursue the matter before this Court.

4. Heard the learned counsel appearing for the appellant and perused the materials available on record as also the orders passed by the Tribunal.

5. On a careful consideration of the matter, this Court finds that at the first instance, the Tribunal has considered the prima facie case and also the plea of financial hardship expressed by the appellant and taking into consideration the quantum of demand of Rs.3,02,08,777/=, had ordered pre-deposit to the tune of Rs.1 Crore only as pre-condition for hearing the appeal. However, though modification was sought for on the same set of arguments, the Tribunal thought it fit not to modify the order. The Tribunal has further observed that, the said amount having not been deposited and the order having not been complied with, and even on enquiry by the



Tribunal on the question of extension of time for making the pre-deposit, the counsel for the appellant having submitted that the appellant is not in a position to make the pre-deposit, the Tribunal thought it fit to dismiss the appeal. In view of the well considered order of the Tribunal, wherein the prima facie case and financial hardship of the appellant were taken into consideration while ordering pre-deposit, which order has not been complied with, the bona fide of the appellant in filing the appeal now itself is in question. In such view of the matter, this Court finds no reason to interfere with the order of the Tribunal at this point of time, more so when the issue has become stale by efflux of time. The appellant is unable to point out any question of law that warrants consideration by this Court to justify this appeal. Nevertheless, we find no question of law, much less substantial question of law that arise for consideration in this appeal.

6. Accordingly, finding no merits, this appeal is dismissed. Consequently, connected miscellaneous petition is also dismissed.

Sd/-
Assistant Registrar
Dated:25.2.15

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Sub Assistant Registrar

To

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