
(2015) 08 AP CK 0071
In the Andhra Pradesh High Court
Case No : C.E.A. No. 90 of 2015

Chandrika Environ

APPELLANT

Vs

The Additional Commissioner, Central Excise, Customs and
Service Tax

RESPONDENT

Date of Decision : 06-08-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35-E, 35G, 35-G
Finance Act, 1994 — Section 65(105)(zzzd), 65(24b)

Citation : (2015) 86 VST 403

Hon'ble Judges : G. Chandraiah and Challa Kodanda Ram, JJ.

Bench : Division Bench

Advocate : Bhaskar Reddy Vemireddy, for the Appellant; V. Gopalakrishna
Gokhale, SC, for the Respondent

Judgement

G. Chandraiah, J.—This Central Excise Appeal under Section 35G of the Central Excise Act, 1944 as substituted by the Finance Act, 2003 (for brevity "the Act") is filed at the instance of the appellant-company against the Stay Order No. 20864/2015, dated 29.14.2015 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Bangalore (for short "CESTAT") by raising the following substantial questions of law for adjudication.

- i) "Whether the appellant has prima facie good case on merits in the appeal before the CESTAT?
- ii) Whether the Hon'ble Tribunal is correct in rejecting the claim of waiver of pre-deposit in the circumstances of the case where the levy is challenged on the ground of merits as well as on the ground of jurisdiction?
- iii) Whether the requirement of depositing entire service tax demanded in terms of the directions of the CESTAT is onerous and causes undue hardship to the appellant particularly when the petitioner is not having sound financial resources?
- iv) Whether the Tribunal is correct in law in imposing condition of deposit of

entire service tax demanded as a condition for admission of the appeal, when the appellant has strong prima facie case on merits in the appeal and will be put to undue hardship if it is required to so deposit and balance of convenience lies in favour of unconditional waiver?

v) Whether the impugned order is in accordance with guidelines laid down by this Hon"ble Court in Sri Chaitanya Educational Committee case (38 VST 292)?"

2. The respondent-company is engaged in the business of providing "Cleaning Service" apart from site formation and clearance, excavation, earthmoving and demolition services to M/s. Cairn Energy India Private Limited. According to the agreement dated 11.04.2006 entered into with M/s. Cairn Energy India Pvt. Ltd., the appellant should have paid service tax based on the nature of services provided by them which are appropriately classifiable under "Cleaning Service" as defined under Section 65(105)(zzzd) read with Section 65(24b) of the Finance Act, 1994. The Additional Commissioner issued show cause notice dated 17.10.2011 proposing to levy service tax of Rs. 23,37,761/- payable on the amounts received during the years from 2006-2007 to 2007-2008 for the works done by them and the Commissioner of Customs and Central Excise, by order dated 14.08.2012, while confirming the proposed levy of tax, directed the appellant to pay the demanded amount. When the appellant preferred an appeal before the CESTAT along with an application seeking stay of recovery of the disputed tax, the Tribunal, by the impugned order dated 29.04.2015, while waiving the requirement of pre-deposit of balance dues, granted conditional stay against recovery subject to deposit of Rs. 25.00 lakhs pending disposal of the appeal. Being aggrieved by the Stay Order passed by the Tribunal, the present appeal is instituted.

3. Sri Bhaskar Reddy Vemireddy, learned counsel for the appellant, has mainly contended that the Tribunal failed to consider the material placed before it about the nature of contract works undertaken by the appellant and if the Tribunal had properly considered the material, the question of directing payment of any amount would not have arisen. He further submits that prima facie, the appellant made out a case for grant of waiver of pre-deposit, but the Tribunal has not properly considered this aspect. The learned counsel fairly submits that the appellant could not place relevant material though available with them before the Tribunal to consider the plea of financial hardship of the appellant in making payment and the same may be condoned and an opportunity may be given to the appellant to place appropriate material before the Tribunal and the Tribunal may be directed to consider the same and pass appropriate orders.

4. On the other hand, Sri V. Gopalakrishna Gokhale, learned Standing Counsel for Customs and Central Excise, appearing for the respondent, has contended that in any appeal filed under Section 35-G of the Act, the appellant-assessee has to satisfy this Court by establishing three parameters such as (a) Prima facie case (2) Undue hardship on the part of the assessee to make payment and (3) Provide measures to safeguard the interest of the Revenue. Inasmuch as no

relevant material was placed before the Tribunal with regard to hardship of the appellant in making payment, the Tribunal was right in passing the conditional stay order, and the same does not warrant any interference by this Court.

5. Prima facie, as could be seen from the Agreement, the work undertaken by the appellant is to restore waste pits and for this purpose the service providers have to undertake skimming of oily waste, collection, redistribution and transportation of oily and non-oily drilling waste and thereafter restoration and back-filling of the pits with locally available soil. It is evident from this that the main nature of work is to clean the pits by removing oily and non-oily waste completely and thereafter put in fresh soil (backfilling) but not site formation since the drilling site is already existing and the appellant has to clean up all the wastage and bring it back to the original condition. The learned counsel for the appellant submits that the activity undertaken by the appellant does not fall within the definition of "Cleaning Service" and that aspect is not properly considered by the Tribunal. Concerning this aspect, we are of the view that when a statutory appeal is pending on the file of the Tribunal and any opinion that is expressed by the Tribunal granting interim relief pending disposal of the appeal, is only a prima facie view and not a conclusive one. Therefore, it is always open for the appellant to plead further before the appellate authority to sustain his plea. At this juncture, we do not express any opinion on this aspect.

6. The very fact that the Tribunal directed a sum of Rs. 25.00 lakhs to be deposited as a condition precedent in exercise of the power under Section 35-E of the Act would indicate that the Tribunal's view expressed on merits is only a prima facie view and the Tribunal would be considering the case on merits at the time of hearing the appeal.

7. So far as financial hardship is concerned, the learned counsel for the appellant urges that even though the appellant made out a prima facie case, the Tribunal did not properly consider the application seeking waiver of pre-deposit, however, he has fairly submitted that for the reasons best known the appellant could not place proper/relevant material though available with them before the Tribunal, but submits that he is prepared to file all the relevant material before this Court for adjudication of the matter.

8. What constitutes undue hardship has been succinctly dealt with by the Supreme Court in its judgment in the case of Benara Valves Ltd. v. Commissioner of Central Excise which was also considered by a Division Bench of this Court in the case of Commissioner of Central Excise v. Sri Chaitanya Educational Committee. Though the learned counsel has placed before us financial statements and the income-tax returns to buttress his contention that the turnover of the company presently has fallen substantially, we are not inclined to go into the details of the same as primarily the appellant ought to have placed these statements before the Tribunal. In that view of the matter and in the interest of justice, we are inclined to dispose of this appeal by making the following order:

"The appellant is at liberty to file all the relevant documents in relation to financial stringency that the appellant is undergoing to pay service tax by filing a petition seeking modification of the order dated 29.04.2015 passed by the Tribunal both on facts and law within a period of two weeks from the date of receipt of a copy of this order. Upon such documents being filed along with a petition seeking modification of the order, the Tribunal shall pass appropriate orders thereon after considering the relevant material that may be filed by the appellant, within a period of four weeks thereafter."

9. In terms of the above observation, the Central Excise Appeal is disposed of. No order as to costs.

10. As a sequel to the disposal of the appeal, Miscellaneous Petitions, if any pending, shall stand disposed of as infructuous.