THE HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN
AND
THE HON'BLE MS. JUSTICE J. UMA DEVI

WRIT PETITION No.2070 of 2017

Between:

M/s. Vijaya Casting Works,
Rep. by its partner B. Babuji

PETITIONER

And

1. Union of India (Revenue) Ministry of Finance and Central Excise, New Delhi, rep. by its Secretary, and others.

RESPONSENTS

THE HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN
AND
THE HON'BLE MS. JUSTICE J. UMA DEVI

WRIT PETITION No.2070 of 2017

ORDER: (Per Hon'ble Sri Justice V. Ramasubramanian)

The petitioner has come up with the above writ petition challenging a conditional order passed by the Tribunal on 18.11.2014 directing the petitioner to deposit a sum of Rs.10,00,000/- as against a demand of Rs.11,53,646/- together with interest and penalty.

2. Heard Mr. K. Raji Reddy, learned counsel for the petitioner, Mr. M.V.J.K. Kumar, learned Standing counsel takes notice for the respondents.

3. As against the Order in Original passed on 27.06.2012 by the Joint Commissioner, the petitioner filed an appeal before the Commissioner (Appeals). The Commissioner (Appeals) dismissed the appeal on 17.01.2014 for non-compliance with the pre-deposit condition. As against the said order the petitioner filed a further appeal to the CESTAT. Before the CESTAT, the petitioner moved an application for stay and waiver. The Tribunal passed an order on 18.11.2014 directing the petitioner to deposit Rs.10.00 lakhs. The amount was to be deposited within eight weeks and compliance was to be reported on 24.02.2105. The petitioner did not comply with the said order resulting in dismissal of the appeal. Thereafter, when a demand notice was served on the petitioner on 08.12.2016, he has come up with the present writ petition challenging an order passed about two years ago.

4. The first objection of the learned Senior Standing Counsel for the Department is that the petitioner ought to have availed statutory remedy

of appeal under Section 35G of the Central Excise Act, 1944 and that a remedy of writ petition does not lie

5. It is true that as against any order passed by the Tribunal, the petitioner has an alternative remedy of an appeal under Section 35G on a substantial question of law. But the present writ petition arises out of the order dated 18.11.2014, which is in the nature of an order passed on an application for stay and waiver of pre-deposit conditions. An appeal under Section 35G could only be on a question of law. When matters are decided on interlocutory applications such as applications for condonation of delay etc., no substantial question of law may actually arise. Therefore, the remedy under Article 226 cannot be stated to have been completely kept out.

6. The second objection of the learned Senior Standing Counsel for the Department is that the petitioner was found to have collected excise duty from the public works department and did not pass on the same to the Department. From the portion of the Order in Original dated 27.06.2012, it is pointed out by the learned Standing Counsel that as per the statements of the Executive Engineers of the Public Works Department, excise duty was collected by the petitioner but not passed on. Therefore, he contended that this is not a case where any indulgence could be shown to the petitioner.

7. It is true that there is a reference in the Order in Original to the statements made by the Executive Engineer. But one fact, which cannot be over looked in this case, is that a search was conducted on 14.03.2006 in the premises of the petitioner. But a show cause notice was issued only on 07.03.2012, nearly after six years. This fact is borne out even by the Order in Original. Therefore in cases of this nature where a valuable plea

of limitation is taken, right or wrong, the imposition of a pre-deposit condition to such an extent, especially in the light of the amendment that came into effect on 06.08.2014, cannot be over looked.

8. It is true that under Section 11D the period of limitation cannot be held against the department whenever duty is collected but not paid. But the question as to whether the duty was in fact collected or not and the question as to whether what happened during the period of six years after search, are all questions that should be addressed to by the Tribunal, when the appeal is taken up on merits.

9. From 06.08.2014, the Tribunal has no discretion to grant a total waiver in view of the mandatory requirement to deposit 7.5%. The Tribunal did not even address itself to this question. Therefore, we are of the considered view that the condition imposed upon the petitioner is onerous warranting our interference.

10. Therefore, the writ petition is allowed, the order dated 18.11.2014 of the Tribunal is set aside. The petitioner shall deposit a sum of Rs.2,00,000/- within a period of three weeks from the date of receipt of a copy of this order. Upon such deposit being made, the Tribunal shall reopen the appeal and take it for disposal and dispose it of in accordance with law.

11. As a sequel, pending miscellaneous petitions, if any, shall stand closed. There shall be no order as to costs.

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JUSTICE V. RAMASUBRAMANIAN

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JUSTICE J. UMA DEVI

2nd February, 2017
Js.

THE HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN
AND
THE HON'BLE MS. JUSTICE J. UMA DEVI

WRIT PETITION No.2070 of 2017

Date: 02-02-2017

Js.