In the High Court of Judicature at Madras

Date :: 25.06.2015

Coram ::

The Hon'ble Mr. Justice R. Sudhakar

and

The Hon'ble Ms. Justice K.B.K. Vasuki

C.M.A. No: 1156 of 2015

M/s. Sterling Lab
No: 57 SIPCOT Industrial Complex
Hosur - 635 126. ... Appellant

-vs-

The Commissioner of Central Excise
Chennai III Commissionerate
26/1 Mahatma Gandhi Salai
Chennai - 600 034. ... Respondent

Civil Miscellaneous Appeal filed under Section 35 G of Central Excise Act against the order dated 02.08.2012 made in Stay Order No: 742 of 2012 - Miscellaneous Order No: 699/12 in E/EU/431/09/E/S/391/2009 in E/614/2009 on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai - 6.

For appellant : Mr. K.V.Subramanian(sc) for
M/s. K.V. Subramanian Associates

For respondent : Mr. T. Chandrasekar

J U D G M E N T

(Judgment of the Court was
delivered by R. Sudhakar, J.)

This Civil Miscellaneous Appeal filed by the assessee is as against the Stay Order passed by the Customs, Excise and Service

Tax Appellate Tribunal in ordering pre-deposit. The assessee has raised the following substantial questions of law in this appeal :

> " 1. Whether when the interest on the defaulted amounts has been already paid along with the defaulted amounts, demanding once again the interest by the Revenue will not amount to double jeopardy of payment of interest twice ?
>
> 2. Whether Sub Rule 3 A of Rule 8 of Central Excise Rules, 2002 regarding the payment of duty in PLA is applicable in respect of regular clearances until the outstanding amount is cleared ? and
>
> 3. Whether the defaulted amount paid using CENVAT credit is appropriate discharge of duty and if so, whether any interest is to be paid for the amounts paid using CENVAT credit?"

2. The case of the assessee is as follows :

> " The assessee manufactures excisable goods. During the period between April 2007 and October 2007 and again during the period between January 2008 and March 2008, the assessee defaulted in payment of excise duty payable net of CENVAT credit available to them for each of the months. As per provisions in Rule 8 (3A) of the said Rules, when such default persists beyond 30 days from the due date, an assessee is not eligible to utilize CENVAT credit available on inputs used in the manufacture of excisable goods for payment of excise duty on final products. Further, the excise duty is to be paid by the assessee on each clearance as against the ususal system of paying excise duty on goods cleared in a calendar month by the 5th of the next succeeding month. The assessee continued to be in default but did not comply with the provisions of Rule 8 (3A) of the Central Excise Rules, 2002. Therefore, a show cause notice was issued demanding excise duty equal to the excise duty paid using CENVAT Credit during the default period along with interest and penalties. After adjudication, the Commissioner of Central Excise, Chennai III Commissionerate, Chennai, by the order dated 17.08.2009, made in Order-in-Original No: 20/2009, confirmed the demand of Rs.4,17,78,147/- along with appropriate interest and penalty equal to the demand. The assessee submitted that they have paid all the defaulted amount by 06.06.2008 and that the interests on the defaulted amount has also been paid. "

3. Challenging the said order, the assessee approached the Tribunal. The Tribunal, vide its order dated 02.08.2012, passed the following order in Stay Order No. 724/12 and Misc. Order No: 699/12:

> " 4. As per Rule 8 (3A), if an assessee is in default of payment of his monthly dues he is not entitled to use CENVAT credit for payment of his excise duty liability during such period. So whatever CENVAT credit the appellant has used for payment of duty during such period cannot be considered as appropriate discharge of duty liability so long as default persists. Therefore, the appellant is required to pay interest on duty liability paid through CENVAT credit during defaulting period from the date of each clearance til the date on which they came out of default. The appellants are directed to calculate such interest and pay such interest as predeposit along with penalty of Rs.5,000/- (Rupess five thousand only) within 6 weeks and submit a copy of such calculation through the jursidictional excise officers. Compliance is to be reported on 20.09.2012.
>
> 5. Subject to such compliance, the appeal will be taken up for final hearing on 29.10.2012 by which time the Department is expected to verify the calculation and report. "

4. Aggrieved over the said order, the assessee is before this Court by filing the present Civil Miscellaneous Appeal.

5. We have heard the learned counsel appearing for the appellant / assessee and the learned counsel appearing for the Department and perused the materails made available on record.

6. The first and foremost contention of the learned counsel appearing for the assessee is that subsequent to the impugned order passed by the Tribunal, a decision has been rendered by the Gujarat High Court in the case of Indsur Global Ltd. vs. Union of India, reported in 2014 (310) E.L.T. 833 (Guj.) wherein the Gujarat High Court declared as unconstitutional the condition contained in sub-rule (3A) of Rule 8 for payment of duty without utilizing the CENVAT credit till an assessee pays the outstanding amount including interest. It is also submitted that following the said decision of the Gujarat High Court, this Court has also allowed the writ petitions filed to declare Rule 8 (3A) of Central Excise Rules, 2002 as oppressive, unreasonable and ultra vires Articles 14 and 19 of the Constitution of India, vide its order dt. 27.03.2015

made in W.P. Nos. 2506 of 2011, etc. Batch.

7. The relevant portion of the order passed by the Gujarat High Court in the case of Indsur Global Ltd. vs. Union of India, reported in 2014 (310) E.L.T. 833 (Guj.) is as follows

> " 36. In the result, the condition contained in sub-rule (3A) of Rule 8 for payment of duty without utilizing the CENVAT credit till an assessee pays the outstanding amount including interest is unconstitutional. Therefore, the portion 'without utilizing the cenvat credit' of sub-rule (3A) of Rule 8 of the Central Excise Rules, 2002, shall be rendered invalid."

This decision of the Gujarat High Court was followed by a Division Bench of this Court in W.P. No. 2506 of 2011, etc. Batch wherein it was held as follows :

> " 7. In the light of the aforesaid judgment of the Gujarat High Court, to which view we are agreeable, all the proceedings initiated by the Department in respect of the respective assessees, invoking the said rule by demanding
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> duty along with interest by denying the benefit of CENVAT credit have to be necessarily set aside. Accordingly, the impugned proceedings are set aside. In the result, all the writ petitions are allowed."

8. In such view of the matter, we find, prima facie, the appellant / assessee has made out a case for waiver of pre-deposit. The questions of law raised are not required to be answered at this stage. The Tribunal will have to decide the issue on the basis of the decided cases. Accordingly, Civil Miscellaneous Appeal is ordered. The impugned order of the Tribunal on pre deposit is set aside and the matter is remanded back to the Tribunal for consdidering the appeal on merits. There shall be no orders as to the costs.

Sd/-
Asst.Registrar (CS IV)

/true copy/

Sub Asst. Registrar

To

The Commissioner of Central Excise
Chennai III Commissionerate
26/1 Mahatma Gandhi Salai
Chennai - 600 034.

+1cc to Mr.K.V. Subramaniam Advocate sr.no.31715.
+1cc to Mr. J.Chandrasekaran Advocate sr.no.31430.

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