IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 581 OF 2018
IN
CENTRAL EXCISE APPEAL NO. 9 OF 2015

Tulasee Bio-Ethanol Ltd. .. Appellant
In the matter between
Tulasee Bio-Ethanol Ltd. .. Appellant
v/s.
The Commissioner of Central Excise
Raigad .. Respondent

Mr. V. Sridharan, Senior Counsel a/w Mr. Prakash Shah I/b PDS Legal for the applicant / orig. appellant
Ms. P.S. Cardozo for the respondent

CORAM : AKIL KURESHI &
M.S. SANKLECHA, J.J.

DATED : 7th DECEMBER, 2018.

P.C.

1. Appellant has taken out this notice of motion seeking stay of operation of an order dated 22.01.2014 passed by the Customs, Excise and Service Tax Appellate Tribunal ("CESTAT" for short).

2. The need to file this notice of motion arises in following back ground.

3. The CESTAT had passed an order on 22.01.2014 dismissing the

appeal of the appellant herein which has been challenged in the present Central Excise Appeal No.9 of 2015. The appeal has been admitted. Substantial questions of law have been framed which read as under :-

> *"(1) Whether, in the facts and circumstances of the case, the adjudication order-in-original dated 31.3.2006 which is passed after 1.4.2000, adjudicating show-cause notices dated 3.10.2003 and 30.4.2004 to the extent covering period prior to 1.4.2000, is valid in law since Rule 57I of the Central Excise Rules, 1944 is no longer in force, despite Section 38A of Central Excise Act, 1944?*
>
> *(2) Whether, in the facts & circumstances of the case, denial of credit on input Naphtha worth Rs.12,38,49,639 under Rule 57I of the Central Excise Rules, 1944 read with Section 11A of Central Excise Act, 1944 is correct even if it is assumed for the sake of argument that the finding of the Tribunal that inputs purchased have been sold / diverted is correct,when undisputedly entire credit amount stands paid / reversed by the Appellants, by way of payment of duty of purported final products?*
>
> *(3) Whether – even if it is assumed for the sake of argument that the finding of fact by the Tribunal that the alleged buyers of finished goods are fictitious, is correct – the dismissal of appeal by the Tribunal is perverse and illegal since such a finding cannot possibly lead any person to conclude that the duty paid inputs had been diverted by the appellants?*

(4) Whether – in the facts & circumstances of the case – denial of credit on inputs by invoking the extended period of limitation is maintainable in law ?”

4. The appellate Tribunal while remanding the proceedings to the adjudicating authority for passing a fresh order, has also dealt with the contention of the appellant regarding applicability of Section 38A of the Central Excise Act, 1944 ("the Act" for short). According to assessee, the case was covered by judgment of Division Bench of the Tribunal in case of *Sunrise Structural & Engineering Ltd*., in which the decision of larger bench of the Tribunal in case of *Kisan Sahakari Chini Mills Ltd.* was considered. The Tribunal in the judgment impugned in the tax appeal held that in the decision in the case of *Sunrise Structural & Engineering Ltd.* the Bench has wrongly distinguished the judgment of the larger bench. The correctness of the view of the Tribunal is at large before this Court in this tax appeal.

5. At one stage, the assessee-appellant had attempted to obtain stay against further proceedings by filing Notice of Motion No.2503 of 2016. The Division Bench however, by an order dated 6th September, 2016 disposed of the said application leaving open to the appellant to apply

for stay of the operation of the impugned order at the appropriate stage. It is now pointed out by the Counsel for the appellant that pursuant to the remand order passed by the Tribunal, by the said order dated 21.2.2014, the adjudicating authority has already passed a fresh order and raised corresponding demands. This order is challenged by the assessee before the Tribunal. In such appeal, the Department requested the Tribunal to take up the appeal for hearing on urgent basis and the Tribunal has granted said request and thus, would take up the appeals for out of turn hearing from other older matters. It is in this back ground, the assessee's fresh request for stay of the order of the Tribunal has been made before us.

6. Having heard learned Counsel for the parties and having perused the documents on record, it would emerge that the pending appeal before the Tribunal is an offshoot of the earlier order of the Tribunal, which is in challenge in this tax appeal. The appeal before the Tribunal is admitted after the appellant has made the mandatory pre-deposit. Allowing the Tribunal at this stage to proceed further with the appeal, would duplicate the efforts. If the present appeal of the appellant was to succeed, the orders consequential to the Tribunal's judgment would automatically not survive. It is also brought to our notice that the

decision of the Tribunal in case of *Sunrise Structural & Engineering Ltd*. was in favour of the assessee and it is the Department who is in appeal before the High Court.

7. In such circumstances, we request the Tribunal not to proceed further with the assessee's Appeals No. E/86271 & 86669/15, E/86672 & 87205/16, E/85821 & 86473/17, till disposal of the present appeal.

8. The Notice of Motion is disposed of.

(M.S. SANKLECHA, J.) **(AKIL KURESHI, J.)**