HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN

AND

HON'BLE MS. JUSTICE J. UMA DEVI

Writ Petition No.7153 of 2017

ORDER: ***(V. Ramasubramanian, J)***

The petitioner has come up with the above writ petition challenging an Order in Original passed by the Adjudicating Authority, demanding payment of an amount equivalent to the Cenvat credit allegedly taken wrongly.

2. Heard Mr. A. Sudershan Reddy, learned senior counsel appearing for the petitioner and Mr. B. Narasimha Sarma, learned senior standing counsel for the respondents.

3. The positive case of the petitioner was that they could collect only 38 copies of invoices at the time of personal hearing but could not collect the remaining invoices since the factory was under lock out. After giving sufficient opportunities to the petitioner, the Adjudicating authority passed the Order in Original.

4. The petitioner filed a statutory appeal, but CESTAT (Customs, Excise & Service Tax Appellate Tribunal) dismissed the same since the pre-deposit condition was not complied with. A regular appeal arising out of CESTAT order, filed by the petitioner in CEA.No.3 of 2017 was dismissed by us on the short ground that the Tribunal could not have entertained an appeal without complying with the pre-deposit condition.

5. After finding the statutory doors shut, the petitioner has come up with a non-statutory route in the form of a writ petition under Article 226 of the Constitution.

6. The writ petition is opposed by Mr. B. Narasimha Sarma, learned senior standing counsel on the ground that once all the remedies under the Act are exhausted, the petitioner cannot challenge the Order in Original. But the said contention cannot be accepted for the simple reason that doctrine of merger will not apply to cases where statutory appeals could not be entertained due to non-compliance with the preconditions. In this case, the appeal filed by the petitioner before CESTAT was not entertained. The non-entertainment of the appeal was found to be in order by this Court. Therefore, there was no appeal in the eye of law and the original order remained as such. Hence, the objection of the learned senior standing counsel is overruled.

7. Even at the time of responding to the show cause notice, the petitioner pointed out that the factory was under lock out from July, 2013. Now the petitioner claims that they have been able to retrieve some of the original documents and they are prepared to produce the same. The petitioner is already a sick industry. Therefore, we are of the view that though the respondents were not guilty of denying the principles of natural justice, the petitioner could well be granted one more opportunity to produce original invoices.

8. Hence, the writ petition is allowed, the impugned order is set aside and the matter is remitted back to the Original Authority for examination of the question without reference to the period of

limitation. The petitioner shall produce all relevant original invoices and other documents on a date fixed by the Authority. The petitioner or their representative shall appear before the Adjudicating Authority on 23-03-2017 at 11.00 A.M. and produce all original records. If the date is not convenient to the Adjudicating Authority, he may inform the same in advance to the petitioner. But his Office shall nevertheless receive all original documents so that the matter does not end in an order being passed under default. Thereafter the Adjudicating Authority shall pass orders afresh in accordance with law.

As a sequel thereto, miscellaneous petitions, if any, pending shall stand closed.

V. RAMASUBRAMANIAN, J

J. UMA DEVI, J

Date: 07-03-2017

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