(2013) 10 P&H CK 0013

In the Punjab And Haryana At Chandigarh

Case No : CEA No. 55 of 2013

Friends Auto Industries	APPELLANT
Vs	
Customs Excise and Service Tax Appellate Tribunal, New Delhi	RESPONDENT

Date of Decision : 22-10-2013

Acts Referred:

Citation : (2014) 43 GST 103

Hon'ble Judges : Rajive Bhalla, J;Bharat Bhushan Parsoon, J

Bench : Division Bench

Advocate : Sudhir Malhotra, for the Appellant; Sunish Bindlish, for the Respondent

Judgement

Rajive Bhalla, J.—The appellant challenges order dated 19.03.2013, passed by the Customs, Excise & Service Tax Appellate Tribunal, Principal Bench, New Delhi (hereinafter referred to as the ''CESTAT''), partly allowing an application filed by the appellant u/s 35F of the Central Excise Act, 1944 (hereinafter referred to as the ''Act'') by directing the appellant to deposit 50% of the amount claimed by the revenue. Counsel for the appellant submits that as the CESTAT has recorded a finding that the appellant has an arguable prima facie case, it should have stayed the entire liability instead of granting stay with respect to 50% of the liability. It is contended that power u/s 35F of the Act, requires the CESTAT to consider merits of the case in the context of "undue hardship" and is, therefore, not prohibited from staying the entire amount. The finding that the appellant has a prima facie case, is sufficient to stay the entire recovery and not merely 50% as allowed by the CESTAT. It is argued that the impugned demand is legally unsustainable as authorities failed to take into consideration the fact that duty has been demanded on two accounts i.e. Rs. 32 lacs surrendered by the appellant and Rs. 16 lacs by Smt. Kailash Malhotra, wife of the appellant, to the Income Tax Department during a survey conducted on 17.09.2004. The demand of excise duty based upon the income in the absence of any evidence of clandestine manufacture and clearance of goods, is illegal and void. The department has not recorded the statement of any consignee or any other person to support its conclusion that the appellant clandestinely manufactured and sold goods without payment of duty. The mere fact that the appellant and its partners surrendered income to the Income Tax Department, is insufficient to raise an inference of evasion of duty particularly in the absence of any material relating to manufacture of goods. The income surrendered to the Income Tax Department has no link with the manufacturing activities of the appellant. It is contended that as the CESTAT has recorded a finding that the appellant has a prima facie case, the appeal may be allowed, the impugned order may be modified and the entire duty may be stayed during pendency of the appeal.

2. Counsel for the revenue submits that orders demanding duty and imposing penalty etc. are legal and valid as the appellant evaded payment of excise duty. It is further submitted that the Assessing Officer as well as the Appellate Authority have after a detailed consideration of the entire record, recorded findings against the appellant. The mere fact that the CESTAT has admitted the appeal, does not entitle the appellant to claim that the duty etc. should be stayed. The CESTAT has in the exercise of bona fide discretion granted relief to the appellant by directing deposit of 50% of the amount claimed by the revenue, which in the considered opinion of the revenue, should not have been granted but as the revenue has not filed any appeal against this order and the order does not suffer from any error of jurisdiction or of law, the appeal may be dismissed without any modification in the impugned order.

3. We have heard counsel for the parties, perused the impugned order as well as the orders passed by the Assessing Officer and the Appellate Authority and in fact are surprised as to why an appeal has been filed.

4. The CESTAT has after considering the prayer for stay of the condition of pre-deposit and upon consideration of arguments advanced, held as follows:--

2. We find a prima facie case in favour of the petitioner/appellant and grant stay of further proceedings pursuant to the order in original on condition that the petitioner deposits 50% of the amount of liability as stipulated in the adjudication order, to the credit of Revenue within 8 weeks. Subject to such deposit, recovery of the balance liability shall be waived and recovery stayed, till disposal of the appeal. Fix the matter for compliance on 24.5.13.

5. The total demand of service tax is Rs. 22,77,732/- along with penalty of a similar amount. The CESTAT has stayed half of this amount after holding that the appellant has an arguable prima facie case.

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 interest 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.

6. A perusal of Section 35F of the Act, reveals that a person desirous of appealing against an order relating to any duty demanded or any penalty levied shall pending the appeal deposit with the adjudicating authority the duty demanded or penalty levied. The proviso, however, empowers the CESTAT or the Commissioner (Appeals) if the duty demanded or penalty levied causes "undue hardship" to such person to dispense with such deposit subject to such conditions as may be deemed fit so as to safeguard the interest of the revenue. Section 35F of the Act, requires the CESTAT, while considering a prayer for stay of the duty demanded or the penalty levied to consider "undue hardship" to such person and "safeguard the interests of revenue". The expression "undue hardship" lies within the special knowledge of an applicant and has to be established as a matter of fact. The CESTAT is required to balance the two expressions while recording its opinion with respect to an application filed u/s 35F of the Act.

7. A relevant extract from the judgment of the Hon''ble Supreme Court in Benara Valves Ltd. and Others Vs. Commissioner of Central Excise and Another, would be appropriate so as to place the meaning of the expression "undue hardship" and the manner in which it required to be proved and adjudicated in its correct perspective. A relevant extract from the judgment, reads as follows:--

11. Two significant expressions used in the provisions are "undue hardship to such person" and "safeguard the interests of 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 interest of Revenue have to be kept in view.

12. As noted above there are two important expressions in Section 35(F). 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, hat 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.

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 interest of 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 interest of 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 condition as required to safeguard the interest of revenue.

8. A perusal of the above extract reveals that it is for the appellant to establish undue hardship and the mere fact that the demand of duty and penalty may appear to be excessive, is irrelevant if the appellant has not been able to establish "undue hardship". The expression "undue hardship" relates not only to the economic well-being of the appellant but also to the merits of the case, thus, requiring the CESTAT to also prima facie appraise the merits and record an opinion for or against the appellant.

9. At this stage, we would like to reiterate an oft repeated principle that an appellate forum while considering legality of an order is confined to ascertaining errors of jurisdiction, a perverse or arbitrary exercise of power and whether any error has led to a miscarriage of justice. An appellate forum cannot where the opinion recorded does not suffer from the aforesaid defects, impose its own perception of the merits of the case whatever be the nature of "undue hardship".

10. The appellant has not pleaded any financial hardship or financial distress in support of its plea of "undue hardship" and has mainly confined its pleadings to the merits of the demand raised by the revenue. A perusal of the orders passed by the Assessing Officer and the Appellate Authority do not enable us to record an emphatic finding in favour of the appellant that duty demanded and penalty levied are illegal or could not have been imposed. The question whether the duty was levied merely as the appellant and its partner surrendered income to the Income Tax Department, is a matter to be considered and decided after appraisal of the entire voluminous record. Recording of any firm opinion, at this stage, would prejudice the rights of the parties. The appellant admittedly, surrendered substantial unaccounted income to the Income Tax Authorities. The duty levied and penalty are based upon this disclosure, documents seized and inventories prepared by the Income Tax Department. While affirming the opinion recorded by the CESTAT, we find no reason to vary the order to grant any further relief to the appellant. In view of what has been stated hereinabove, the appeal is dismissed.

The appellant is directed to deposit the amount as directed by the CESTAT within one month from receipt of a certified copy of this order.

