

(2014) 12 AHC CK 0126

In the Allahabad High Court

Case No : Central Excise Appeal No. 29 of 2014

Gambhir Construction Co.

APPELLANT

Vs

Commissioner of Central Excise & Service Tax

RESPONDENT

Date of Decision : 10-12-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35, 35(G), 35F
Customs Act, 1962 — Section 129
Finance Act, 1994 — Section 68, 69, 70, 70(1), 73(1)
Limitation Act, 1963 — Section 5

Citation : (2015) 1 ADJ 57 : (2015) 37 STR 425 : (2015) 86 VST 213

Hon'ble Judges : Rakesh Srivastava, J; Krishna Murari, J

Bench : Division Bench

Advocate : G.S. Bisht and Neeraj Rai, Advocates for the Appellant; Rajesh Singh Chauhan, Advocates for the Respondent

Judgement

Krishna Murari, J.—This appeal under Section 35(G) of the Central Excise Act, 1944 (hereinafter referred to as the Act, 1944) is directed against the order dated 16.9.2014 passed by Customs, Excise and Service Tax Appellate Tribunal, New Delhi rejecting the appellant's application filed in the Appeal No. ST/55763 of 2013 for stay/waiver of pre-deposit of outstanding demand of tax, penalty and interest and to deposit the amount within a period of four weeks from the date of the order and report compliance thereafter, the appeal was to be taken up for final disposal. Facts giving rise to the dispute are as under.

2. Appellant was issued a notice dated 21.4.2010 to show-cause as to why:

(i) The amount of Service Tax (including Education Cess and Secondary & Higher Education Cess) to the tune of Rs. 22,86,777.00 not paid by the Noticee, should not be demanded and recovered under proviso to Section 73(1) of Finance Act, 1994.

(ii) interest at applicable rates, on the Service Tax not paid, should not be demanded and recovered under Section 75 of Finance Act, 1994.

(iii) penalty should not be imposed upon them under Section 76 of Chapter V of Finance Act, 1994 for contravention of provisions of Section 68 *ibid.* read with Rule 6 of Service Tax Rules, 1994.

(iv) Penalty should not be imposed upon them under Section 78 of Chapter V of Finance Act, 1994 for suppressing the facts and value of taxable service in contravention of provisions of Section 68 *ibid.* read with Rule 6 of Service Tax Rules, 1994.

(v) Penalty should not be imposed upon them under Section 77 of Chapter V of Finance Act, 1994 for contravention of provisions of Section 69 *ibid.* read with Rule 4 of Service Tax Rules, 1994.

(vi) Amount of late fee should not be demanded and recovered under Rule 7(C) of Service Tax Rules, 1994 read with Section 70(1) of Chapter V of the Finance Act, 1994 for contravention of Rule 7 of Service Tax Rules, 1994 read with Section 70 *ibid.*

3. The appellant filed its reply to the show-cause notice vide letter dated 21.5.2010 contending that they are registered contractor of Bharat Petroleum Oil Corporation Ltd., and are engaged to construct the Petrol Pump, Canopies, Bunks at retail outlet. It was admitted that the service provided by them are covered in the Service Tax net but due to lack of knowledge, they did not charge the service tax against the works done during the year 2004-05, 2005-06 and 2006-07. It may be relevant to quote the reply submitted by the appellant, which reads as under.

"To,

The Additional commissioner

Central Excise, Customs & Service tax

Lucknow.

Sub: Written submission regarding show-cause notice 34/ADC/LKO/2010 Dt. 22.4.2010

Sir,

With ref. to the above it is most respectfully submitted that we are the registered contractor of Bharat Petroleum Corporation Ltd. We are engaged in the institute to construct the Petrol Pump, Canopies, Bunks at retail outlet, the service provided by us are covered in the Service Tax net but due to lack of knowledge we have not charged the Service tax against the work done during the year 2004-05, 2005-06 and 2006-07. When you have issued us show-cause notice then we have given a application to Bharat Petroleum Corporation Ltd. to collect the Service Tax for the above mentioned period and they assure to give us. (copy of the letter is enclosed herewith for your kind perusal.)

That our firm is registered under the Service Tax Act and we have deposited the

tax accordingly for last 2 years, but as our senior accountant who has the record regarding the service tax quit the job and not handed over the record to us so we were unable to produce the fact and records before your goodself at the time of hearing fixed earlier.

Therefore it is requested as the mistake appears is just due to lack of knowledge it was not intentional one so please no demand, late fee and penalty impose on the applicant and grant us another chance to produce our facts before your goodself in the interest of justice and oblige.

Thanking you.

For Ghambhir Construction Co. Proprietor With regards"

4. Thus, the reply submitted by the appellant goes to show that liability of payment of service tax was admitted by them. Commissioner of Central Excise and Service Tax, Lucknow passed the order dated 30.11.2010 confirming the proposal contained in the show-cause notice and, accordingly, passed the following order.

"1. I confirm the amount of Rs. 22,86,777/- (Rupees Twenty Two Lakh Eighty Six Thousand Seven Hundred Seventy Seven Only) of Service Tax which shall be demanded and recovered wider proviso to Section 73(1) of Finance Act, 1994 from M/s. Ghambhir Construction Co., 156, Rabindrapalli, Faizabad Road, Lucknow;

2. Interest at the applicable rate on the amount mentioned in para 1 above shall be recovered under Section 75 of the Finance Act, 1994 from M/s. Ghambhir Construction Co., 156, Rabindrapalli, Faizabad Road, Lucknow.

3. I impose a penalty @ Rs. 100/- per day (up to 17.4.2006) and Rs. 200/- per day thereafter, for the period during which such failure continues or at the rate of two percent, of such tax, per month, whichever is higher, starting with the first day after the due date till the date of actual payment of the outstanding amount of Service Tax, under Section 76 of the Finance Act, 1994, till the date of deposit of Service Tax by the Party, subject to the condition that the penalty under this Section does not exceed the amount of Service Tax involved. The penalty liability is to be computed by the Assistant Commissioner/Deputy Commissioner Central Excise as the case may be, of the Central Excise Division-I, Lucknow at the time of payment of Service Tax by the Party;

4. I impose a penalty of Rs. 22,86,777/- (Rupees Twenty Two Lakh Eighty Six Thousand Seven Hundred Seventy Seven Only) on M/s. Ghambhir Construction Co., 156, Rabindrapalli, Faizabad Road, Lucknow.

5. I impose a penalty of Rs. 5,000/- (Rupees Five Thousand Only) on M/s. Ghambhir Construction Co., 156, Rabindrapalli, Faizabad Road, Lucknow in terms of Section 77 of Finance Act, 1994 for violation of provision of Section 69 ibid; and

6. I also impose a penalty of Rs. 2,000/- (Rupees Two Thousand Only) on M/s. Ghambhir Construction Co., 156, Rabindrapalli, Faizabad Road, Lucknow in terms of Section 70 of Finance Act, 1994 read with Rule 7(C) of Service Tax Rules, 1994."

5. Thereafter, the appellant moved an application under Section 74 of the Finance Act, 1994 (for short Act, 1994) for rectification of the order in original dated 30.11.2010. The adjudicating authority finding that there was no mistake apparent from the record, rejected the rectification application vide order dated 15.2.2012.

6. Aggrieved, with the order dated 15.2.2012 as well as the order in original dated 30.11.2010 of the adjudicating authority, the appellant preferred a time barred appeal before the Commissioner (Appeals), Customs Central Excise and Service Tax, Lucknow. The appeal was accompanied by an application seeking condonation of delay in filing the appeal. The Commissioner, Central Excise and Service Tax, Lucknow finding that the appellate order in original was received by the appellant on 1.12.2010 and the appeal filed is beyond the stipulated period of three months and also beyond the condonable time limit by the Commissioner (Appeals), which is also of three months, rejected the appeal being time barred vide order dated 30.7.2012.

7. The appellant thereafter approached this Court by filing Writ Petition (M/B) No. 322 of 2013. vide order dated 15.1.2013, a Division Bench of this Court finding that the appellant has a remedy of filing a second appeal under Section 86 of the Act, 1994, refused to interfere in the matter and dismissed the writ petition giving it liberty to prefer a second appeal before the Tribunal under Section 86 of the Act, 1994 within one month with the direction to the Tribunal to entertain the same expeditiously within a period of four months from the date of filing of the appeal. Thereafter, the appellant preferred the appeal before the Customs and Central Excise and Service Tax Appellate Tribunal, New Delhi alongwith the stay application. An application under Section 35F of the Act, 1944 was also filed making a prayer for waiver of the condition of pre-deposit on the ground that having a prima facie case, insistence of pre-deposit of any part of the duty and penalty imposed, would cause undue hardship and irreparable loss. The appellate Tribunal vide order dated 16.9.2014 impugned in this appeal finding that appellant did not have any prima facie case in its favour so as to dispense with the condition of the pre-deposit of the outstanding demand, dismissed the application for waiver directing the appellant to deposit the entire duty alongwith interest and penalty within a period of four weeks from the date of the order and to report compliance by 24.10.2014 when the appeal was to be taken up for final disposal subject to ascertaining compliance.

8. By virtue of Section 83 of Chapter V of the Act, 1994, the provisions of Finance Act, 1944 has been made applicable to the Service Tax, as they apply in relation to a duty of excise.

9. Section 35F of the Act, 1944 reads as under.

"35 F. 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."

10. It has been urged by the learned counsel for the appellant that, in case, it is established before the Tribunal that if an appellant has a strong case on merits, the appellate authority is bound to examine the issue and if, prima facie, a strong case on merit is established, the condition of pre-deposit ought to be waived.

11. It is well-settled that right of appeal is a creature of Statute and if the legislation in its wisdom has imposed certain condition such as pre-deposit for the purpose of maintaining the appeal, normally the Court cannot interfere unless the condition imposed for the exercise of such right are so onerous so as to amount to unreasonable restrictions rendering the said right almost illusory as observed by the Hon"ble Supreme Court in the case of Seth Nand Lal and Another Vs. State of Haryana and Others, . However, in cases where the legislature has conferred the power upon the appellate authority to waive the condition for maintaining the appeal in a particular situation, the question which arises for consideration is whether the appellate authority is bound to examine as to whether the case of waiver has been made out after examining the issues and condition/situation.

12. This question is no longer res integra and has been examined and is being examined by the Courts everyday.

13. Delhi High Court in the case of Sri Krishna Vs. Union of India (UOI), , has observed as under.

"8. Mr. M.L. Bhargava, the learned Counsel for the respondent submitted that the impugned order being a discretionary order is not liable to be interfered with in

exercise of writ jurisdiction of this Court. He relied on the decision of the Supreme Court in *South India Coir Mills, Poochakkal Vs. The Additional Collector of Customs and Central Excise and Another*, and *Workmen of Oswal Weaving Factory Vs. State of Punjab*, . Suffice it to observe that while disposing of an application under Section 129 of the Customs Act, 1962 the Tribunal is obliged to adhere to the question of undue hardship. The order of the Tribunal should show if the pleas raised before it, have any merit prima facie or not. If the appellant has such a prima facie strong case as is most likely to exonerate him from payment and still the Tribunal insists on the deposit of the amount it would amount to undue hardship."

14. A Division Bench of this Court in the case of *ITC Limited Vs. CC (Appeals) and CE and Others*, , held as follows.

"While considering the application for stay/waiver of a pre-deposit, as required under the law, the Court must apply its mind as to whether the appellant has a strong prima facie case on merit. In case it is covered by the judgment of a Court/Tribunal binding upon the Appellate Authority, it should apply its mind as to whether in view of the said judgment, the appellant is likely to succeed on merit. If an appellant having strong prima facie case, is asked to deposit the amount of assessment so made or penalty so levied, it would cause undue hardship to him, though there may be no financial restraint on the appellant running in a good financial condition. The arguments that appellant is in a position to deposit or if he succeeds in appeal, he will be entitled to get the refund, are not the considerations for deciding the application. The order of the Appellate Authority itself must show that it had applied its mind to the issue raised by the appellant and it has been considered in accordance with the law. The expression "undue hardship" has a wider connotation as it takes within its ambit the case where the assessee is asked to deposit the amount even if he is likely to exonerate from the total liability on disposal of his appeal.

Dispensation of deposit should also be allowed where two views are possible. _____ Undoubtedly, the interest of the Revenue cannot be jeopardized but that does not mean that in order to protect the interest of the Revenue, the Court or authority should not exercise its duty under the law to take into consideration the rights and interest of an individual. _____"

15. Uniform view of the various High Courts of the country on the question has been that while considering provisions of pre-deposit of duty and penalty, the authority concerned has to examine the question whether the appellant has a good prima facie case so as to justify the dispensation of requirement of pre-deposit of the disputed amount of duty and penalty and the authority must exercise its discretion to dispense with such requirement particularly in a case where appellant satisfies the appellate authority that his case is squarely covered by the decision of a competent Court binding on it and in such cases, asking the appellant to deposit the duty demanded and the penalty levied would cause undue hardship to the appellant. Reference may be made to the decision of

Karnataka High Court in the case of M/s. BPL Sanyo Utilities and Appliances Limited, Bangalore Vs. Union of India and others, , Calcutta High Court in the case of J.N. Chemical (Pvt.) Ltd. Vs. CEGAT, , Madras High Court in the case of Andhra Civil Construction Company Vs. CEGAT, , Allahabad High Court in the case of Hindustan Ferro & Industries Ltd. v. CESTAT, New Delhi, 2006 (205) ELT 153 (All).

16. For a good or strong prima facie case, it is not necessary for the appellant to satisfy the tribunal that his case is foolproof and is bound to succeed. Strong prima facie case would mean that the case is an arguable one and fit for trial, or prima facie covered by a binding precedent. In such a situation, the tribunal is under a legal obligation to consider the application of waiver taking into account the undue hardship which would require examination of prima facie case, on merits.

17. In view of above exposition of law, the argument advanced on behalf of the appellant has no force.

18. Admittedly, the appeal before the Customs Central Excise and Service Tax, Lucknow against the order in original dated 30.11.2010, which was received on 1.12.2010, was filed on 19.7.2012, which was much beyond the prescribed period of limitation of three months prescribed by Section 85 of the Finance Act, 1994. It was also beyond the period of three months, which could have been extended by the Commissioner (Appeals) on being satisfied that appellant was prevented by sufficient cause within the period of three months.

19. The issue that Commissioner (Appeals) has no power to condone the delay beyond the period prescribed by Section 85 of Act, 1994, is no longer res integra and stands settled by decision of Hon"ble Apex Court in the case of Singh Enterprises Vs. Commissioner of Central Excise, Jamshedpur and Others, . The Hon"ble Apex Court while considering the provisions of Section 35 of the Central Excise Act which are pari materia with Section 85 of Finance Act, 1994, has held in paragraph 8 of the reports as under.

"The Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of Statute are vested with jurisdiction to condone the delay beyond the permissible period provided under the Statute. The period upto which the prayer for condonation can be accepted is statutorily provided. It was submitted that the (sic) of Section 5 of the Indian Limitation Act, 1963 (in short the Limitation Act) can be availed for condonation of delay. The first proviso to Section 35 makes the position clear that the appeal has to be preferred within three months from the date of communication to him of the decision or order. However, if the Commissioner is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, he can allow it to be presented within a further period of 30 days. In other words, this clearly shows that the appeal has to be filed within 60 days but in terms of the proviso further 30 days time can be granted by the appellate authority to entertain the

appeal. The proviso to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only upto 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act. The Commissioner and the High Court were therefore justified in holding that there was no power to condone the delay after the expiry of 30 days period."

20. In view of the settled law on the issue that Commissioner (Appeals) has no power to condone the delay in filing the appeal beyond three months after prescribed period of limitation, which is also of three months, no exception can be taken to dismissal of the appeal by the Commissioner (Appeals), as barred by limitation. In view of settled legal proposition, the appellate Tribunal was not left with any authority or jurisdiction to interfere in the matter. In such view of the matter, it cannot be said that the appellant has any prima facie case, much less a strong, prima facie, case for waiver so as to dispense with the pre-deposit of the outstanding demand. Further, once the liability was not denied, but was rather admitted by the appellant in his reply to the show-cause notice dated 22.4.2010 and the notice was being contested on the ground that due to lack of knowledge, the service tax was not charged, the appellant cannot claim to have any prima facie case to dispense with the condition of pre-deposit for filing an appeal.

21. Once the appellant did not have any prima facie case, there was no reason or occasion for the Tribunal to consider the issue of any hardship to the appellant in making the deposit.

22. In view of the above facts and discussions, we do not find any illegality in the impugned order passed by the appellate Tribunal to dispense with the condition of pre-deposit and rejecting the application for waiver. The appeal, accordingly, fails and stands dismissed.