Commissioner of Central Excise Vs. Baldev Raj Ram Murthi

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Apr-26-2005

Reported in : (2005)(187)ELT477TriDel

Judge : R Abichandani, M T K.C.

Appellant : Commissioner of Central Excise

Respondent : Baldev Raj Ram Murthi

Judgement :

1. This Stay Application is listed for hearing before this Bench though appeal was listed before Single Member Bench, in view of the fact that connected appeals were listed before two member Bench, it was directed by the learned Single Member on 7-2-2005 that this case also should be placed before that Bench along with the connected matter.

2. This application is filed by the Commissioner praying for the stay of the impugned order-in-appeal dated 14-6-2004 passed by the Commissioner (Appeals) to the extent it imposes a penalty of Rs. 30,000/- on the respondent.

3. We notice from the order-in-appeal that there is absolutely no reference to the reasoning and findings of the Assistant Commissioner given in the context of the order of penalty imposed on the respondent in the Order-in-original. In paragraph 20 of the order-in-original, it was noted that on verification of the stocks, as per RG-23D register of the dealer, it was found that there was no stock available with

the registered dealer against the recorded balance of the relevant goods.

Enquiries were conducted from M/s. Micro Max Enterprises as to whom the supply of inputs was made by the respondent vide invoice No. 307 dated 2-11-1999. As per the statement of the Manager, recorded on 22-11-2002, they had received the said materials after making payments through bank draft and partially by cash, and that it was not possible at that belated stage to co-relate whether the particular material was received from M/s. Majestic Industries Ltd. or had been received from the open market. In paragraph 7 of the show cause notice, it was specifically stated that proprietor of the respondent was summoned to further investigate his role in passing of inadmissible Modvat credit to various manufacturers on the basis of the sale invoices of M/s.

Majestic Industries Limited, without actually physically sending the goods as detailed in their sale invoices. In his statement dated 15-9-2000, the proprietor admitted of having received only the Modvatable invoices from M/s. Majestic Industries Ltd., Ludhiana and subsequently issuing Modvatable invoices as second stage dealer against those invoices to his manufacturer customers for the sake of passing on the Modvat credit only. He categorically admitted of passing on of Mod-vat credit as a second stage dealer on the sale invoices of M/s.

Majestic Industries Limited, to various parties without physically sending the goods of M/s. Majestic Industries Limited, as claimed in their sale invoices, but, he had substituted the material with that procured from the open market.

4. Despite a clear case in the show cause notice and consideration of the relevant aspects by the Assistant Commissioner for reaching the conclusion that all the dealers had intentionally and wilfully issued the fake invoices to avail of the Cenvat facility, the Appellate Commissioner has not cared to consider any of the aspects that had bearing on the penalty that was on the respondent. In fact, his reasoning that followed his declaration, that he had carefully examined the case record, is nothing but conjectural. A prima facie case is, therefore, made out for staying the impugned order to the extent to which it is challenged. It is made clear by the learned Authorised Representative of the Department that the prayer in the application mainly relates to the penalty of Rs. 30,000/- imposed on the

respondent though it was widely worded so as to include the entire order made in respect of the five appellants before the Commissioner.

5. A contention was sought to be raised on behalf of the respondent that no stay may be granted against the order-in-appeal setting aside the imposition of penalty because the effect of the stay order will be that the respondent will have to pay the penalty amount while the appeal is still pending. The learned counsel for the respondent initially drew our attention to the provisions of Section 35F of the Act and tried to contend that the question of stay would arise only in the context of an assessee who is required to deposit an amount under Section 35F of the Act. The learned Authorised Representative of the Department referring to the provision of Section 35B as well as 35C(2A) of the Central Excise Act, 1944, submitted that, the Tribunal has ample power to stay the order of setting aside the penalty and that power of stay is not confined to matters falling under Section 35F of the Act.

6. The inherent power of a Tribunal was upheld by the Apex Court in ITO v. M.K. Mohammed Kunhi reported in 71 ITR 815 (S.C.), in which the Supreme Court, in the context of power of the Income Tax Appellate Tribunal, held that the power to grant stay of recovery proceedings pending an appeal is incidental and ancillary. It was held that an express grant of statutory power carries with it, by necessary implication, the authority to use all reasonable means to make such grant effective. The Supreme Court, in the case of Union of India v.Paras Laminates (P) Ltd., the Tribunal functions as a court within the limits of its jurisdiction and being a judicial body, it has all those incidental and ancillary powers which are necessary to make fully effective the express grant of statutory powers. It was held in paragraph 8 of the judgment that, certain powers, are recognised as incidental and ancillary not because they are inherent in the Tribunal, nor because its jurisdiction is plenary, but because it is the legislative intent that the power which is expressly granted in the assigned field of jurisdiction is efficaciously and meaningfully exercised. This Tribunal has, therefore, inherent power to grant stay.

7. The learned counsel for the respondent contended that the amount of duty involved in respect of M/s. Micromax Enterprises for whom the respondent was dealer, was only Rs. 6,679/- and, therefore, penalty of Rs. 30,000/- was

disproportionate and not justified. The assessable value of the goods admittedly was Rs. 47,900/- as stated by the learned counsel for the respondent after verifying from his record. Under Rule 173Q, penalty not exceeding three times the value of the excisable goods could be imposed in respect of any contravention of the nature referred to in Clause (bbb) under which the penalty was imposed on the respondent by the order-in-original. It is, therefore, not open for the respondent to contend that the penalty amount was relatable to the amount of duty under Rule 173Q.8. In the present case, the appellant has made out a strong prima facie case for staying the impugned order because the Appellate Authority has not at all considered the case in the context of the penalty imposed on the respondent as dealt with by the Original Authority in paragraph 21 of the order-in-original. The power to stay the order-in-appeal, which appears on the face of it wholly unjustified and unwarranted, is ancillary to power of entertaining and deciding the appeal conferred on the Appellate Tribunal by Section 35B of the Act.

9. We, therefore, hold that this is a fit case for staying the impugned order to the extent it sets aside the penalty imposed on the respondent under the Order-in-original. The impugned order-in-appeal is, therefore, stayed to the extent that it has set aside the penalty imposed on the respondent under the order-in-original and this application is allowed accordingly.