

(2014) 02 AP CK 0002

In the Andhra Pradesh High Court

Case No : Central Excise Appeal No. 25 of 2014

Indian School of Business

APPELLANT

Vs

The Commissioner of Customs and Central Excise

RESPONDENT

Date of Decision : 26-02-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11D 35(F) 35F

Citation : (2014) 26 GSTR 234 : (2014) 35 STR 21 : (2014) 71 VST 126

Hon'ble Judges : Kalyan Jyoti Sengupta, C.J.; Sanjay Kumar, J

Bench : Division Bench

Advocate : S.R. Ashok, for the Appellant; N. Gopalakrishna Gokhale, for the Respondent

Judgement

Kalyan Jyoti Sengupta, C.J.—After hearing Mr. Ashok, learned Senior advocate, and going through the judgment and order of the learned Tribunal, we admit this appeal on the following suggested question of law:

Whether the learned Tribunal is correct in law in holding that financial difficulty is not a primary criteria for deciding the issue of undue hardship as mentioned 35F of the Central Excise Act, 1944, which has been adopted by the appropriate Finance Act?

The learned counsel for the respondent Revenue is present and takes notice. Having regard to the magnitude of the matter, we feel that it can be decided finally today.

2. The appeal is preferred against the judgment and order of the learned Customs, Excise and Service Tax Appellate Tribunal dated 08.01.2014 passed on an application made by the appellant for stay of operation of the impugned order of the Commissioner of Customs, Central Excise and Service Tax, Hyderabad-IV, allowing dispensation of pre-deposit. The learned Tribunal after assessing the prima facie case granted waiver of pre-deposit subject to condition that the appellant shall deposit Rs. 30 crores as against the alleged demand of Rs. 86

crores.

3. Mr. Ashok submits that the aforesaid view of the Tribunal with regard to the financial hardship is patently wrong, as it is contrary to the judgment of the Supreme Court rendered in case of Benara Valves Ltd. and Others Vs. Commissioner of Central Excise and Another, .

4. Learned counsel for the respondent, on the other hand, says that having regard to the amount of tax involved, the aforesaid deposit of Rs. 30 crores is permissible under law and rather more deposit should be asked.

5. After hearing the learned counsel for the parties and going through the impugned judgment and order, we feel that the learned Tribunal has gone wrong on the preposition of law holding that the financial difficulty is a subordinate criteria and in our considered view financially undue hardship is also another criteria. It seems that the learned Tribunal was under the view that prima facie case is only the criteria to adjudge the waiver of pre-deposit issue. The relevant provision of law no way envisages making out prima facie case for waiver of pre-deposit. However, the judicial pronouncement enables the Tribunal and Court of law to decide the prima facie case for granting stay and waiver of pre-deposit in a fit case. Section 35F of the Act, which is relevant, is therefore set out for complete understanding.

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.

Explanation-For the purpose of this Section "duty demanded" shall include-

(i) amount determined u/s 11D.

(ii) amount of erroneous CENVAT credit taken;

(iii) amount payable under rule 57CC of Central Excise Rules, 1944;

(iv) amount payable under Rule 6 of CENVAT Credit Rules, 2001 or CENVAT Credit Rules, 2002 or CENVAT Credit Rules, 2004;

(v) interest payable under the provisions of this Act or the rules made thereunder.

6. The proviso involves certain terms, which provide that undue hardship is the element to be considered. The Supreme Court construed such undue hardship to be of financial hardship, but at the same time the interest of the Revenue has also to be safeguarded. Therefore, a fair balancing exercise has to be worked out while passing the order of waiver of pre-deposit. This has been explained by the Supreme Court in clear terms in the case of Benara Valves Limited (1 supra). The Supreme Court has explained what is the material that has to be considered for dealing with this sort of application. Therefore, we set out the relevant paragraphs of the aforesaid judgment.

9. It has become an unfortunate trend to casually dispose of stay applications by referring to decisions in Silliguri Municipality and Dunlop India cases (supra) without analyzing factual scenario involved in a particular case.

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, 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.

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.

7. Thus, it is clear that prima facie case is not only criteria, but the financial hardship has also to be considered side by side. Here the learned Tribunal has taken note of the case of financial hardship, but did not feel to decide or consider the same as the prima facie case was assessed. We are therefore of the view that the impugned judgment and order is completely contrary to the provisions of law as well as the principle laid down by the Supreme Court in the aforesaid case. We therefore set aside the judgment and order of the learned Tribunal and direct the learned Tribunal to reconsider the issue of financial hardship taking note of the audited balance sheets of the appellant of the relevant time and also by following the aforesaid Supreme Court guidelines. In view of the urgency involved in this matter, we direct the learned Tribunal to decide the matter afresh in the aforesaid terms within a period of 15 days from the date of communication of this order. The appeal is accordingly allowed. No costs.