HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN

AND

HON'BLE SRI JUSTICE P.KESHAVA RAO

C.E.A.No.179 of 2018

JUDGMENT: *(per V. Ramasubramanian, J)*

This appeal filed by the assessee under Section 35G of the Central Excise Act, 1955, raises the following substantial questions of law:-

i) Whether the Commissioner (Appeals) was correct in deciding the appeal, when the appeal filed against the Stay order was pending before the Tribunal?

ii) Whether the Commissioner (Appeals) was correct in dismissing the appeal only for non-compliance of the stay order, without examining the merits of the case?

iii) Whether the Tribunal, Hyderabad, was correct in dismissing the condonation of delay application, without getting a report on the action taken on the appeal filed against the stay order of the Commissioner (Appeals) before the Tribunal, Bangalore?

iv) Whether the order of the Tribunal was correct in dismissing the condonation of delay application without disputing the fact that the appeal was filed on 20.12.2013 against stay application?

2. Heard Mr.Eswar, learned Senior Counsel appearing for the appellant and Mr.K.Laxman, learned Assistant Solicitor General, appearing for the Revenue.

3. Shorn of unnecessary details, the facts out of which the present appeal arises can be summarized as follows:

1) The petitioner suffered an order of original authority on 18.10.2012 demanding service tax to the tune of Rs.18,54,000/- including cess for the period 2007-2008 under Section 73(2) of the Finance Act, 1994.

2) The appellant filed an appeal before the Commissioner on 07.12.2012 along with applications for waiver of pre-deposit condition and for stay.

3) On 28.01.2013, the Commissioner passed an Order directing the appellant to pay the entire amount as fixed under the Order in original, on or before 08.02.2013.

4) Since the appellant failed to comply with the pre-deposit condition imposed on 28.01.2013, the appeal was dismissed on 25.02.2013.

5) As against the order dismissing the appeal, the appellant filed a further appeal to CESTAT. By an order, dated 27.09.2013, the Tribunal remanded the matter back to the Commissioner for a fresh disposal, directing the appellant to appear before the Commissioner on 26.11.2013.

6) The appellant appeared before the Commissioner and the Commissioner passed an Order on 28.11.2013 directing the appellant to make a pre-deposit of Rs.16,50,000/- on or before 18.12.2013. The Commissioner also fixed the date of hearing of the appeal on 20.12.2013, provided the pre-deposit condition has been complied with by 18.12.2013.

7) On 20.12.2013, the Commissioner dismissed the appeal for non-compliance with the conditional order passed on 28.11.2013.

8) According to the appellant, he filed two appeals, one against the conditional order passed on 28.11.2013 and another against the order of dismissal of the appeal on 20.12.2013. We do not know what happened to the appeal said to have been filed as against the conditional order passed on 28.11.2013. But the appeal against the dismissal order, dated 20.12.2013, was filed after a delay of 812 days. Therefore, the appeal was accompanied by an application for condonation of delay of 812 days.

9) The application for condonation of delay was dismissed by the CESTAT by an Order, dated 06.06.2018. It is against the said order that the above appeal has been filed under Section 35G.

4. It is contended by Mr.Eswar, learned Senior Counsel appearing for the appellant, that the case on hand is a very hard case where the amendment brought into effect after 01.07.2010, proposing to levy service tax on brand promotional activities, has been applied retrospectively to an event in which the appellant participated in the year 2007-2008 and that therefore the omission of all the three (3) authorities viz., the Original Authority, the First Appellate Authority, and the Tribunal to take note of the same, has resulted in gross injustice to the appellant. It is further contended by the learned Senior Counsel that the Tribunal ought not to have adopted a pedantic approach in dealing with the application for condonation of delay, when on merits, the appellant had an excellent case which was borne out even on the face of the record. It is also contended by the learned Senior Counsel that as on date, the entire amount of Rs.18,54,000/- as ordered by the Original Authority has been paid in full together with interest. The amount said to have been paid by the appellant is about Rs.73,44,642/-. Therefore, the learned Senior Counsel contended that by allowing the above appeal and condoning the delay and remitting the matter to CESTAT for a consideration on merit, the Department will not be prejudiced in any manner.

5. We have carefully considered the above submissions.

6. At the outset, it should be pointed out that an appeal under Section 35G, can only be on a substantial question of law. The order under appeal, is one refusing to condone the delay in filing the appeal. The delay was of the magnitude of 812 days. The Tribunal was not satisfied with the sufficient cause shown by the

appellant in his application for condonation of delay. The only reason stated by the appellant in his application for condonation of delay was that he was advised that another appeal filed by him as against the conditional order passed on 28.11.2013 would also be taken up together with this appeal. The Tribunal was not satisfied with this reasoning. If the Tribunal is not satisfied with the reasoning stated by the appellant, we do not think that any substantial question of law would arise out of such an Order of the Tribunal.

7. In any case, even if we allow the appeal by taking a lenient view about the reasons for the delay and the hardship caused to the appellant, we do not think that the same would take the appellant anywhere. The reason is that so long as the conditional order on the application for waiver of pre-deposit, passed on 28.11.2013, is not set aside, the consequential order of the Commissioner dismissing the appeal on 20.12.2013, cannot be interfered with by CESTAT. It is well settled that an appeal without complying with the pre-deposit condition, is no appeal in the eye of law. The only manner in which such an appeal could be disposed of is to dismiss the same. Therefore, no Court much less the Tribunal can find fault with the Order, dated 20.12.2013, so long as the order passed on the waiver application has not been set aside by any Court. In fact, it is not even known whether any appeal ever took shape as against the order, dated 28.11.2013.

8. Therefore, we do not think that the substantial questions of law raised by the appellant arisen in this case. Hence, the appeal is dismissed.

Consequently, miscellaneous petitions if ay pending in the writ petition shall stand dismissed. No order as to costs.

V. RAMASUBRAMANIAN, J

P. KESHAVA RAO, J

March 14, 2019
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