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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jun-30-2006

Reported in : (2006)(111)ECC126

Judge : S Kang, Vice, S T T.V.

Appellant : Jindal Stainless Ltd.

Respondent : Cce

Judgement :

1. This application No. 435/2006 is a miscellaneous application filed by M/s. Jindal Stainless Ltd. This application has been filed "for correction of errors and modification of Stay Order No. S/316-317/2006 dated 30.3.2006 under the inherent powers of the Tribunal". The stay order dated 30.3.2006 directs the applicants to pre-deposit 50% of the duty demanded from them within a period of 4 weeks from 30.03.2006.

2. The learned Counsel for the applicants states that this Tribunal had come to the prima facie conclusion that the applicants had exported more quantity of electricity to the State Electricity Department and imported lesser quantity from them. It was thus, inferred that the applicants had received more quantity of electricity from the State Electricity Board than that exported, which is not correct. Further, the learned Advocate states that, it was a mistake totally on his part as he could not react correctly when the question was asked by this Bench.

3 While going through the current application, we come across a paragraph - para 13- which reads as given under: 13. The applicants further submit that there was no offer made by the counsel for the applicants as indicated by the Hon'ble Tribunal in para-5 of the Stay Order. The applicants in fact submit that at the time of dictation of the Stay Order the counsel had interfered to clarify the factual position to the Hon'ble Tribunal. However, the same was not considered by the Hon'ble Tribunal since the order was already dictated.

4. However, the learned Counsel states that the contents of the above paragraph are not to be taken into consideration and may be treated as withdrawn. At the same time, he states that the applicants have prima facie a strong case in their favour for total waiver of pre deposit and hence the stay order dated 30.3.2006 may be recalled for issuance of modified order to the effect that pre-deposit of duly demand and penalties is waived totally for the purpose of hearing their appeals.

5. In this connection, the learned Counsel states that the current application has been filed by them under the inherent powers of the Tribunal and in pursuance of the order of the Hon'ble High Court of Punjab and Haryana in their Civil Writ Petition No. 8507 of 2006. The order reads as follows: On a query put by the Court that the order dated March 20, 2006 (Annexure P-I) passed by the Customs Excise & Service Tax Appellate Tribunal, New Delhi appears to be a consent order as specifically reflected in para 5 of the aforesaid order, learned Counsel has pointed out to an application dated April 25, 2006 (Annexure P-14) which has been filed for correction of errors and modifications before the Tribunal itself on behalf of the petitioner. Shri Rao has pointed out that the aforesaid application remains undecided so far.

On that account, learned Counsel contends that at this stage, the petitioner would confine its prayer for issuance of a direction to the Tribunal to decide the aforesaid application dated April 25, 2006.

In view of the limited prayer made by the learned Counsel for the petitioner, we dispose of the present writ petition with a direction to the Customs, Excise & Service Tax Appellate Tribunal New Delhi to take a final and appropriate decision on the application dated April 25, 2006 stated to have been filed by the petitioner

company, in accordance with law, within a period of 3 months from the date a certified copy of this order is received, after affording an opportunity of hearing to all the concerned parties. With the aforesaid directions, the present petition is disposed of.

6. From the above, it is clear that the Hon'ble High Court has directed us to take a "final and appropriate decision" on the application dated April 25, 2006 in accordance with law within a period of 3 months from the date of certified copy of the said order is received, after affording an opportunity of hearing to all the concerned parties.

7. In this connection, the learned Counsel for the applicant draws our attention to the Bombay High Court's Judgment in the case of Baron International Ltd. v. Union of India . Our attention is drawn to para-8 of the said judgment, which is reproduced below: Our experience shows that in almost all the applications moved to seek modification of the Tribunal's order contain only grounds of review. They are freely entertained by the CEGAT and the same are sometime accepted or rejected on merits with detailed order. Such exercise, apart from labour, must be consuming major part of its working hours. This waste of labour and working hours can easily be saved by the CEGAT, if application moved in this behalf is prima facie, examined by CEGAT to find out whether any change in circumstance after the previous order, is shown with sufficient material in that behalf; or any other reason prima facie; exists warranting modification of the previous order on the grounds which was not available when the previous order wax made. At the threshold, if such preliminary enquiry is made by the Tribunal, we are sure in most of the cases application may not be required to be heard on merits. Had such enquiry been made by the CEGAT in this behalf in this case, we are sure, Tribunal would have saved its labour and time and would not have been required to devote nine pages for writing impugned order. We direct that henceforth the Tribunal shall first make prima facie; enquiry whether application needs consideration on merits as indicated by us hereinabove before considering any application for modification of us previous order on merits. If the Tribunal finds that prima facie case for modification is made out, then, only the Tribunal shall deal with such application on merits. The Tribunal shall be justified in rejecting frivolous applications at the

threshold.8. He further relies upon a judgment by the Hon'ble Supreme Court in Central Council for Research in Ayurveda & Siddha and Anr. v. Dr. K.Santhakumari 12...The only contention urged by the respondent is that the Departmental Promotion Committee did not follow the principle of "seniority-cum-fitness". In the High Court, the appellants herein failed to point out that the promotion is in respect of a "selection post" and the principle to be applied is "merit-cum-seniority". Had the appellants pointed out the true position, the learned Single Judge would not have granted relief in favour of the respondent. If the learned Counsel has made an admission or concession inadvertently or under a mistaken impression of law, it is not binding on his client and the same cannot enure to the benefit of any party.

9. The above remarks of the Hon'ble Apex Court in the said judgment were relied upon for arguing that if the learned Counsel had made an admission or concession inadvertently or under a mistaken impression of law, it is not binding on his client and the same cannot enure to the benefit of any party.

10. Further, the learned Counsel referred to the Madras High Court decision in Indotex Machinery Works v. Asstt. Collector of Central Excise and Ors. and stated that stay once refused does not operate as res judicata if party renew request for stay by placing necessary material for justification of the interim relief earlier refused.

11. The judgment of Allahabad High Court in Anant Ram Prem Prakash v.State of U.P. and Ors. in which the Hon'ble High Court had an occasion to observe as follows was also referred to before us: It is well-settled that power to pass order includes power 10 recall that order. The power to pass stay order has been conferred on the Tribunal under Sub-section (6) of Section 10 of the Act. It will therefore, include power to recall the stay order in appropriate cases. The Tribunal has got power to recall modify or set aside the stay order at this subsequent stage of appeal in appropriate cases.

The arguments of the learned Counsel is that the Tribunal does not possess any power to recall or modify the stay order is too wide and cannot be accepted.

12. The learned Counsel further submitted that an error has crept in para-4 of the Stay Order in question wherein it was noticed that during all these years, the figures consistently indicated that electricity imported was far higher than the electricity exported to the appellant with the sole exception in the years 2003-2004.

4. While going through the case records, we chance on a chart indicating the figures of import and export of electricity by HSEB during the years 1999-2000, 2000-2001 2001-2002 and 2002-2003. It was noticed that during these years the figures consistently indicated that the electricity imported was far higher than the electricity exported to the appellants with the sole exception during the year 2003-2004, in respect of which only three months figures were available before us.

5. In view of the above, prima facie, we do not find it a fit case for total waiver of duty. At this point, Ld. Counsel for the appellant offers to pay 50% of the duty demanded in the order as a pre-deposit. We, therefore, direct the appellants to deposit 50% of the duty demanded from the appellant company within four weeks from today, failing which the appeals shall be dismissed. On deposit of the same by the appellant company, the rest of the amount of duty and penalty leviable on them and on its employee shall stand waived till the matter is taken up for final hearing. Post compliance on 4.5.2006.

According to the learned Counsel the quantum of electricity exported by the applicant to HSEB was much less than the quantity imported by them.

In view of the wrong understanding of the fact on the part of the Advocate, it was argued that this error had crept in and consequently the offer to pay 50% of the amount as stated therein needs to be corrected. In view of this, the learned Advocate requested for re-calling of the order and to make suitable modifications.

14. The learned Authorised Representative for the Department (SDR) submitted that in such a situation no power of review was available to this Tribunal. According to him, the only power available relates to the provisions of Section 35C(2) of the Act wherein with a view to rectifying any mistake apparent from the record the Tribunal has powers to amend any order passed by it under Section

35C(1), which is not admittedly the case here. 10 beef up his arguments, the ld. SDR would rely upon the judgment of Hon'ble Supreme Court in Commissioner of Customs, Calcutta v. A.S.C.U. Ltd. stating that the only power available to the Tribunal is the power of rectification of a mistake apparent from the record. Further, he also argued that a careful perusal of the Hon'ble High Court s order in Baron International Ltd. v. Union of India (supra), (relied upon by the applicant) would clarify that in order to avoid the waste of labour and working hours of this Tribunal unless there is any change in circumstances after the previous order or any strong reasons warranting modification of the previous order on the ground which was not available when the previous order was made, the Tribunal cannot effect any change in the order already passed by it. He argues that the circumstance which were there before the issue of interim order dated 30.3.2000 has not undergone any change whatsoever after passing the said order No new interpretation has come to fore on the fact and evidence as was presented at that time. In these circumstances, he stated that any attempt to modify the order which has been fair to both the Revenue and the appellant by ordering only 50% of the duty demanded by the respondent, would amount to review of the order Me heavily relies upon the decision of the Karnataka High Court in the case of CCE, Bangalore v. McDowell & Co. Ltd. , 33. I am unable to accept the contention that an existence of mere prima facie case in itself amount to causing undue hardship to an assessee if the assessee is required to fulfil the requirements of pre-deposit It is necessary to recall some words of caution and wisdom sounded by the Supreme Court in this regard in the case of Jesus Corporation referred to earlier. If the test is applied, the order is woefully lacking in the Tribunal having not exhibited its awareness to the requirements of proviso of Section 35F of the Act.

It is also clear that the Tribunal after having exercised jurisdiction for the purposes of passing an order for waiver of pre-deposits under the proviso to Section 35 F of the Act cannot modify that order subsequently like an appellate authority, nor can keep tinkering with the order as and when applications for modification of the order are filed. It is significant to notice that the Supreme Court has ruled that the Tribunal does not even have the power to review its orders while exercising its appellate powers under Section 35 C of the Act, See CCE v. ASCU Ltd., when this is the legal position with regard to the exercise of the power in respect of the main

appeal itself, it cannot he higher while passing orders in exercise of the power under the proviso to Section 35 F, which is a provision stipulating the condition for the maintainability of the appeal.

15. We have heard both the sides at considerable length and perused the documents before us. It is clear that this application has neither been made under Section 35 C nor under Section 35 F as admitted by the applicants taut under the so-called inherent powers of this Tribunal.

We also notice that the factual position as contained in the interim Order passed by us on 30.3.2006 has been questioned in the application vide para-13 before us although the learned Counsel has verbally stated during the hearing that the contents of this paragraph can be treated as withdrawn. Though we can conveniently turn a blind eye at this "withdrawn" paragraph, we find that it weighs rather like a rock tied to a swimmer's neck. We, therefore, consider it our bounden duty to take this up here for ironing out the matter. Following the tall traditions of transparency thriven in this Tribunal, where we have come to occupy as birds of passage. we would rather put down in black and white that para-13 does not reflect the correct position. The interim order dated 30.3.2006 was pronounced in the open court on that dale in the presence of the representatives from both the sides. Hence, the views expressed in paragraph 13 are not in accord with the record of proceedings.

16. Coming to the merits, we find that the Hon'ble Supreme Court in A.S.C.I Ltd. (supra) has laid down clear guidelines with regard to the inherent power of this Tribunal, stating that the only power available to the Tribunal is the power of rectification of a mistake apparent from the record. The Hon'ble Karnataka High Court in the case of McDowell & Co. Ltd. (supra)had also an occasion to go though the inherent powers of this Tribunal, It has made it clear that the Tribunal after having exercised jurisdiction for the purposes of treating an order for waiver of pre-deposit under the first proviso to Section 35F of the Act cannot modify that order, subsequently, like an appellate authority, nor can keep tinkering with the order as and when applications for modification of the order are filed. The Hon'ble Court had also made it more than clear that an existence of prima facie case - as

sought to be made out in the present application - cannot itself amount to causing undue hardship to the assessee, if it was required to fulfill the requirements of pre-deposit. The court also noticed that the Apex Court had ruled that the Tribunal even have the power to review its order while exercising its appellate power under Section 35C of the Act.

17. In view of the ratio adopted in the decisions of various higher fora, as discussed above, and also finding no change in circumstances, after the passing of our order dated 30.3.2006, we are at a loss to marshal any merit in the application. The application is, therefore, rejected. However, the appellants are at liberty to make the deposit ordered on 30.03.2006 within four weeks time from today, failing which the appeals shall stand dismissed. After making the required deposit, the applicants are also at liberty to move this Tribunal for an early hearing, if they wish to do so. Adjourned to 4th August, 2006 to report compliance.