
(2014) 07 MAD CK 0273

In the Madras High Court

Case No : Civil Miscellaneous Appeal Nos. 285 and 1320 of 2014

Core Minerals

APPELLANT

Vs

Commissioner of Service Tax

RESPONDENT

Date of Decision : 10-07-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35F
Finance Act, 1994 — Section 67(1)(i), 67(1)(iii)

Citation : (2014) 36 STR 533 : (2015) 79 VST 579

Hon'ble Judges : R. Sudhakar, J;G.M. Akbar Ali, J

Bench : Division Bench

Judgement

R. Sudhakar, J.—C.M.A. No. 285 of 2014 is filed against the Misc. Order No. 42617 of 2013, dated 4-11-2013 passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai (for brevity, "the Tribunal"), directing the appellant to make a pre-deposit of Rs. 2.50 crores. C.M.A. No. 1320 of 2014 is filed against the Final Order No. 40191 of 2014, dated 21-3-2014 passed by the Tribunal, dismissing the appeal filed by the appellant for non-compliance of the stay order under Section 35F of the Central Excise Act, 1944.

2. The substantial question of law that arises for consideration in these appeals is whether the Tribunal was justified in calling upon the appellant to make a pre-deposit of Rs. 2.50 crores for entertaining an appeal in terms of Section 35F of the Central Excise Act, 1944.

3. The brief facts of the case are as under: The appellant is engaged in the business of providing mining services to Thakurani Mines and Nuagaon Mines. The appellant entered into two agreements with the persons holding mining licenses - one for providing mining services and the other for purchasing the goods exclusively by the appellant from the license holders. We are now concerned with the agreement relating to providing of mining services and in terms of the said agreement, the owner of the mine has to pay a sum of approximately Rs. 60/- per ton for Lump Ore and Rs. 40/- per ton for Natural

Fines to the appellant.

3.1 The service tax, which is the subject matter of the present appeals, relates to the years 2007-2008 and 2008-2009. On the amount received under the agreement for providing mining services, the appellant paid service tax to the department to the tune of Rs. 2.90 crores. The department appears to have raised a dispute taking note of certain expenses shown by the appellant in the Profit and Loss Account - Worksheet-III, which include the heads Over Burden Removal; Raising and Stacking Charges; Hire Charges; Mining Expenses; Screening Charges; Sampling and Analysis; Power and Fuel; Wages; Maintenance, etc., which, according to the department, have to be added to the value of the mining services for the purpose of determining the service tax.

3.2 The department issued a show cause notice and adjudicated the same, resulting in confirmation of service tax amount of Rs. 9,38,97,251/- under the category "Mining Service" for the period from 1-6-2007 to September, 2008. Certain other issues have also been adjudicated, of which we are not concerned in these appeals. Aggrieved by the adjudication order, the appellant filed an appeal before the Tribunal along with an application for waiver of pre-deposit of dues.

3.3 The stand of the appellant before the Tribunal for seeking waiver of pre-deposit for the purpose of hearing the appeal, prima facie, is that the agreement for providing mining services is a specific agreement in respect of the services rendered, for which the value has already been fixed per ton in respect of various categories of mining products and, therefore, the department is not entitled to take a different value for the purpose of determining the service tax. It is only in cases where there is no receipt of consideration in money, either wholly or partly, the question of determination of value by other methods will arise.

3.4 It was pleaded by the appellant before the Original Authority as well as the Tribunal that a specific agreement has been entered into for providing mining services; the value has been fixed, and service tax has been paid on the said sum and, therefore, the department is not entitled to add the expenses incurred by the appellant in the course of business of raising ore, which is not part of the agreement for providing mining services. It is another matter that the appellant incurred other expenses at their own cost, even though the agreement for providing mining services is for a lesser amount.

3.5 It is the further case of the appellant that the department is not entitled to reject the value as per the agreement for providing mining services and derive a different value under Rule 3 of the Service Tax (Determination of Value) Rules, 2006, as the said provisions of Service Tax (Determination of Value) Rules, 2006 will come into play only in a case that falls under Section 67(1)(iii) of the Finance Act, 1994, whereas the transaction in the present case falls under Section 67(1)(i) of the Finance Act, 1994.

3.6 The above plea of the appellant was not accepted by the Tribunal, resulting in

ordering payment of pre-deposit of Rs. 2.50 crores within eight weeks from the date of the said order (4-11-2013). Assailing the said order dated 4-11-2013 passed by the Tribunal, C.M.A. No. 285 of 2014 is filed. In view of the non-compliance of the said above order, the appeal was dismissed by the Tribunal by order dated 21-3-2014, challenging which C.M.A. No. 1320 of 2014 is filed.

4. Heard Mr. Arvind P. Datar, learned Senior Counsel appearing for the appellant and Mr. V. Sundareswaran, learned Standing Counsel appearing for the first respondent and perused the documents filed in support of these appeals.

5. We find that there are two specific agreements - one in respect of providing mining services and other in respect of purchase of goods. One is independent of the other. However, insofar as the service tax component is concerned, the department is proceeding on a premise that there is suppression of value. That issue will have to be decided on the touchstone of Section 67(1)(i) of the Finance Act, 1994. If a specific amount is charged by the service provider under the mining services agreement, that agreement has to be tested on its own merits in terms of Section 67(1)(i) of the Finance Act, 1994. Nevertheless, falling upon Rule 3(b) of the Service Tax (Determination of Value) Rules, 2006, overlooking the provisions of Section 67(1)(i) of the Finance Act, 1994, may not be justified.

6. Further, Rule 3(b) of the Service Tax (Determination of Value) Rules, 2006 will come into play only when the value of such taxable service cannot be determined under Rule 3(a) of the Service Tax (Determination of Value) Rules, 2006. Prima facie, there is no cogent reason shown in the order of adjudication as to how Rule 3 of the Service Tax (Determination of Value) Rules, 2006 will come into play when there is a specific agreement for providing services, indicating the value.

7. The reasoning given by the Tribunal that the minerals received back from the service recipient are sold by the appellant for profit and such back to back agreements act as vehicles of undervaluation is an issue which has to be gone into on merits in the appeal considering all issues, including the two agreements. The department has to first come to the conclusion that the provisions of Section 67(1)(i) of the Finance Act, 1994 will not apply to the facts of the present case before proceeding to contend that there is an element of undervaluation. No provision of law under the Finance Act, 1994 or the Service Tax (Determination of Value) Rules, 2006 calls upon the assessee to prove the cost of services in any particular manner. In this case, the agreement for providing mining services stands and the appellant has paid service tax in accordance with the value in the said agreement. In any event, Rule 4 of the Service Tax (Determination of Value) Rules, 2006 provides for the method in which the Central Excise Officer can satisfy himself as to the accuracy of any information furnished or document presented for valuation and it provides for a procedure. Such procedure has not been followed in the instant case.

8. In such view of the matter, the issue raised by the appellant in this Case on

the question of law takes within its fold the primary issue as to whether the Mining Service Agreement, which provides for consideration in money, can be straightaway rejected in the teeth of Section 67(1)(i) of the Finance Act, 1994. This plea of the appellant establishes prima facie case for considering the request for waiver of pre-deposit.

9. The issue as to whether the back to back agreements entered into between the appellant and the service recipients was a method adopted by the appellant to suppress the value of services is also a question that should be answered in the appeal on considering Section 67(1)(i) of the Finance Act, 1994. As to whether such a transaction is opposed to the provision of law has not been considered by the Original Authority itself and that cannot be a ground for, prima facie, rejecting the value stated by the appellant.

10. In this regard, it is apposite to refer to a decision of the Supreme Court in *Benara Valves Ltd. and Others Vs. Commissioner of Central Excise and Another*, , wherein it has been held as under:

"8. It is true that on merely establishing a prima facie case, 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 on, 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 licence 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 citizen's faith in the impartiality of public administration, interim relief can be given.

9. It has become an unfortunate trend to casually dispose of stay applications by referring to decisions in *Siliguri Municipality and Others Vs. Amalendu Das and Others*, and *CCE v. Dunlop India Ltd.*, (1985) 1 SCC 260 cases without analysing factual scenario involved in a particular case.

10. Section 35F of the Act reads as follows:

"35F. Deposit, pending appeal, of duty demanded or penalty levied. - Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of Central Excise Authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied:

Provided that where in any particular case, the Commissioner (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty

levied would cause undue hardship to such person, the Commissioner (Appeals) or as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of the Revenue:

Provided further that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so, decide such application within thirty days from the date of its filing."

11. Two significant expressions used in the provisions are "undue hardship to such person, and "safeguard the interests of the Revenue". Therefore, while dealing with the application twin requirements of considerations i.e. consideration of undue hardship aspect and imposition of conditions to safeguard the interests of the Revenue have to be kept in view.

12. 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 expression "undue hardship" is normally related to economic hardship. "Undue" which 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.

13. 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.

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

15. 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."

11. The plea of financial hardship has been raised by the appellant before the Tribunal and that has also been recorded in Paragraph (8) of the order of the Tribunal. We find much force in the plea of the appellant regarding undue hardship and financial difficulty in pursuing the appeal on payment of the pre-deposit as ordered by the Tribunal. The same, therefore, requires to be modified considering the prima facie case of the appellant. The payment already made by

the appellant towards tax and the further payment that we are ordering will safeguard the interest of the Revenue as well.

12. For the foregoing reasons and taking note of the fact that the appellant had already paid a sum of Rs. 2.90 crores towards service tax, we pass the following order:

(i) On the question of law raised, we are of the view that the Tribunal was not justified in ordering the pre-deposit in the manner stated in its order dated 4-11-2013;

(ii) Consequently, the order of the Tribunal, dated 4-11-2013 is modified to the effect that the appellant shall make a pre-deposit of Rs. 1,00,00,000/- (Rupees one crore only) towards the claim of service tax on or before 18-8-2014 and subject to such compliance, as stated in the order of the Tribunal, dated 4-11-2013, the pre-deposit of balance amount demanded shall remain waived and its collection shall stand stayed during the pendency of the appeal before the Tribunal; and

(iii) The order of the Tribunal, dated 21-3-2014 dismissing the appeal for non-compliance of the stay order is set aside and the appeal is restored to the file of the Tribunal.

In the result, these appeals are ordered in the above terms. No costs. Consequently, M.P. No. 1 of 2014 (2 Petitions) are closed.