IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.04.2015

CORAM:

THE HONOURABLE MR.JUSTICE R.SUDHAKAR
and
THE HONOURABLE Ms.JUSTICE K.B.K.VASUKI

Civil Miscellaneous Appeal No.705 of 2015
& M.P.No.1 of 2015

M/s.Caress Industries Pvt. Ltd.,
302, Appakoodal Road,
Kavindapadi - 638 435.
Erode District, Tamil Nadu.
.. Appellant

versus

1. The Customs, Excise and Service Tax
Appellate Tribunal,
South Zonal Bench, Chennai,
Shastri Bhavan Annexe,
Haddows Road, Chennai - 600 034.

2. The Commissioner of Central Excise,
No.1, Foulk's Compound, AnnaiMedu,
Salem - 636 001.
.. Respondents

PRAYER: APPEAL filed under Section 35-G of the Central Excise Act against the order dated 11.2.2015 in Misc.Order No.40348/2015 in Stay Application No.E/Stay/41413/2014 in Appeal No.E/41190/2014-DB on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai

For Appellant : Ms.L.Maithili

For Respondents : Mr.V.Sundareswaran

J U D G M E N T

(Delivered by R.SUDHAKAR,J.)

This Civil Miscellaneous Appeal is filed by the assessee as against the order dated 11.2.2015 in Misc.Order No.40348/2015 in Stay Application No.E/Stay/41413/2014 in Appeal No.E/41190/2014-DB on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai raising the following substantial questions of law:

> "1. Whether the Tribunal is right in directing pre-deposit of over 70% of the duty demand when the order under challenge in the appeal is ex-facie illegal and unsustainable both on merits and on limitation?
>
> 2. Whether the order of the 1st Respondent is contrary to settled law requiring the waiver of pre-deposit of the adjudged dues where the prima facie merits of the case are in favour of the appellant?
>
> 3. Whether the 1st respondent was correct in passing an order of pre-deposit by taking a prima facie view against the appellant on an issue which was not infact the controversy involved in the appeal?
>
> 4. Whether the Tribunal was correct in not appreciating glaring lack of application of mind to well settled cannons of classification, express statutory provisions, board circulars and binding precedents in the order of the lower appellate authority that had resulted in the upholding of the duty demand against the appellant?
>
> 5. Whether the direction to pre-deposit over 70% of the duty demand would constitute "undue hardship", when the prima facie merits are in favour of the appellant as to warrant complete waiver of pre-deposit in terms of Section 35F of the Act?
>
> 6. Whether the Tribunal erred in not taking into account the fact that the demand being substantially barred by limitation and that out of the total demand of Rs.1,53,672/- falling within the normal period of limiation, the appellant had already paid Rs.66,895/- and ordering pre-deposit of Rs.10 lakhs?"

2. The brief facts of the case are as follows:

The appellant manufactured Chelated Zinc, Chelated Iron, MNM Chelated and cleared as other fertilizers falling under the chapter sub-heading No.31059090 of CETA, 1985, at Nil rate of duty for the period upto 28.02.2011. On investigation, the Department found that the appellant manufactured only plant growth regulators falling under Chapter Heading No.38089340 of CETA, 1985 and hence issued show cause notice proposing to demand central excise duty of Rs.14,95,381/- under Section 11A of the Central Excise Act, along with interest and penalty. The Adjudicating Authority, after due process of law, confirmed the demand along with interest and imposed 100% penalty under Section 11AC of the Central Excise Act holding that the ingredients, source and nature of the products, manner of usage, end use, trade parlance etc. in respect of all the impugned goods clearly suggested that the same were not fertilizer. Aggrieved by the said order, the appellant preferred an appeal before the Commissioner (Appeals), who by following the decision of the Apex Court in the case of Karnataka Agro Chemicals (2008 - TIOL- 117-SC-CX), confirmed the adjudication order, thereby dismissed the appeal. Aggrieved by the same, the appellant preferred an appeal before the Tribunal along with an application for waiver of pre-deposit. The Tribunal vide Miscellaneous Order No.40348 of 2015 dated 11.02.2015 observed as follows:

> "Prima facie, it appears that the contents of the goods do not substantially contain nitrogen and phosphates. To call the goods as fertilizers, these ingredients substantially dominate. Therefore, appellant is directed to deposit Rs.10,00,000/- (Rupees Ten Lakhs only) within eight weeks and make compliance on 22nd April, 2015. Subject to compliance, realization of the balance demand shall be stayed during the pendency of the appeal."

3. Aggrieved by the said order of the Tribunal, the appellant is before this Court.

4. Heard learned counsel appearing for the appellant and the learned Standing Counsel appearing for the respondent and perused the materials placed before this Court.

5. We find that the substantial issue raised by the appellant is on fact as to whether the goods cleared by the appellant falls under the category of other fertilizers or not. The another plea raised by the appellant is with regard to limitation. The said factual issues have to be gone into by the Tribunal taking into consideration the relevant materials placed by the appellant.

6. In such view of the matter, we find no reason to interfere with the order passed by the Tribunal. Being pure question of fact, we find no question of law much less any substantial question of law arises for consideration in this appeal. Hence, the order of the Tribunal stands confirmed and this Civil Miscellaneous Appeal stands dismissed. No costs. Consequently, M.P.No.1 of 2015 is also dismissed.

7. Learned counsel appearing for the appellant submits that time may be extended for depositing the amount ordered by the Tribunal. Taking into the consideration the submission made by the counsel for the appellant, time granted by the Tribunal to make deposit of the amount of Rs.10,00,000/- is extended till 19.06.2015.

sl

-s/d-
Assistant Registrar( )

True Copy

Sub-Assistant Registrar

To

1. The Customs, Excise and Service Tax
Appellate Tribunal,
South Zonal Bench, Chennai,
Shastri Bhavan Annexe,
Haddows Road, Chennai - 600 034.

2. The Commissioner of Central Excise,
No.1, Foulk's Compound, AnnaiMedu,
Salem - 636 001.

+ 1 cc to Mrs.L.Maithili Associates, Advocate SR 19779

+ 1 cc to Mr.V.Sundareswaran, Advocate SR 19724

ev(co)
prk20/4

C.M.A.No.705 of 2015
& M.P.No.1 of 2015