(2013) 12 CAL CK 0077

In the Calcutta High Court

Case No : W.P. No. 256 of 2012

Distant Horizon Orchard Private Limited — APPELLANT

Vs

Commissioner (Appeals) — RESPONDENT

Date of Decision : 17-12-2013

Acts Referred:

Citation : (2014) 74 VST 103

Hon'ble Judges : Indira Banerjee, J

Bench : Single Bench

Judgement

Indira Banerjee, J.—In this writ petition the petitioner has challenged an order dated February 9, 2012 passed by the Commissioner (Appeals), Central Excise, Appeal-I, Kolkata, directing the appellant to pre-deposit Rs. 30 lakhs u/s 35F of the Central Excise Act, 1944 applicable to appeals relating to service tax, by virtue of section 83 of the Finance Act, 1994 and to report compliance within March 25, 2012, subject to which there would be stay of further recovery of tax/ interest/penalty till the disposal of the appeal. By an order dated April 10, 2012 the Commissioner (Appeals) has dismissed the appeal of the petitioner on the ground of non-compliance of its impugned order dated February 9, 2012, whereby the petitioner was required to pre-deposit Rs. 30 lakhs. The appeal was, according to the petitioner, dismissed after service of the writ petition on the concerned respondents including the Commissioner (Appeals).

2. The petitioner claims to carry on business of providing services of liasoning and monitoring of movement of coal to the plants of cement manufacturing companies. During the period from September 10, 2004 to June 15, 2005, M/s. Ambuja Cement Eastern Limited and some other cement companies appointed the petitioner as their "coal loading supervisory representative" to ensure proper loading of coal and to verify the quality and quantity of the coal so loaded.

3. As "coal loading supervisory representative", the petitioner was required to obtain consent of coal companies to load coal into wagons on behalf of its clients; obtain sanction from the office of the Executive Director, Rail Movement, for

movement of coal to clients; to supervise the loading of wagons at the collieries having regard to the proper quality and quantity; send samples of coal to the laboratory of the clients for the purpose of analysis of coal and for complying with the formalities relating to payment of freight. In terms of the contract executed by the petitioner with its clients, the petitioner was remunerated on per ton basis.

4. According to the petitioner, the petitioner does not cause sale or purchase of coal. Coal is neither procured by the petitioner nor directly procured by the cement manufacturing companies. According to the petitioner, the petitioner has been providing the same service of liasoning and monitoring the movement of coal on behalf of its clients since the financial year 1999-2000 and had even obtained service tax registration under the head "clearing and forwarding agent service" u/s 65(105)(j) of the Finance Act, 1994. According to the petitioner, after the petitioner realized that no service tax was payable for the services rendered by the petitioner, the petitioner applied for surrender of registration certification vide a letter dated May 29, 2000.

5. By an Order No. CE-7/110/CFA/ST/CAL-I/99/388 dated February 8, 2001, the Superintendent of Central Excise, Service Tax Cell, Kolkata-1, rejected the application of the petitioner for surrender of service tax registration, on the ground that the service provided by the petitioner was liable to service tax under the head "clearing and forwarding agent".

6. The petitioner filed an appeal before the Commissioner (Appeals) on April 20, 2001. By an order dated November 5, 2002, the Commissioner of Appeals upheld the order of the Superintendent of Central Excise and rejected the appeal filed by the petitioner.

7. Being aggrieved, the petitioner filed an appeal before the Central Excise and Service Tax Appellate Tribunal, hereinafter referred to as "the CES-TAT", contending that, if the services rendered by the petitioner was at all classifiable, the same would fall under "business auxiliary service" as defined in section 65(19) of the 1994 Act.

8. By an order dated June 9, 2004, the CESTAT held that the services rendered by the petitioner were classifiable under the head "clearing and forwarding agent" and not under "business auxiliary services".

9. Being aggrieved, the petitioner filed an appeal before the Supreme Court being Civil Appeal No. 7215 of 2004 (Coal Handlers Pvt. Ltd. v. Commissioner of Central Excise), which was admitted by the Supreme Court by an order dated September 23, 2005. The petitioner contends that the respondents were, all along, aware that the petitioner had been contending that classification of the service rendered by the petitioner under the head "clearing and forwarding agent" was done erroneously and this was known to these authorities.

10. Section 65(105)(zzp) covering levy of service tax under the head "business

auxiliary service" was introduced by an amendment with effect from June 1, 2003. After the aforesaid amendment "business auxiliary service" was defined to mean, any service in relation to,--

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) promotion or marketing of service provided by the client; or

(iii) any customer care service provided on behalf of the client; or

(iv) any incidental or auxiliary support service such as billing, collection or recovery of cheques, accounts and remittance, evaluation of prospective customer and public relation services,

and includes services as a commission agent, but does not include any information technology service."

11. By a notification dated June 20, 2003, levy of service tax on a "commission agent", i.e., a person who causes sale or purchase of goods on behalf of another person, for a consideration which is based on the quantum of such sale or purchase, was exempted.

12. The definition of "business auxiliary service" has from time to time being expanded. Section 65(19) was further expanded with effect from September 10, 2004. "Business auxiliary service" was thus denned to mean, any service in relation to--

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) promotion or marketing of service provided by the client; or

(iii) any customer care service provided on behalf of the client; or

(iv) procurement of goods or services, which are inputs for the client; or

(v) production of goods on behalf of the client; or

(vi) provision of service on behalf of the client; or

(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision,

and includes services as a commission agent, but does not include any information technology service and any activity that amounts to ''manufacture'' within the meaning of clause (f) of section 2 of the Central Excise Act, 1944 (1 of 1944)."

13. It is contended that the petitioner did not fall within the purview of the definition of "commission agent" for the purpose of business auxiliary service. However, with effect from June 16, 2005 an Explanation was inserted u/s 65(19) of the 1994 Act by the Finance Act, 2005 read with Notification No. 15/2005 Service Tax dated June 7, 2005 to define "commission agent" to mean any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person--

(i) deals with goods or services or documents of title to such goods or services; or

(ii) collects payment of sale price of such goods or services; or

(iii) guarantees for collection or payment for such goods or services; or

(iv) undertakes any activities relating to such sale or purchase of such goods or services;"

14. After insertion of the definition of "commission agent" with effect from June 16, 2005 the services rendered by the petitioner came within the ambit of services of commission agent. The petitioner, therefore, obtained service tax registration and started paying service tax. According to the petitioner the petitioner has duly being filing statutory returns to the service tax authorities in accordance with law.

15. In February, 2008, in course of audit of the business premises of the petitioner, certain audit queries were raised alleging that the petitioner had not paid service tax amounting to Rs. 48,47,784 during the period September, 2004 to June 2005.

16. On September 22, 2009 a show-cause-cum-demand notice being C. No. V(15)176/ST-Adjn/Addl. Comm/09/22901 was issued by the Additional Commissioner of Service Tax, Kolkata, alleging, inter alia, that the petitioner had evaded service tax of Rs. 48,47,784 under the head "business auxiliary service".

17. Section 73(1) of the 1994 Act provides as follows:

"73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded.--(1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, (Central Excise Officer) may, within one year from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has been erroneously made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of--

(a) fraud; or

(b) collusion; or

(c) willful mis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or the rules made thereunder with intent to evade payment of service tax, by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words ''one year'', the words ''five years'' had been substituted.

Explanation.--Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of one year or five years, as the case may be."

18. The show-cause notice was issued by invoking the extended period of limitation as prescribed under the proviso to section 73(1) of the 1994 Act. The petitioner replied to the show-cause notice and also availed of the opportunity of personal hearing given to the petitioner.

19. By an Order No. 04/ADC/ST/Kol/2010-11 dated June 6, 2011, the Additional Commissioner of Service Tax, Kolkata, confirmed the demand of Rs. 48,47,784 along with interest u/s 75 of the 1994 Act, and imposed penalty of Rs. 48,47,791 u/s 78 of the 1994 Act, apart from penalties u/s 77(1)(a) and u/s 77(2) of the 1994 Act.

20. Being aggrieved by the original order of adjudication, the petitioner appealed to the Commissioner (Appeals), Central Excise, contending that the petitioner carried on business as "commission agent" which became taxable as service from June 16, 2005 onwards. The same activity could not be taxed for a prior period under the head "business auxiliary service", and that too, by invoking the extended period of limitation. The petitioner also made an application u/s 35F of the Central Excise Act for waiver of pre-deposit.

21. By an order No. 17/ST/KOL/2012 dated February 9, 2012, the Commissioner directed the petitioner to deposit Rs. 30 lakhs as pre-deposit u/s 35F of the Central Excise Act read with section 83 of the Finance Act, 1994, inter alia, holding that the petitioner had not made out any prima facie case. The petitioner was directed to file compliance report by March 25, 2012.

22. Section 35F of the Central Excise Act provides 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 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."

23. The said section provides for waiver of pre-deposit in case of extreme hardship. Just as financial inability to make pre-deposit can lead to hardship, payment of an amount which is not payable, under compulsion, also leads to hardship. It is well-settled by judicial precedents both of this court and of the Supreme Court that when a strong prima facie case is made out pre-deposit must be waived. Even where the assessee has an arguable case, pre-deposit should be waived. However, in such a case the concerned appellate authority would have to secure the interest of the Revenue in the manner he deems appropriate.

24. It is well-settled that in considering the question of waiver of pre-deposit, the appellate authority is bound to consider the prima facie merits of the case. Prima facie case does not mean gilt edged case as held by this court in Ruby Rubber Industries v. Commissioner of Central Excise, Calcutta II reported in [1998] 104 ELT 330 (Cal). The appellate authority is to examine, whether the case made out by the appellant is an arguable one.

25. Where an assessee has a good prima facie case, and the disputed duty and/or penalty has apparently been charged wrongfully, the requirement of pre-deposit of the disputed tax and/or penalty is liable to be waived, since pre-deposit of tax not payable by an assessee, would in itself was hardship to that assessee, as held by this court in Bongaigaon Refinery and Petrochem. Ltd. Vs. Collr. of C. Ex. (A),

26. The judgments of this court in Ruby Rubber Industries Vs. Commissioner of C. Ex., and Bongaigaon Refinery and Petrochem. Ltd. Vs. Collr. of C. Ex. (A), were followed by this Bench in Tijiya Steel Pvt. Ltd. and Another Vs. Union of India (UOI) and Others,

27. In Tijiya Steel Pvt. Ltd. and Another Vs. Union of India (UOI) and Others, this court has observed that in considering the question of waiver of pre-deposit, two factors are of paramount importance, the financial capacity of the appellant and the prima facie case. The financial capacity of the appellant has to be considered in all cases, irrespective of the prima facie merits of the case. Even where an appellant has the financial capacity to deposit the disputed tax and/or penalty, pre-deposit might have to be waived if the appellant makes out a prima facie

case.

28. Where there is a very good prima facie case, pre-deposit would have to be waived altogether. Where the appellant has an arguable case, pre-deposit might be waived on such conditions as would protect the interest of Revenue. In fact, the Commissioner (Appeals), was conscious of his duty to consider the prima facie case and accordingly recorded a finding that the service rendered was covered under the definition of "business auxiliary service". The Commissioner (Appeals), however, did not consider whether the purported demand was barred by limitation.

29. In Farmania Steel Works v. Union of India reported in [2011] 274 ELT 331 (Cal) this court set aside an order of pre-deposit because the order did not disclose reasons for directing pre-deposit of rupees four lakhs. In this case too the reasons for directing lump sum deposit of Rs. 30 lakhs have not been disclosed.

30. In Amitava Sana v. CESTAT reported in [2007] 215 ELT 173 (Cal) this court in effect and substance held that an order of appellate authority for pre-deposit of a lump sump amount which was devoid of reasons for deposit of that amount, was in flagrant violation of principles of natural justice.

31. In CEAT Limited Vs. The Union of India (UOI) and Others, a Division Bench of the Bombay High Court observed (para 7, pages 799 and 800 in 2 GSTR):

"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 have 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."

32. The appellate authority has, u/s 35F of the Central Excise Act, been conferred with discretion to waive pre-deposit in a case where pre-deposit would cause undue hardship to the appellant. As held by a Division Bench of this court presided over by P.D. Desai, C.J. in J.N. Chemical (Pvt.) Ltd. Vs. CEGAT, where enabling or discretionary power is conferred on a public authority, the words which are permissive in character may be construed as involving a duty to exercise the power. Thus, where the facts and circumstances of the case warrant dispensation of pre-deposit, pre-deposit must be dispensed with.

33. In J.N. Chemical (Pvt.) Ltd. Vs. CEGAT, the Division Bench found that the appellant was covered by another decision of the Tribunal. The Division Bench, therefore, examined the findings with regard to prima facie case and observed that it was impossible for the Tribunal to arrive at the conclusion that it could not be said that the appellant had a good prima facie case.

34. In ITC Limited Vs. CC (Appeals) and CE and Others, a Division Bench of the Allahabad High Court held that while the court should not grant stay of recovery for the asking, at the same time, while considering an application for waiver of pre-deposit, the court must apply its mind as to whether the appellant has a strong prima facie case on merits. If an appellant having a strong prima facie case on merits is asked to deposit the amount assessed or penalty imposed, it would cause undue hardship to the appellant.

35. In the instant case, the Commissioner (Appeals) has cursorily considered the merits of the case. The learned Tribunal has not at all considered the question of limitation. Admittedly, the demand was not raised within one year but almost after five years by invoking the extended period of limitation. The justification of such invocation has not at all been considered.

36. The Commissioner (Appeals) has not at all considered whether there was any fraud, misrepresentation or suppression with intent to defraud revenue to justify the invocation of the extended period of limitation.

37. In Nestle India Ltd. Vs. Commnr. of Central Excise, Chandigarh, cited by Mr. Khaitan, the Supreme Court held that the extended period of limitation is not invocable unless there is some positive act other than mere inaction or failure on the part of the manufacturer. There must be conscious or deliberate withholding of information by the assessee to invoke the larger period of limitation. In the instant case, there is not a whisper of the information that was deliberately withheld by the petitioner to avoid its liability to pay service tax.

38. In Aban Loyd Chiles Offshore Limited and Others Vs. Commissioner of Customs, Maharashtra, cited by Mr. J.P. Khaitan, the Supreme Court held that when facts were within the knowledge of the Department, invocation of extended period of limitation was not sustainable.

39. In Indu Nissan Oxo Chemicals Ind. Ltd. Vs. Union of India (UOI) and Others, the Supreme Court held (pages 136 and 137 in 10 RC):

"12. 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 leg 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 matter 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 citizens'' faith in the impartiality of public administration, interim relief can be given."

40. The Commissioner of Appeals, inter alia, held, in effect, that the service rendered by the petitioner constituted business auxiliary service. The Commissioner observed that service as a commission agent was actually covered under clause (vii) of the definition of "business auxiliary service" and the broad definition of service under clause (vii) was that any service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi) would come within the purview of business auxiliary service. The Commissioner was of the view that the services rendered by the petitioner were incidental or auxiliary to the service of procurement of goods and services, which were inputs for the clients.

41. The petitioner contends that the Commissioner (Appeals) did not properly apply his mind to the submissions made on behalf of the petitioner, but cursorily arrived at its conclusion of the service rendered by the petitioner, being covered by the definition of "business auxiliary service", only to avoid passing order for waiver of pre-deposit.

42. Even assuming that prima facie case was in favour of the demand, in so far as recovery of Rs. 48,47,791 is concerned, the Commissioner (Appeals) did not consider whether imposition of 100 per cent penalty was justified in the particular facts of the case, when, for the same activities, the petitioner was registered as commission agent, and had been paying service tax as commission agent. The learned Tribunal also did not consider the question of limitation at all.

43. An ad hoc amount of Rs. 30 lakhs has been directed to be deposited by way of pre-deposit. The amount of Rs. 30 lakhs has been directed to be deposited taking into account the total liability of the appellant, in the order under appeal, which is Rs. 48,47,791 as service tax, Rs. 48,47,791 as penalty u/s 78, Rs. 5,000 as penalty u/s 77(2), penalty u/s 77(1)(a) and interest.

44. First of all, the order does not disclose the reason for directing deposit of Rs. 30 lakhs only. Moreover, that amount as stated above has been determined on the assumption that the petitioner was liable to pay penalty as well. The Commissioner of Appeals has not considered the question of justification of imposition of penalty in the facts and circumstances of the instant case.

45. Moreover, after the writ petition was filed the appeal has been dismissed on April 9, 2012 without any further notice to the petitioner and without opportunity to the petitioner to make pre-deposit.

46. The impugned order cannot be sustained and the same is set aside and quashed. The order of dismissal of the appeal on the ground of failure to make pre-deposit is also set aside. The Commissioner shall consider the stay

application afresh in the light of the observations made above. The Commissioner (Appeals) may, if he so chooses, hear out the appeal itself, notwithstanding pendency of the stay application. Photostat certified copy of this judgment, if applied for, be supplied to the parties expeditiously, subject to compliance with the requisite formalities.