

**(2015) 03 UK CK 0070**

**In the Uttarakhand High Court**

**Case No : Central Excise Appeal No. 2 of 2015**

AICA Laminates India P. Ltd.

APPELLANT

Vs

Commissioner of Central Excise and Service Tax

RESPONDENT

**Date of Decision : 09-03-2015**

**Acts Referred:**

Central Excises and Salt Act, 1944 — Section 35F, 35G

**Citation : (2015) 35 GSTR 130**

**Hon'ble Judges : K.M. Joseph, C.J. and V.K. Bist, J.**

**Bench : Division Bench**

**Advocate : Alok Yadaw and Pullak Raj Mullick, for the Appellant; Shobhit Saharia Advocate Standing Counsel, for the Respondent**

## **Judgement**

K.M. Joseph, C.J.

1. This is an appeal which has been filed under section 35G of the Central Excise Act, 1944 (hereinafter referred to as the Act). The appellant is aggrieved by annexure 3 order. By annexure 3 order, the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as the Tribunal) has disposed of the application maintained under section 35F of the Act by directing the appellant to deposit fifty per cent of the Rs. 3.07 crores, i.e., Rs. 1.58 crores within a period of eight weeks; the learned counsel for the appellant, in fact, would not dispute that the deposit of amount of Rs. 3.07 crores shown should be read as Rs. 3.17 crores. The total duty involved appears to be Rs. 4.06 crores. We extract hereunder the order passed by the Tribunal:

"The total duty of Rs. 4.06 crores approximately stands confirmed against the appellant in respect of phenol formaldehyde resin, urea formaldehyde resin, melamine formaldehyde resin and cardanol formaldehyde resins, which are resins manufactured by the appellant and used captively in the manufacture of their final products, i.e., laminates, etc. Inasmuch as the appellant is enjoying the area based exemption notification, they were not paying any duty on their final products.

2. In such a scenario, the Revenue raised demands in respect of the above resins, by invoking the longer period of limitation, which stands confirmed vide the impugned orders of the Commissioner.

3. After hearing both sides, we find that an identical issue was the subject matter of the earlier stay order passed by the Tribunal. Vide Stay Order Nos. 51868 to 51871/2014, dated April 21, 2014 passed in the case of M/s. Archidply Industries Ltd. and others, the appellants were directed to deposit 50 per cent, of the demands falling within the limitation period.

4. The learned advocate submits that a demand of around Rs. 3.07 crores would fall within the limitation period. As such, by adopting the earlier stay orders passed in the case of other appellants, similarly situate, we direct the appellants to deposit 50 per cent, of the amount of Rs. 3.07 crores, i.e., Rs. 1.58 crores within a period of eight weeks from today and report compliance on February 4, 2015. Subject to deposit of the above amount, the pre-deposit of the balance amount of duty and entire amount of penalty shall stand waived and its recovery stayed during the pendency of appeal."

2. We have heard the learned counsel for the appellant and the learned standing counsel for the Central excise/respondent.

3. The appellant is engaged in manufacture of laminates. The appellant captively manufactures the products, which are referred to in the first paragraph. The case of the appellant was that the appellant has not received fair consideration before the Tribunal inasmuch as, its application for exemption from pre-deposit has not been considered on the merits.

4. When we queried the learned counsel for the appellant as to the orders, which are referred to by the Tribunal in paragraph 3, he would respond by saying that they are related to other manufacturers. In short, the complaint is that the actual contentions raised by the appellant were not as such considered. This is in response to the contention of the learned counsel for the respondent, who contended that there is no substantial question of law made out and what is really involved is only the exercise of discretion by the Tribunal, and it has acted within its jurisdiction and no interference is called for.

5. According to the learned counsel for the appellant, the issue at hand is squarely covered by virtue of the decision of the hon"ble apex court reported in Moti Laminates Pvt. Ltd. and Others Vs. Collector of Central Excise, Ahmedabad, . It is further contended that the issue at hand is squarely covered by virtue of the decision of the Tribunal dated April 10, 1999, wherein, the Tribunal has held as follows:

"The issue involved in this appeal is whether the products, namely, phenyl formaldehyde, phenolic resin, melamine resin, urea formaldehyde, phenolic acid, etc., coming into existence at the intermediate stage are chargeable to excise duty.

2. Shri. Ramachandran, Corporate Taxation Advisor, submitted that the Department is seeking to levy the duty at the initial stage when two products, namely, phenol and formaldehyde or urea and formaldehyde are mixed. The mixture is in unstable condition. He further submitted that the issue has been settled by the Supreme Court in the case of Moti Laminates Pvt. Ltd. and Others Vs. Collector of Central Excise, Ahmedabad, (SQ in which it was held that for the purpose of levying excise duty the goods must be useable, and marketable. Phenol formaldehyde an intermediate product produced by the manufacturers of laminated sheets for captive consumption is not marketable, and hence, not dutiable. He finally mentioned that the ratio of the Supreme Court's decision has been followed by the Tribunal in the following cases:

(i) Viral Laminates P. Ltd. v. Collector of Central Excise , [1996] 85 ELT 191 (Trib.-Delhi) .

(ii) Metro Wood and Engg. Works v. CCE , [1996] 65 ECR 79 (Tribunal) .

(iii) Collector of Central Excise v. Metrowood and Eng. Works P. Ltd. , [1998] 98 ELT 383 (Trib.-Delhi) .

3. We heard Shri. H.K. Jain, the learned senior Departmental representative.

4. As the issue involved in the appeal has been settled by the Supreme Court in the case of Moti Laminates Pvt. Ltd. and Others Vs. Collector of Central Excise, Ahmedabad, , following the ratio of that decision, we set aside the impugned order and allow the appeal."

6. According to him, the Commissioner has not properly considered the case of the appellant, namely, that resin, which is captively consumed in the manufacture of the final product, is actually not marketable as was understood by the hon"ble apex court also in its decision in Moti Laminates Pvt. Ltd. and Others Vs. Collector of Central Excise, Ahmedabad, .

7. Per contra, the learned counsel for the respondent would draw us to the order passed by the Commissioner in order to point out that the Commissioner has fairly considered the case of the appellant and relying on the statement given by the employees of the appellant itself, arrived at the finding of fact. No doubt, it is a matter, which the Tribunal will investigate in the appeal, but pending such investigation, the Tribunal has only directed, in exercise of its discretion, deposit of 50 per cent, of the amount and, that too, only after reckoning the amount, which is within time and also excluding the penalty portion. Hence, no interference is called for.

8. The learned counsel for the appellant also drew our attention to the decision of the hon"ble apex court reported in Benara Valves Ltd. and Others Vs. Commissioner of Central Excise and Another, , where in the hon"ble apex court delineating the scope of jurisdiction of the Tribunal has held as follows (page 9 of 8 RC):

"It is true that on merely establishing a prima facie case, an interim order of protection should not be passed. But if on a cursory glance it appears that the demand raised has no legs to stand, it would be undesirable to require the assessee to pay full or substantive part of the demand. Petitions for stay should not be disposed of in a routine manner unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand. There can be no rule of universal application in such matters and the order has to be passed keeping in view the factual scenario involved. Merely because this court has indicated the principles that does not give a license to the forum/ authority to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest. Where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizens' faith in the impartiality of public administration, interim relief can be given . . .

As noted above there are two important expressions in section 35F . One is undue hardship. This is a matter within the special knowledge of the applicant for waiver and has to be established by him. A mere assertion about undue hardship would not be sufficient. It was noted by this court in S. Vasudeva Vs. State of Karnataka and others, that under Indian conditions the expression "undue hardship" is normally related to economic hardship. "undue" means something which is not merited by the conduct of the claimant, or is very much disproportionate to it. Undue hardship is caused when the hardship is not warranted by the circumstances.

For a hardship to be "undue" it must be shown that the particular burden to observe or perform the requirement is out of proportion to the nature of the requirement itself, and the benefit which the applicant would derive from compliance with it.

The word "undue" adds something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant.

The other aspect relates to imposition of condition to safeguard the interests of the Revenue. This is an aspect which the Tribunal has to bring into focus. It is for the Tribunal to impose such conditions as are deemed proper to safeguard the interests of the Revenue. Therefore, the Tribunal while dealing with the application has to consider materials to be placed by the assessee relating to undue hardship and also to stipulate conditions as required to safeguard the interests of the Revenue."

9. He would, therefore, contend that this court having already directed, as an interim order, to deposit a sum of Rs. 40 lakhs, the appeal can be disposed of by substituting the said interim measure for the impugned order and directing the appeal to be heard.

10. We notice that in the impugned order, there is no reference to the case of the appellant as such or its contentions. We further notice that there is no reference to the order of the Tribunal, which was passed in the year 1999, which, according

to the appellant should have received far greater significance in the decision in the stay application.

11. Having considered all aspects, we would think that in the interest of justice, the impugned order must be modified and in place of Rs. 1.58 crores, the appellant must deposit a sum of Rs. 80 lakhs. Accordingly, we modify the impugned order and direct that the appellant will deposit a sum of Rs. 40 lakhs, after giving credit for the amount of Rs. 40 lakhs, which is brought to our notice has been deposited as directed by us in the interim order, within a period of three weeks from today. Accordingly, the appeal stands disposed of.