THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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C.E.A.No.131 of 2015

JUDGMENT: (per Hon'ble Sri Justice Ramesh Ranganathan)

This appeal under Section 35G of the Central Excise Act, 1944 (for short "the Act") is preferred against the order of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Banglore in Appeal No.ST/26294/2013 dated 03.02.2015.

In an application filed by the respondent herein, seeking waiver of per-deposit, the Tribunal passed the following order:

> *"….. Under Rule 3 of Cenvat Credit Rules 2004 in respect of input service, credit is admissible to a manufacturer or a service provider unlike the case of inputs where the receipt of inputs in the factory is required. For input services there is no requirement that it should be received in a particular place for availment of credit. One of the main objections in this case is that the services were received in R&D unit and there was no manufacture of excisable goods or provision of output service in the R&D unit. There is no dispute that R&D units belong to the same manufacturer and in the excise registration and service tax registration for the units, the manufacturer is one and the same. In the case of M/s. Cadila Healthcare Ltd., [(2013-TIOL-12-HC-AHM-ST)] even the credit relating to R&D work in respect of product which was ultimately not manufactured at all was held to be admissible. The Hon'ble High Court of Gujarat upheld the decision by the Tribunal. R&D cost is necessarily factored to arrive the sale value of the final product.*
>
> *In view of the observations above, we consider that in this case the appeal can be heard without any requirement of pre-deposit. Accordingly, the requirement of predeposit of entire dues is waived and stay against recovery of the dues by the Revenue is granted during the pendency of appeal……"*

Sri P.S.P.Suresh Kumar, learned counsel for the appellant, would draw attention of this Court to the Division Bench judgment in ***SQL Star International Ltd. and Others Vs. Commissioner of Customs, Central Excise and Service Tax Commissionerate and Others*** to contend that the Tribunal, while dealing with an application for waiver of pre-deposit, should take into consideration the requirements of undue hardship and safeguarding the interests of Revenue. In ***SQL***

Star International Ltd.[1] the Division Bench, after considering the judgments of the Supreme Court in ***Benara Valves Ltd. vs. Commissioner of Central Excise*** observed:

> *"The following principles should be kept in mind while considering the applications for stay or for dispensing with the requirement of pre-deposit under Section 35F of the Act:*
>
> *1) Three aspects to be focused while dealing with the applications for dispensing of pre-deposit are: (a) prima facie case, (b) balance of convenience, and (c) irreparable loss;*
>
> *2) Interim orders ought not to be granted merely because a prima facie case has been shown;*
>
> *3) The balance of convenience must be clearly in favour of making of an interim order and there should not be the slightest indication of a likelihood of prejudice to the interest of public revenue;*
>
> *4) While dealing with the applications, the twin requirements of consideration i.e., consideration of undue hardship, and imposition of conditions to safeguard the interests of revenue must be kept in view;*
>
> *5) When the Tribunal decides to grant full or partial stay, it has to impose such conditions as may be necessary to safeguard the interests of the revenue. This is an imperative requirement; and*
>
> *6) An Appellate Tribunal, being a creature of the statute, cannot ignore the statutory guidance while exercising general powers or expressly conferred incidental powers. (Commissioner of Central Excise, Guntur v. Sri Chaitanya Educational Committee ((2011) 38 VST 292 (AP)))."*

Sri S.Ravi, learned Senior Counsel, would submit that the Tribunal has, in the order under appeal, noted that the subject matter of the appeal before the Tribunal was squarely covered by the judgment of the Gujarat High Court in ***Commissioner of Central Excise, Ahmedabad-II vs. Cadila Healthcare Ltd.*** and, as there is no other judgment of any other High Court to the contrary, the Tribunal had rightly observed that the appeal should be heard without any requirement of pre-deposit.

In ***M/s.Hira Ferro Alloys Limited vs. Commissioner (Appeals), Central Excise and Service Tax and Assistant Commissioner of Customs***, the Division bench observed that, where the order passed is patently contrary to the decision of the Supreme Court or the High Court on an identical issue which has reached finality, it would be a strong case where full waiver would be justified.

The jurisdiction, which this Court exercises, under Section 35G of the Act, is only where a substantial question of law arises for consideration. While exercising jurisdiction under Section 35-G of the Act, this Court would not record a finding afresh on facts. The

Tribunal was required in law to assign reasons why it considered it appropriate that the appeal should be heard without the requirement of pre-deposit; and to take into consideration undue hardship, if any, as also to safeguard the interests of Revenue. As the Tribunal has not assigned any reasons why it considered it appropriate to hear the appeal without any requirement of pre-deposit, the order under appeal is set aside.

Sri S.Ravi, learned Senior Counsel appearing on behalf of the respondent, would submit that, since the subject matter of the appeal is covered by the judgment of the Gujarat High Court, the Tribunal may be directed to hear the appeal itself.

We consider it appropriate, therefore, to request the Tribunal to decide either the stay application, or the main appeal itself, within four weeks from the date of receipt of a copy of this order. Till orders are passed afresh by the Tribunal, the appellant shall not take any coercive steps for recovery of the disputed duty.

The appeal is disposed of accordingly.

The miscellaneous petitions pending, if any, shall also stand disposed of. There shall be no order as to costs.

RAMESH RANGANATHAN, J

M. SATYANARAYANA MURTHY, J

Date:16.11.2015.

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<u>THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN</u>

AND

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