(2014) 08 MAD CK 0136

In the Madras High Court

Case No : Civil Miscellaneous Appeal Nos. 1543, 1544 of 2014 and M.P. No. 1 of 2014

Kishorkumar Gokaldas Developers and Promoters — APPELLANT

Vs

Commissioner of Service Tax — RESPONDENT

Date of Decision : 21-08-2014

Acts Referred:

Citation : (2014) 47 GST 593 : (2015) 37 STR 442

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

Bench : Division Bench

Judgement

R. Sudhakar, J.—These Civil Miscellaneous Appeals are filed challenging the Final Order Nos. 40180 and 40181 of 2014, dated 19.3.2014, passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai (for brevity, "the Tribunal").

1.1 The facts in a nutshell are as under: The appellant is a proprietorship firm engaged in construction of commercial and residential complexes. On scrutiny of the records of the appellant firm by the Officers of Service Tax Department, it was found that in respect of four projects involving construction of residential complexes as well as commercial complexes, the appellant had not paid appropriate service tax.

1.2 The department issued two show cause notices demanding service tax of Rs. 3,22,42,643/- and Rs. 61,37,445/- respectively, apart from interest and penalty. The appellant submitted his objections and sought for personal hearing. After affording personal hearing, the matter was taken up for adjudication and by order dated 29.3.2012 made in Order-in-Original Nos. 16 and 17 of 2012, the demand of service tax was confirmed and interest and penalty were also directed to be paid.

1.3 The appellant filed appeals to the Tribunal along with stay petitions. The Tribunal, by order dated 17.12.2013, directed the appellant to make a pre-deposit of Rs. 1 Crore within a period of six weeks and report compliance on

3.2.2014, which period was subsequently extended on the request of the appellant to 19.3.2014. However, since the appellant did not comply with the conditional stay order, the appeals were dismissed by the Tribunal by order dated 19.3.2014 made in Final Order Nos. 40180 and 40181 of 2014.

1.4 Aggrieved by the said order, the present appeals are filed 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 appellant had sought for further time to pre-deposit the amount due to financial hardship?

2. 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?

3. Whether in the facts and circumstances of the case, the Tribunal was right in ignoring the law laid down by this 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?

4. 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 Commissioner of ST 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?

5. 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?

6. 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. We have heard the learned counsel on either side and perused the order passed by the Tribunal and the authority below.

3. When the matter was taken up for admission, this Court gave an option to the appellant to comply with the direction of the Tribunal regarding pre-deposit of Rs. 1 Crore. Today, the learned counsel for the appellant filed a document set showing compliance of the order of the Tribunal. As per the said report,

payments were made as under:

4. According to the appellant, at the present, the construction industry is experiencing a slump and their business is presently going through a very serious financial crisis, as lot of flats remain unsold as on date, and that is the sole reason for the delay in making the pre-deposit and, therefore, the said plea of undue financial hardship should be considered in favour of the appellant.

5. Mr. Vikram Ramakrishnan, learned Standing Counsel appearing for the first respondent acknowledges the payment as above and leaves it to the Court for passing appropriate orders.

6. We find that the order of the Tribunal directing payment of pre-deposit has been duly complied with by the appellant, though belatedly. The Tribunal has dismissed the appeals only on the ground that the conditional order of pre-deposit was not complied with. As on date, the conditional order passed by the Tribunal has been complied with and the interest of the Revenue is safeguarded. Considering the plea of undue financial hardship raised by the appellant, we are of the view that the Tribunal should decide the appeals filed by the appellant on merits.

7. The above said view is fortified by a decision of the Supreme Court in Benara Valves Ltd. and Others Vs. Commissioner of Central Excise and Another, , 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 Dular Mahto and Others Vs. State of Bihar, 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, the order of the Tribunal dated 19.3.2014 made in Final Order Nos. 40180 and 40181 of 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. The Tribunal shall take up the appeals in the usual course and dispose of the same on merits and in accordance with law. Since the conditional order of stay passed by the Tribunal has been complied with by the appellant and we are restoring the appeals to the file of the Tribunal, we are not expressing any opinion on the substantial question of law raised for consideration at this stage.

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