

(2014) 08 MAD CK 0137

In the Madras High Court

Case No : Civil Miscellaneous Appeal Nos. 3289 of 2013, 1419 to 1421 of 2014,
M.P. Nos. 1 of 2013 and 1 of 2014

Jain Housing

APPELLANT

Vs

Commissioner of Service Tax

RESPONDENT

Date of Decision : 13-08-2014

Acts Referred:

Finance Act, 1994 — Section 60(105)(zzzh), 65(105)(zzzh), 65(105)(zzzza), 65(30a),
65(91)(a)
Income Tax Act, 1961 — Section 80IB

Citation : (2014) 47 GST 601 : (2014) 36 STR 1010 : (2015) 79 VST 501

Hon'ble Judges : R. Sudhakar, J;G.M. Akbar Ali, J

Bench : Division Bench

Judgement

R. Sudhakar, J.—C.M.A. No. 3289 of 2013 is filed against the Misc. Order No. 41959 to 41961 of 2013, dated 29.7.2013 passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai (for brevity, "the Tribunal"). C.M.A. Nos. 1419 to 1421 of 2014 are filed against the Final Order Nos. 40170 to 40172 to 2014, dated 17.3.2014, passed by the Tribunal.

2.1 The brief facts of the case are as under: The appellant is engaged in the development of residential projects. The relevant period in all these appeals is from April, 2006 to June, 2010. The Finance Act, 2010, with effect from 1.7.2010, introduced an explanation to Section 65(105)(zzzh) and that brought about a change in the manner in which the business transactions of the assessee was to be considered. During the relevant period, the appellant executed four projects, namely, Sundarbans, Sudarsana, Nakshatra and Inseli Park.

2.2 The Department issued three show cause notices proposing to levy service tax on the ground that the activity undertaken by the assessee is liable to service tax under the category of "Construction of Complex" service as defined under Section 65(30a) of the Finance Act, 1994, as amended. The assessee filed its objections to the show cause notices relying upon various decisions of the Co-

ordinate Benches of the Tribunal and the circulars issued by the Department, on the prima facie plea that the activity undertaken by the appellant is in the nature of works contract as denied under Section 65(105)(zzzza) of the Finance Act, 1994. The assessee also pleaded that the nature of transaction in the present case would not attract service tax in terms of the Finance Act, 1994 in view of the various circulars issued from time to time clarifying the position. The assessee specifically relied upon the circular in D.O.F. No. 334/1/2010-TRU, dated 26.2.2010, relating to changes and clarifications on service tax law proposed in Union Budget 2010-2011. The relevant portion of the said circular relating to "Service tax on construction services" is extracted hereunder for better clarity:

"8. Service tax on construction services

8.1. The service tax on construction of commercial or industrial construction services was introduced in 2004 and that on construction of complex was introduced in 2005.

8.2 As regards payment made by the prospective buyers/flat owners, in few cases the entire consideration is paid after the residential complex has been fully developed. This is in the nature of outright sale of the immovable property and admittedly no service tax is chargeable on such transfer. However, in most cases, the prospective buyer books a flat before its construction commencement/completion, pays the consideration in instalments and takes possession of the property when the entire consideration is paid and the construction is over.

8.3 In some cases the initial transaction between the buyer and the builder is done through an instrument called "Agreement to Sell". At that stage neither the full consideration is paid nor is there any transfer in ownership of the property although an agreement to ultimately sell the property under settled terms is signed. In other words, the builder continues to remain the legal owner of the property. At the conclusion of the contract and completion of the payments relating thereto, another instrument called "Sale Deed" is executed on payment of appropriate stamp duty. This instrument represents the legal transfer of property from the promoter to the buyer.

8.4 In other places a different pattern is followed. At the initial stage, instruments are created between the promoter and all the prospective buyers (which may include a person who has provided the vacant land for the construction), known as "Sale of Undivided Portion of the Land". This instrument transfers the property right to the buyers though it does not demarcate a part of land, which can be associated with a particular buyer. Since the vacant land has lower value, this system of legal instrumentation has been devised to pay lesser stamp duty. In many cases, an instrument called "Construction Agreement" is parallelly executed under which the obligations of the promoter to get property constructed and that of the buyer to pay the required consideration are incorporated.

8.5 These different patterns of execution, terms of payment and legal formalities have given rise to confusion, disputes and discrimination in terms of service tax payment.

8.6 In order to achieve the legislative intent and bring in parity in tax treatment, an Explanation is being inserted to provide that unless the entire payment for the property is paid by the prospective buyer or on his behalf after the completion of construction (including its certification by the local authorities), the activity of construction would be deemed to be a taxable service provided by the builder/promoter/developer to the prospective buyer and the service tax would be charged accordingly. This would only expand the scope of the existing service, which otherwise remain unchanged."

2.3 However, the first respondent, vide Order-in-Original Nos. 13 to 15 of 2012, dated 29.3.2012, confirmed the demand of service tax on the ground that the activity is in the nature of Construction of Complex Service, which is liable to service tax and the appellant was directed to pay a sum of Rs. 11,28,85,825/- under various heads.

2.4 Challenging the said order passed by the first respondent, the assessee filed appeals before the second respondent in A.Nos.ST/S/354-356/12 in ST/448-450/12 and the Tribunal by Misc. Order No. 41959-41961/2013, dated 29.7.2013, directed the appellant to make a pre-deposit of Rs. 4,50,00,000/- within a period of eight weeks and report compliance on 10.10.2013.

2.5 The appellant challenged the said order passed by the Tribunal by way of a writ petition and the same was disposed of by a learned Single Judge of this Court on 30.12.2013 directing the appellant to file a fresh civil miscellaneous appeal. Accordingly, C.M.A. No. 3289 of 2013 came to be filed by the appellant challenging the Misc. Order No. 41959-41961/2013, dated 29.7.2013 passed by the Tribunal, on the following substantial questions of law:

"1. Whether in the facts and circumstances of the case, the Tribunal was right in directing the pre-deposit without considering the plea on limitation and plea on financial hardship?

2. Whether in the facts and circumstances of the case, the Tribunal was right in ignoring the law laid down by this Hon"ble Court in the case of Sanghvi and Doshi Enterprises (TCA. No. 581 and 582 of 2011) wherein it was held that ownership is not a criteria to determine the status as a developer and the risk element involved should also be taken into consideration?

3. Whether in the facts and circumstances of the case, the Tribunal was right in ignoring the decision of the Bombay High Court in the case of Maharashtra Chamber of Housing Industry and another Vs. Union of India and others, and the decision of the Gujarat High Court in the case of CST v. Shrinandanagar-IV Co-op Housing Society Ltd. [2011] 23 STR 439, wherein it was held that prior to the amendment to Section 65(105)(zzzh) with effect from 1.7.2010 the service

provided by the builder is a self service and not liable to service tax?

4. Whether in the facts and circumstances of the case, the Tribunal was right in ignoring the decisions of co-ordinate benches. High Court; Board Circular dated 29.1.2009, amendment introduced to the Act before coming to a conclusion that there is no prima facie case made out for absolute waiver of pre-deposit?

5. Whether in the facts and circumstances of the case, the Tribunal was correct in directing pre-deposit ignoring the cognizance of the decision by the very same Tribunal in the case of M/s. Virgo Properties private Ltd. v. Commissioner of Service Tax, Chennai, 2010 - TIOL - 1142 wherein the case was remanded to the original authority to consider relevance of Board Circular dated 29.1.2009?"

2.6 In the meanwhile, the appellant filed a modification application before the Tribunal seeking modification of the Misc. Order No. 41959-41961/2013, dated 29.7.2013. However, the Tribunal disposed of those applications by Miscellaneous Order No. 40412 to 40414 of 2012, dated 27.1.2014 extending the period for compliance of the earlier order dated 29.7.2013 by two weeks and directed the appellant to report compliance on or before 11.2.2014. As the appellant reneged on compliance of the pre-deposit as ordered, the Tribunal by Final Order Nos. 40170 to 40172 of 2014, dated 17.3.2014 dismissed the appeals filed by the appellant. Challenging this order passed by the Tribunal, the appellant has filed C.M.A. Nos. 1419 to 1421 of 2014 raising the following substantial questions of law:

"1. Whether in the facts and circumstances of the case, the Tribunal was right in dismissing the appeal for non-compliance when the CMA challenging the Misc. order directing the pre-deposit is pending before the High Court when it was brought to the notice of the Tribunal?

2. Whether in the facts and circumstances of the case, the Tribunal was right in ignoring the decision in the case of Jai Prakash Slips Ltd v. Union of India [2009] 243 ELT 341 of the Bombay High Court wherein it has been held that when an appeal is preferred an pending judicial exercise to avoid multiplicity of proceedings reasonable time to be granted to enable the petitioner to produce an order from this Court?

3. Whether in the facts and circumstances of the case, the Tribunal was right in directing the pre-deposit without considering the plea on limitation and the plea of financial hardship?

4. Whether in the facts and circumstances of the case, the Tribunal was right in ignoring the law laid down by this Hon"ble Court in the case of Sanghvi and Doshi Enterprises (TCA. No. 581 and 582 of 2011) wherein it was held that ownership is not a criteria to determine the status as a developer and the risk element involved should also be taken into consideration?

5. Whether in the facts and circumstances of the case, the Tribunal was right in ignoring the decision of the Bombay High Court in the case of Maharashtra

Chamber of Housing Industry and another Vs. Union of India and others, and the decision of the Gujarat High Court in the case of CST v. Shrinandanagar-IV Co-op Housing Society Ltd. [2011] 23 STR 439, wherein it was held that prior to the amendment to Section 65(105)(zzzh) with effect from 1.7.2010 the service provided by the builder is a self service and not liable to service tax?

6. Whether in the facts and circumstances of the case, the Tribunal was right in ignoring the decisions of co-ordinate benches, High Court; Board Circular dated 29.1.2009, amendment introduced to the Act before coming to a conclusion that there is no prima facie case made out for absolute waiver of pre-deposit?

7. Whether in the facts and circumstances of the case, the Tribunal was correct in directing pre-deposit ignoring the cognizance of the decision by the very same Tribunal in the case of Virgo Properties private Ltd v. Commissioner of Service Tax, Chennai, 2010 - TIOL - 1142 wherein the case was remanded to the original authority to consider relevance of Board Circular dated 29.1.2009?"

3. We have heard Mr. Arvind P. Datar, learned Senior Counsel appearing for the appellant and Mr. V. Sundareswaran, learned Standing Counsel appearing for the first respondent and perused the orders passed by the Tribunal and the authorities below.

4. The appellant in this case has promoted four projects, as stated above, and in all these projects, the appellant entered into Memorandum of Agreement with the intending purchaser for construction of a residential flat and along with that an Agreement of Sale is entered into between the parties. Thereafter, in many a cases, sale deeds are executed insofar as the undivided share of the land is concerned. The sale of undivided share is post the Memorandum of Construction and Agreement for Sale. In identical manner in all these projects, the appellant entered into agreements with the intending buyers and it on the basis of these documents, construction was taken up.

5. The view of the Department as well as the Tribunal, prima facie, appears to be that when undivided share is sold, the person to whom the undivided share is sold becomes the legal owner of the undivided share. At this juncture, it is relevant to refer to the said observation made by the Tribunal in Misc. Order No. 41959 to 41961 of 2013, dated 29.7.2013, in paragraph (22), which reads as under:

"22. ... When UDS is sold the person to whom UDS is sold becomes the legal owner of the UDS. The fact that there is an agreement giving possession to the applicant to do construction activity cannot be interpreted to mean that the applicant continued to be the owner of the land. Applicant's right is diminished to the extent UDS is sold. In the case of residential complex constructed nobody gets full title to the land. Right of each buyer is subject to the right of others. The clause in the agreement for construction creates a lien on the land sold in favour of the applicant who advances money for construction, if necessary. In most cases money is collected in advance from the buyers of UDS. But if there is

no buyer for certain flats at initial stage or any buyer defaults on payment of installment, the applicant had to advance his money to carry on the construction activity. In such situation the lien only helps him to take possession of land and sell it to another person. This clause cannot be interpreted to mean that the initial transfer was not complete. The taking over is a separate transaction arising because of subsequent financial transactions and conditions attached to such transactions. So we are not prima facie in agreement that the land continued to belong to the applicant and therefore there was no service provider and recipient."

6. Before the Tribunal, the assessee placed reliance upon a decision of a Division Bench of this Court in Commissioner of Income Tax Vs. Sanghvi and Doshi Enterprise, to contend that despite there being a sale of undivided share in favour of the prospective owner of the flat, the developer is entitled to the relief under Section 80-IB of the Income-tax Act. This decision was relied upon by the assessee to contend that it continues to be the owner and, therefore, the Circular F. No. 332/25/2006-TRU, dated 1.8.2006 would apply. The relevant portion of the said Circular reads as under:

7. The Tribunal, however, took a different view and stated that the facts in Sanghvi & Doshi Enterprises case, referred (supra), does not apply to the case on hand, as in the present case, the issue is relating to cases where undivided share is sold and then construction is undertaken, which, according the learned Senior Counsel for the appellant, is not the correct way of appreciating the nature of the agreements entered into between the developer and the intending purchaser. The Tribunal relied upon an earlier decision of the 2012 (193) ECR 66 to hold that construction of residential complex is taxable in terms of Section 60(105)(zzzh) prior to 1.6.2007.

8. The assessee now relies upon the decisions of the Delhi Tribunal in Krishna Homes v. CCE [Final Order No. 50834-50835/2014, dated 14-2-2014] and CCE & ST v. Flowmore Builders (P.) Ltd., [Final Order No. 53009/2014, dated 30-7-2014], where they have clearly held that prior to 1.7.2010, there is no liability to pay service tax for construction of residential complex.

9. There is no dispute that the appellant in this case is engaged in the business of development of residential complex. Prior to the sale of undivided share, in respect of all the flats, there is an agreement for construction entered into between the appellant and the intending purchaser, apart from an agreement for sale of the undivided share, on which certain payments are made. It is only thereafter sale deeds are entered into with the individual intending purchasers.

10. However, the key issue raised is that pursuant to the agreement for construction and agreement for sale, the title to the property does not stand transferred to the intending buyer. There are clauses in the agreement which specify that if there is a default in payment of installments, the promoter is entitled to cancel the agreement and sell it to third party. The so-called sale of

undivided share does not describe any particular portion of the property to be sold. It is only in the nature of a small portion of land in the larger extent, without any definite demarcation insofar as the extent sold under the undivided share agreement. The clauses in the agreement also provide that it is not subject to demarcation, thereby making it clear that all the owners enjoy the property in common. In this view of the matter, the learned Senior Counsel appearing for the appellant took pains to point out that the clarification issued at the earliest point of time, namely, Circular F. No. 332/25/2006-TRU, dated 1.8.2006, would favour them. The relevant portion of the circular, with the risk of repetition, is extracted hereunder:

11. The second circular relied upon by the appellant is Circular No. 96/7/2007-S.T., dated 23.8.2007, which is almost identical to the earlier circular dated 1.8.2006. The relevant portion of the Circular dated 23.8.2007 reads as under:

12. The next circular, which, according to the Tribunal, is in favour of the Department is Circular No. 108/2/2009-S.T., dated 29.1.2009, but we do not think so. The relevant portion of the said Circular reads as under:

"2. A view has been expressed that once an agreement of sale is entered into with the buyer for a unit in a residential complex, he becomes the owner of the residential unit and subsequent activity of a builder for construction of residential unit is a service of "construction of residential complex" to the customer and hence service tax would be applicable to it. A contrary view has been expressed arguing that where a buyer makes construction linked payment after entering into agreement to sell, the nature of transaction is not a service but that of a sale. Where a buyer enters into an agreement to get a fully constructed residential unit, the transaction of sale is completed only after complete construction of the residential unit. Till the completion of the construction activity, the property belongs to the builder or promoter and any service provided by him towards construction is in the nature of self service. It has also been argued that even if it is taken that service is provided to the customer, a single residential unit bought by the individual customer would not fall in the definition of "residential complex" as defined for the purposes of levy of service tax and hence construction of it would not attract service tax.

3. The matter has been examined by the Board. Generally, the initial agreement between the promoters/builders/developers and the ultimate owner is in the nature of "agreement to sell". Such a case, as per the provisions of the Transfer of Property Act, does not by itself create any interest in or charge on such property. The property remains under the ownership of the seller (in the instant case, the promoters/builders/developers). It is only after the completion of the construction and full payment of the agreed sum that a sale deed is executed and only then the ownership of the property gets transferred to the ultimate owner. Therefore, any service provided by such seller in connection with the construction of residential complex till the execution of such sale deed would be in the nature of "self-service" and consequently would not attract service tax.

Further, if the ultimate owner enters into a contract for construction of a residential complex with a promoter/builder/developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of "residential complex". However, in both these situations, if services of any person like contractor, designer or a similar service provider are received, then such a person would be liable to pay service tax.

4. All pending cases may be disposed of accordingly. Any decision by the Advance Ruling Authority in a specific case, which is contrary to the foregoing views, would have limited application to that case only. In case any difficulty is faced in implementing these instructions, the same may be brought to the notice of the undersigned."

13. Giving a go-by to the two earlier circulars dated 1.8.2006 and 23.8.2007, referred supra, and placing reliance upon the Circular No. 108/2/2009-S.T, dated 29.1.2009, it is the prima facie view of the Tribunal that the clause in the agreement for construction creates a lien on the land sold to the appellant, who advances money for construction, if necessary; and that in most cases monies are collected in advance from the buyers of the undivided share and in such a situation, the lien only helps him to take possession of land and sell it to another person. The Tribunal held that this clause cannot be interpreted to mean that initial transfer was not complete. The taking over is a separate transaction arising because of subsequent financial transactions and conditions attached to such transactions. Therefore, the Tribunal took the view that the land stood transferred to the intending buyer and, therefore, there was a service provided by the appellant to the intending buyer and, therefore, liable to tax.

14. In the Circular F. No. 332/25/2006-TRU, dated 1.8.2006, it is clearly provided that in a case where the builder, promoter or developer builds a residential complex having more than twelve residential units by engaging a contractor for the construction of such residential complex, the contractor shall be liable to pay service tax to the builder, promoter or developer under the "construction of complex" service falling under Section 65(105)(zzzh) of the Finance Act, 1994 and in a case where the builder, promoter or developer undertakes construction work on his own without engaging the services of any other person, there is no service provider and service recipient relationship and, therefore, the question of providing taxable service to any other person by any other person does not arise.

15. At this juncture, it would be relevant to refer to Section 65(105)(zzzh) of the Finance Act, 1994 and the Explanation inserted by Finance Act, 2010, with effect from 1.7.2010, which read as under:

"Section 65(105)(zzzh) to any person, by any other person, in relation to construction of complex.

Explanation.--For the purposes of this sub-clause, construction of a complex which is intended for sale, wholly or partly, by a builder or any person authorised by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or a person authorised by the builder before the grant of completion certificate by the authority competent to issue such certificate under any law for the time being in force) shall be deemed to be service provided by the builder to the buyer."

16. It is the specific case of the appellant that they are engaged in the construction of residential complex and in the light of Section 65(105)(zzzh) of the Finance Act, 1994 and the Circular F. No. 332/25/2006-TRU, dated 1.8.2006, they are not liable to pay any service tax. That apart, the master circular clarifying technical issues relating to taxation on services, namely Circular No. 96/7/2007-S.T. dated 23.8.2007, is on the same lines.

17. The view of the Department that Circular No. 108/2/2009-S.T., dated 29.1.2009 is in their favour, is, prima facie, not tenable. The applicability of the said circular can be divided into two limbs. The first limb states that "... the initial agreement between the promoters/builders/developers and the ultimate owner is in the nature of "agreement to sell". Such a case, as per the provisions of the Transfer of Property Act, does not by itself create any interest in or charge on such property. The property remains under the ownership of the seller (in the instant case, the promoters/builders/developers). It is only after the completion of the construction and full payment of the agreed sum that a sale deed is executed and only then the ownership of the property gets transferred to the ultimate owner. Therefore, any service provided by such seller in connection with the construction of residential complex till the execution of such sale deed would be in the nature of "self-service" and consequently would not attract service tax." The second limb of the said circular states that "if the ultimate owner enters into a contract for construction of a residential complex with a promoter/builder/developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of "residential complex"". However, in both these situations, if services of any person like contractor, designer or a similar service provider are received, then such a person would be liable to pay service tax.

18. The first part of the circular, as set out above, applies to a case where there is an initial agreement between the promoter, builder, developer in the nature of an agreement of sale. The circular holds that the property remains under the ownership of the seller, namely, promoter, builder or developer. It is only after completion of the construction or full payment of entire sum, the sale deed is executed and then ownership gets transferred to the ultimate owner. It, therefore, holds that any service provided by such seller in connection with the construction of residential complex till the execution of such sale deed would be

in the nature of self-service and consequently, would not attract service tax. In the present case, this portion of the circular does not apply. Initially two agreements are signed one for construction and one for sale of undivided share and, thereafter sale deed is executed insofar as undivided share is concerned. Therefore, the first part of paragraph (3) of the circular may not apply to this case.

19. Consequent to the sale of the undivided share, the ultimate owner, namely the prospective buyer, comes into play and as per the second portion of paragraph (3) of the circular dated 29.1.2009, if the ultimate owner enters into a contract for construction of a residential complex with a promoter, builder, or developer, who himself provides service of design, planning and construction, and after such construction the ultimate owner receives such property for his person use, then such activity would not be subjected to service tax, because, according to the Circular, it would fall under the exclusion provided in the definition of "residential complex" under Section 65(91)(a) of the Finance Act, 1994.

20. It, therefore, follows that for the purpose of this case, if the department accepts that the sale in favour of the ultimate owner, even then by virtue of the prior agreements for construction and sale of undivided share, it would fall under the second limb of paragraph (3) of the circular dated 29.1.2009 and to that extent the appellant has a prima facie case. The circular further makes it clear that in both the situations, if services of any profession like contractor, designer or a similar service provider are received, then such a person is liable to pay service tax. That clarifies the stand of the assessee that in the nature of the transaction entered into in the present case, there is no liability to pay service tax up to 1.7.2010. On and from 1.7.2010 the Explanation to Section 65(105) (zzzh) of the Finance Act, 1994 makes the present transaction liable to service tax and we are not on that issue. At present, we are concerned with the period prior to 1.7.2010. The Tribunal has unfortunately not considered the said factor which prima facie enures to the benefit of the appellant.

21. Insofar as undue hardship is concerned, it is pleaded by Mr. Arvind P. Datar, learned Senior Counsel that only 843 flats out of 4252 flats have been sold and thereby huge amount is locked up and therefore, the assessee is suffering extreme undue financial hardship and this has not been considered by the Tribunal. He further pleaded that at the time of adjudication a sum of Rs. 1,17,91,287/- was appropriated. Thereafter, a further sum of Rs. 2 Crores was paid on 28.3.2014 and 20.6.2014. Thereafter, on 16.7.2014, attachment notices were issued to the banks and Rs. 70 Lakhs were appropriated from bank accounts. In the light of the above, he pleaded that the balance amount of duty, fine and penalty may be waived.

22. The learned Standing Counsel appearing for the Revenue reiterated the stand taken by the Department before the Tribunal and also relied upon a decision of a Division Bench of this Court in *South India Shelters (P.) Ltd. v. CST* [C.M.A. Nos.

392 & 393 of 2014, dated 5.2.2014].

23. In *South India Shelters (P.) Ltd* case (supra), the plea of undue hardship was rejected as there was no material placed before the Court in support of the said plea and the same is evident from paragraph (6) of the order itself. We find much force in the plea of the appellant regarding undue hardship and financial difficulty in pursuing the appeal on payment of the pre-deposit as ordered by the Tribunal. In the present case, nearly 40% of the demand has been paid and that would safeguard the interest of the Revenue. Even otherwise, we are satisfied that there is a *prima facie* case on merits and, therefore, the appellant is entitled to the benefit of waiver of balance amount of pre-deposit as ordered by the Tribunal.

24. The above said view is fortified by a decision of the Supreme Court in *Benard Valves Ltd v. CCE* [2007] 6 STT 13 (SC), wherein it has been held as under:

"8. 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 legs 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 manner 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 citizen's faith in the impartiality of public administration, interim relief can be given.

9. It has become an unfortunate trend to casually dispose of stay applications by referring to decisions in *Siliguri Municipality and Others Vs. Amalendu Das and Others*, and *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others*, cases without analysing factual scenario involved in a particular case.

10. 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 interests of the 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."

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

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 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 interests of the 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 interests of the 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 conditions as required to safeguard the interests of the Revenue."

For the foregoing reasons, we pass the following order:

(i) On the questions of law raised, we are of the view that the Tribunal was not justified in ordering the pre-deposit in the manner stated in its order dated 29.7.2013;

(ii) Consequently, the order of the Tribunal dated 29.7.2013 is modified to the effect that the pre-deposit of balance dues, as ordered by the Tribunal, is waived; and

(iii) The order of the Tribunal dated 17.3.2014 dismissing the appeals for noncompliance of the conditional stay order is set aside and the appeals are restored to the file of the Tribunal.

In the result, these appeals are ordered in the above terms. No costs. Consequently, connected miscellaneous petitions are closed.