

(2012) 11 BOM CK 0050

In the Bombay High Court

Case No : Central Excise Appeal (L) No. 137 of 2012

D.P. Jain and Co. Infrastructure Pvt. Ltd.

APPELLANT

Vs

Commr. of C. Ex. and Cus.

RESPONDENT

Date of Decision : 29-11-2012

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35F, 35G
Finance Act, 1994 — Section 65(64), 83, 97
Finance Act, 2012 — Section 95

Citation : (2013) 29 STR 7 : (2013) 38 STT 596

Hon'ble Judges : M.S. Sanklecha, J; J.P. Devadhar, J

Bench : Division Bench

Advocate : Sridharan, with Prakash Shah, instructed by PDS Legal, for the Appellant; Pradeep S. Jetly, for the Respondent

Judgement

1. This appeal u/s 35G of the Central Excise Act, 1944 read with Section 83 of the Finance Act (hereinafter referred to as "the Act") challenges an order dated 30-7-2012 passed by the Customs, Excise and Service Tax Appellate Tribunal (Tribunal) directing the appellant to deposit an amount of Rs 3 Crores under the proviso to Section 35F of Central Excise Act, 1944 read with Section 83 of the Act for the purpose of entertaining the appellant's appeal on merits. The question of law that arises for our consideration is thus :

Whether in the facts and circumstances of the case, the Tribunal was justified in directing the appellant to pre-deposit an amount of Rs. 3 Crores in terms of Section 35F of the Central Excise Act, 1944 read with Section 83 of the Act as a condition to hear the appeal on merits?

2. The appellant is registered as Service Tax Provider inter alia carries on business of maintenance and repairs of roads including runways at different airports. A show cause notice dated 23-2-2009 was issued to the appellant inter alia seeking to tax the appellant's service of maintaining and repairing roads and runways under the head management, maintenance or the repairs of properties

whether immovable or not u/s 65(64) of the Act. The respondent issued a show cause notice to the appellant demanding duty of Rs. 10.25 crores for the period 2005-06 to 2009-10.

3. The appellant contested the show cause notice. However, the Commissioner of Central Excise by his order dated 20-10-2011 confirmed the duty amount of Rs. 10.25 crores and also imposed penalties upon the appellant.

4. Being aggrieved, the appellant filed an appeal to the Tribunal and along with the appeal also filed an application for dispensing with the pre-deposit of Rs. 10.25 crores with interest thereon and penalties imposed by the order dated 20-10-2011 of the Commissioner of Central Excise. At the hearing of stay application, the appellant pointed out that no service tax is payable in respect of repairs of roads as the same were exempted with retrospective effect from 16-6-2005 to 26-7-2009 by virtue of Section 97 of the Finance Act, 2012. In fact, on 27-7-2009, the Central Government had issued an exemption Notification No. 24/2009-ST by which the service tax leviable in relation to maintenance and repairs of roads were exempted. The Tribunal in its order dated 30-7-2012 while partly dispensing with pre-deposit held that repairs and maintenance of roads are exempted from service tax and therefore demand made by the revenue to that extent is not tenable. However, the Tribunal took a view that the repairs and maintenance of runways at airports are chargeable to service tax. In view of the above, the Tribunal directed the appellant to deposit an amount of Rs. 3 crores (demand attributable to the service of repairing of runways) for the purpose of hearing the appellant's appeal on merits.

5. We have heard the Advocates for the appellant and the respondent. We find that the issue for consideration before the Tribunal on merits would be whether the word "roads" would include within it "runways" at airports. Prima facie it appears to us that runways at the airports are species of the genus "road". Therefore, the runways should also normally receive the same treatment as roads for service tax purpose. We find prima facie that the case of the appellant is a very arguable case. However, we find that in the order of the Tribunal dated 30-7-2012 there is no consideration of the issue even for the purposes of taking a prima facie view. The consideration bestowed by the Tribunal on the issue whether the term "roads" would include "runways" is as under :

4 We find that applicants are providing maintenance/repair of property under contract as provided u/s 65(64) of the Finance Act. The applicants undertook the repair of public roads as well as runway at different airports. Maintenance and repair of roads is exempted from service tax with retrospective effect by Section 95 of the Finance Act, 2012.

5 In respect of the maintenance and repair of runway on airports the total demand comes to approx. Rs. 3 crores and applicant has not made out a case for waiver of this amount. No financial hardship is pleaded. Therefore, applicants are directed to deposit Rs. 3,00,00,000/- (Rupees Three Crores only) which is in

regard to repair and maintenance of runway, within a period of 8 weeks. On compliance of the pre-deposit of the same, remaining dues are waived and recovery stayed Compliance on 15-10-2012.

In the above circumstances, we would have normally remanded the issue to the Tribunal for fresh consideration. However, we are not doing the same, as the amount involved is over Rs. 10 crores, it would be appropriate if the Tribunal hear the appeal itself finally at the earliest.

6. In view of the above, we set aside the order of the Tribunal dated 30-7-2010 and direct the Tribunal to hear the appellant's appeal on merits without insisting of any pre-deposit of duty, interest or penalty. However, as the amount involved in the appeal is over Rs. 10 crores, we would direct the Tribunal to hear the appellant's appeal on merits itself at the earliest and hopefully within a period of three months from today.

7. We make it clear that the observations made by us in this order are only a prima facie view and the Tribunal should not be influenced by the same while disposing of the appellant's appeal on merits. With the aforesaid directions, the appeal is disposed of with no order as to costs.