IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 09.07.2019
CORAM
THE HON'BLE MR. JUSTICE M. SUNDAR
W.P.No.15149 of 2019
and W.M.P.No.15134 of 2019

M/s.TTK Prestige Limited,
Represented by its authorised representative: D.Arul
No.82 & 85, SIPCOT industrial Estate Complex,
Hosur - 635 126. ... Petitioner

Vs.

1.The Superintendent of GST & Central Excise,
Office of the Superintendent of Central GST & Central Excise,
Hosur II-A Range, SIPCOT,
Hosur - 635 126.

2.The Commissioner of CGST & Central Excise,
Coimbatore,
Circuit Office @ Salem Commissionerate,
No.1, Foulke's Compound,
Anai Road,
Salem - 636 001. ... Respondents

Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus, calling for the records in file comprising OC.No.215/2019 dated 17.05.2019 on the file of the first respondent and to quash the same and for consequential direction forbearing the respondents herein from taking any further action till the outcome of the decision by the Hon'ble CESTAT Tribunal, Chennai in the Appeal filed by the petitioner in Appeal Numbers E/41595/2018, E/41596/2018, E/41597/2018, E/41598/2018 and E/41599/2018.

For Petitioner : Ms.P.Jayalakshmi

For Respondents : Ms.Anu Ganesan
for Mr.Rajinish Pathiyil
Senior Panel Counsel

O R D E R

Ms.P.Jayalakshmi, learned counsel on behalf of sole writ petitioner and Ms.Anu Ganesan, representing Mr.Rajinish Pathiyil, learned Standing counsel on behalf of both the respondents, are before this Court.

2.A communication from respondent No.1, being communication dated 17.05.2018, bearing reference No.O.C.215/2019 (hereinafter 'impugned communication' for brevity), has been called in question in the instant writ petition.

3.Short points shorn of details, particulars and elaborations or in other words, factual matrix in a nutshell which is imperative for appreciating this order are to the effect that, writ petitioner had set law in motion under 'Central Excise Act, 1944' ('CE Act' for brevity) for the period between February 2013 and April 2016 and five original orders came to be passed. Against these five original orders, admittedly, statutory appeals to the Commissioner (Appeals) have been filed and those statutory appeals are Orders in Appeal Nos.47/2018 SLM-CEX in O.I.O.No.47/2017 (CE), 48/2018 SLM-CEX in O.I.O.No.48/2017 (CE), 49/2018 SLM-CEX in O.I.O.No.49/2017 (CE), 50/2018 SLM-CEX in O.I.O.No.50/2017 (CE) and 51/2018 SLM-CEX in O.I.O.No.51/2017 (CE). To be noted, all the five statutory appeals were disposed of by the statutory Appellate Authority on 08.03.2018.

4.It is the further case of the writ petitioner that, each of the aforesaid five orders made by the Appellate Authority, all dated 08.03.2018, have been carried by way of further appeal to the 'Customs Excise and Service Tax Appellate Tribunal' ('CESTAT' for brevity) by way of five different appeals. All these appeals to CESTAT have been filed on 25.06.2019 and there is no disputation or disagreement before this Court that these statutory appeals before CESTAT are pending.

5.When the aforesaid five statutory appeals before CESTAT are pending, impugned communication came to be issued and that is the trigger for the instant writ petition.

6.It is submitted by learned counsel for writ petitioner that Section 35 of CE Act has been amended on and with effect from 06.08.2014 and post amendment, the concept of seeking stay of the order under challenge before CESTAT was done away with. A master circular, being circular dated 10.03.2017, bearing reference No.1053/2/2017-CX, came to be issued. Most relevant part of the master circular is paragraph 20.2 and the same reads as follows :

> '20.2 Recovery during pendency of litigation: Board has issued two circulars on the subject vide Circular No.984/08/2014-CX, dated 16.09.2014 [2014 (307) E.L.T. (T47)] and Circular No. 1035/23/2016-CX, dated 04.07.2016 [2016 (337) E.L.T. (T25)].
>
> (i) Sub-Section (iii) of Section 35F of the Central Excise Act, 1944 and section 129E of the

Customs Act, 1962 stipulate payment of 10% of the duty or penalty payable in pursuance of the decision or order being appealed against i.e. the order of Commissioner (Appeals). In the event of appeal against the order of Commissioner (Appeals) before the Tribunal, 10% is to be paid on the amount on duty demanded or penalty imposed by the Commissioner (Appeals). This need not be the same as the amount of duty demanded or penalty imposed in the Order-in-Original in the said case.

(ii) In a case, where penalty alone is in dispute and penalties have been imposed under different provisions of the Act, the pre-deposit would be calculated based on the aggregate of all penalties imposed in the order against which appeal is proposed to be filed.

(iii) In case of any short-payment or non-payment of the amount stipulated under Section 35F of the Central Excise Act, 1944 or Section 129E of the Customs Act, 1962, the appeal filed is liable for rejection.

(iv) Section 35F of the Central Excise Act, 1944 has been amended with effect from 06.08.2014 to provide for mandatory payment of 7.5% or 10% of the duty demanded where duty demanded is in dispute or where duty demanded and penalty levied are in dispute for admission of appeal before Commissioner (Appeals) or CESTAT. Once the amount is paid, no coercive action shall be taken for recovery of the balance amount during the pendency of the appeal proceedings before these authorities.'

7.A perusal of the impugned communication reveals that it clearly refers to the aforesaid five orders, all dated 08.03.2018, made by the Appellate Authority. Therefore, there is no disputation that these five appeals referred to in the impugned communication are those where CESTAT is in seizin of the matter.

8.Learned Revenue Counsel adverting to the impugned communication submits that, despite the aforesaid order, there is also reference to a 'Statement of Demand' dated 04.07.2018 ['SOD' for brevity].

9.As the SOD dated 04.07.2018 bearing reference No.06/2018-CE(ADC) has been referred to separately, but in conjunction with five orders in original, there is lack of clarity as to whether this SOD refers to these five orders in original or is independent of the same. Relevant paragraph in the impugned communication is paragraph 3 and the same reads as follows :

'3.As directed by the Commissioner (Appeals) in the above mentioned five OIAs (47/2018, 48/2018, 49/2018, 50/2018 and 51/2018 all dated 08.03.2019) and also for the SOD SI.No.06/2018-CE (ADC), dated 04.07.2018 all the necessary documents i.e., ISD Credit availed for the above mentioned five OIAs and SOD SI.No.06/2018 may be submitted immediately both soft/~~Hard~~ copy in respect of Hosur unit to this office for through verification.'

10.Be that as it may, with regard to amendment to Section 35 of CE Act, on and with effect from 06.08.2014, the aforesaid circular dated 16.09.2014 and paragraph 20.2 of the said circular (extracted and reproduced supra), there is no disputation.

11.Therefore, to the extent that the impugned communication calls for submission of documents pertaining to the aforesaid five orders in appeal, it is clearly in breach of the obtaining position, where the matter is pending before CESTAT.

12.Therefore, this Court deems it appropriate to set aside the impugned communication insofar as it relates to five orders in appeal, all dated 08.03.2018, made in Order in Appeal Nos.47/2018 SLM-CEX, 48/2018 SLM-CEX, 49/2018 SLM-CEX, 50/2018 SLM-CEX and 51/2018 SLM-CEX, preserving the rights of the respondent to issue communication afresh, if any SOD or other documents are required with regard to periods not covered by the aforesaid five orders which are now pending before CESTAT.

This writ petition is partly allowed with directions as above. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

mkn/rst

To

1.The Superintendent of GST & Central Excise,
Office of the Superintendent of Central GST & Central Excise,
Hosur II-A Range, SIPCOT,
Hosur - 635 126.

2.The Commissioner of CGST & Central Excise,
Coimbatore,
Circuit Office @ Salem Commissionerate,
No.1, Foulke's Compound,
Anai Road,
Salem - 636 001.

+1cc to Mr.S.Muthu venkataraman, Advocate SR.No. 57800
+1cc to Mr.Mr.Rajinish Pathiyil , Advocate SR.No. 57807

W.P.No.15149 of 2019 and
WMP.No.15134 of 2019

A.SK(13/08/2019)