IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 27.8.2015

CORAM

THE HON'BLE MR.JUSTICE V.RAMASUBRAMANIAN
AND
THE HON'BLE MR.JUSTICE T.MATHIVANAN

C.M.A.Nos.1915 and 1916 of 2015
and
M.P.Nos.1 of 2015

M/s.Gem Granites,
78, Cathedral Road,
Chennai 600 086. ... Appellant/Appellant

Vs.

1. Commissioner of Central Excise,
   Chennai-IV Commissionerate,
   Nandanam, Chennai.

2. Customs, Excise and Service Tax
   Appellate Tribunal,
   South Zonal Bench,
   Shastri Bhavan, Chennai 600 006.

3. Commissioner of Central Excise (Appeals)
   Central Excise Building,
   Mahatma Gandhi Marg,
   Nungambakkam, Chennai 600 006. ... Respondents/Respondents

Civil Miscellaneous Appeals against the final order Nos.40435 and 40436 of 2015 dated 16.4.2015 in Appeal Nos.C.S.41521/2013 & C/41769/2013 and E/S/41520/2013 & E/41768/2013 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For appellant : Mr.Raghavan Ramabadran

For Respondents : Mr.A.P.Srinivas, Senior Panel Counsel

COMMON JUDGMENT

(Judgment of the Court was delivered by V.RAMASUBRAMANIAN, J.)

These appeals, under section 130 of the Customs Act, 1962, is filed by the assessee.

2. Heard Mr.Raghavan Ramabadran, learned counsel for the appellant and Mr.A.P.Srinivas, learned Senior Panel Counsel appearing for the respondents.

3. As against the order in original bearing No.01/2012 dated 13.12.2012, passed by the Deputy Commissioner of Central Excise, demanding a duty of Rs.519.88 lakhs under the provisions of section 72(1)(d) of the Customs Act, 1962 read with section 11A of the Central Excise Act, 1944, for the years 2000-2001 to 2005-2006, the appellant filed a statutory appeal before the Commissioner of Central Excise (Appeals). Alongwith the appeal, the assessee moved an application for stay. The Commissioner (Appeals) passed an order on 8.5.2013 in the stay petition directing the appellant to make a pre-deposit of 50% of the amount demanded, on or before 7.6.2013. Without challenging the said order before the CESTAT, the appellant went before the same Commissioner (Appeals) and moved an application for modification of the stay order on the ground that when the goods are bonded, the question of payment of duty as a condition for the grant of stay would not arise under section 129E of the Customs Act, 1962.

4. The petition for modification was dismissed by the Commissioner (Appeals) by an order dated 5.6.2013 on the ground that the failure to comply with the conditional order would result in the automatic dismissal of the stay petition and that the Commissioner (Appeals) would become functus officio thereafter.

5. Aggrieved by the said order of the Commissioner (Appeals), refusing to modify his conditional order, the assessee moved a further appeal before the Tribunal. Without going into the merits, the Tribunal disposed of the appeal by order dated 16.4.2015, modifying the order of the Commissioner and directing the appellant to deposit a sum of one crore rupees in five equal monthly instalments commencing from 30.5.2015. Not satisfied with such a discount granted by the CESTAT, the appellant has come up with these further appeals.

6. It is contended by Mr.Raghavan Ramabadran, learned counsel for the assessee (1) that while setting aside the order of the lower authority, the higher authority has no power to impose a condition and (b) this is a case where no pre-deposit condition can be levied at all in terms of section 129E.

7. On the first contention, we do not think that the learned counsel is correct on facts. The Tribunal did not set aside the order of the Commissioner (Appeals) to remand the matter. The Tribunal modified the pre-deposit condition imposed by the Commissioner (Appeals) and directed the Commissioner to dispose of the appeal. The order of the CESTAT, impugned in this appeal, can be treated as an order of remand only if the stay petition has been directed to be re-heard. Since the condition imposed by the Commissioner (Appeals) for the grant of stay was modified by the Tribunal, the Tribunal was obliged to direct the Commissioner (Appeals) to take up the appeal and decide on merits. Therefore, the first contention lacks merit. Hence, it is rejected.

8. Insofar as the second contention is concerned, we do not think that we would go into it. The original order of the Commissioner (Appeals) imposing a condition for the deposit of 50% of the demand was dated 8.5.2013. As against the said order, the appellant did not file an appeal before the CESTAT. Instead, the appellant went before the very same Commissioner (Appeals) and sought a modification. The Commissioner (Appeals) did not refuse to modify, after considering the merits. But, he simply refused to entertain the modification application on the ground that he had become functus officio. It was only as against this order, the appellant filed an appeal before the CESTAT. Therefore, the CESTAT was not obliged to go into this question. However, on the other question, the Tribunal took a lenient view and reduced the amount demanded by the Commissioner (Appeals) by 50%. Hence, the order of the Tribunal does not really call for any interference.

9. However, one gross mistake, which is apparent on the face of the record from the order of the Commissioner (Appeals) dated 5.6.2013, deserves to be noted. The Commissioner (Appeals) has indicated in his order dated 5.6.2013 that he had become functus officio, due to the dismissal of the appeal for non-compliance with the conditional order. But, the last date for complying with the condition was 7.6.2013. On 5.6.2013, the Commissioner (Appeals) could not have become functus officio and the appeal could not have been dismissed. The authorities, as well as the learned counsel, have omitted to take note of this aspect.

10. Therefore, we are of the considered view that granting some concession and directing the appellate Commissioner to dispose of the appeal within a time frame would put an end to the issue which is more than five years old. The appellant is said to have deposited Rs.60,00,000/- pursuant to the impugned order of the Tribunal. The balance to be paid is Rs.40,00,000/- and the time granted by the Tribunal has also not expired. If the Commissioner (Appeals) had not treated himself as functus officio even before the expiry of time for making the deposit and for hearing the appeal, all these problems would not have cropped up.

11. Therefore, taking the facts and circumstances, the appeals are disposed of modifying the order of the appellate Commissioner directing the appellant to make a deposit of another sum of Rs.15,00,000/- apart from the amount of Rs.60,00,000/- already deposited by him. This deposit of Rs.15,00,000/- shall be made within a period of four weeks from the date of receipt of copy of this order. Upon such deposit being made, the main appeal itself shall be taken up by the Commissioner (Appeal) and disposed of in accordance with law within a further period of four weeks. No costs. The connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

ssk.

To

1. Commissioner of Central Excise,
   Chennai-IV Commissionerate,
   Nandanam, Chennai.

2. The Assistant Registrar,
   Customs, Excise and Service Tax
   Appellate Tribunal,
   South Zonal Bench,
   Shastri Bhavan, Chennai 600 006.

3. Commissioner of Central Excise (Appeals)
Central Excise Building,
Mahatma Gandhi Road,
Nungambakkam, Chennai 600 006.

+1cc to M/s.A.P.Srinivas, Advocate, S.R.No.45865
+2cc's to Mr.Lakshmi Kumaran, Advocate, S.R.No.46095

RSI(CO)
CA(08/10/2015)