
(2014) 07 MAD CK 0131

In the Madras High Court

Case No : Civil Miscellaneous Appeal No. 3478 of 2013 and M.P. No. 1 of 2013

Mohabir Enterprises

APPELLANT

Vs

Commissioner of Service Tax

RESPONDENT

Date of Decision : 18-07-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35F, 35F, 35G
Finance Act, 1994 — Section 65(105)(zzv), 73(1), 75, 76

Citation : (2014) 47 GST 497 : (2015) 37 STR 471

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

Bench : Division Bench

Judgement

R. Sudhakar, J.—This appeal has been filed under section 35-G of the Central Excise Act, 1944 challenging the order dated 24.09.2013 made in Misc. Order No. 42319 of 2013 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, directing the appellant herein to deposit a sum of Rs. 30 Lakhs within a period of eight weeks and granting waiver of deposit of the balance tax, interest and penalty, pending the appeal. The substantial questions of law that arise for consideration in this appeal are --

"(1) Whether the order of the Tribunal is right in directing a pre-deposit of Rs. 30 Lakhs for hearing the appeal, when the appellant is not liable to pay the service tax, since they are only the sub-contractor of the main contractor?

(2) Whether the order of the Tribunal is right in directing the appellant to pre-deposit when the main contract or themselves admitted that they have already paid the service tax liability to the Department?

(3) Whether the Tribunal is right when the sub-contractor agreement is specifically mentioned that the main contractor is liable to pay the service tax?

(4) Whether the order of the Tribunal directing a pre-deposit of Rs. 30 Lakhs of the taxes stands vitiated inasmuch as it fails to see that the condition imposed is such which for all intent and purport takes away the appellant's vested right of

appeal and works as a deterrent or disables and impedes access to a forum, viz., CESTAT, which is meant for redressal of the grievance of an assessee suffering an adverse order and results in rendering the statutory remedy of appeal illusory?

(5) Whether the order of the Tribunal inasmuch as it has not even considered nor rendered any finding on the existence or otherwise of "undue hardship" while exercising its powers to dispense with pre-deposit under Sec. 35F of the Central Excise Act suffers from non-consideration of relevant aspect/statutory condition stands vitiated?

(6) Whether the Tribunal is right in directing to pre-deposit of Rs. 30 Lakhs for hearing appeal, since the prima facie in the absence of any taxing provision in Section 65(105)(zzv) of the Finance Act, 1994, which reads as follows:-

"To a customer, by any person, in relation to survey and exploration of mineral"

From the reading above, exploration of Oil or gas there is no reference in the definition of taxable service. No service tax is leviable.

(7) Whether the Tribunal is right in directing to pre-deposit when the issue is purely revenue neutral, since the service recipient is entitled for Cenvat Credit for the payment made to the appellant?"

2. The appellant undertook the job of executing a sub-contract awarded to the main contractor, viz., Sri Sai Engineering & Drilling and M/s. Shiv Vani Oil and Gas Exploration and Services, who undertook to execute the work for M/s. ONGC, which offered the contract for their hole drilling on seismic exploration activity. It is an admitted fact that the appellant is a registered service tax assessee under the Finance Act, 1994.

3. A show-cause notice was issued claiming service tax of Rs. 1,18,39,576/- (Rupees One Crore Eighteen Lakh Thirty Nine Thousand Five Hundred and Seventy Six only) in terms of Section 73(1), interest under Section 75 and penalty under Section 76 of the Finance Act, 1994. In response to the show-cause notice, the appellant, inter alia, contended that the demand for service tax stood extinguished by the principal contract or, viz., Sri Sai Engineering & Drilling and M/s. Shiv Vani Oil & Gas Exploration and Services Ltd. In support of the plea of discharge of service tax liability, it appears that the appellant produced certificate of the principal contract or to the effect that they had discharged the service tax liability. The said stand was not accepted by the original authority on the ground that the liability to pay service tax is on the appellant/assessee and set-off, if at all, could be claimed by the principal contract or the main contractor, as and when service tax liability is discharged by the assessee, the appellant herein. Therefore, the department declined to accept such a procedure adopted in the present transaction and proceeded to impose service tax at Rs. 1,18,39,576/- (Rupees One Crore Eighteen Lakhs Thirty Nine Thousand Five Hundred and Seventy Six only) together with interest under Section 75 and penalty under Section 76 of the Finance Act, 1994.

4. Aggrieved against the said order of the original authority, an appeal was filed before the Customs, Excise & Service Tax Appellate Tribunal along with an application for waiver of pre-deposit. The Appellate Tribunal, considering the above stated plea, came to the conclusion that the appellant herein is liable to discharge tax liability and payment by the main contractor is an issue to be decided in the appeal. However, the Appellate Tribunal, taking note of the undue hardship due to the financial difficulties faced by the appellant herein, ordered pre-deposit as stated above. Aggrieved by the said order of the Appellate Tribunal, the appellant has preferred the present appeal.

5. Heard Mr. M.N. Bharathi, learned counsel appearing for the appellant and Mr. Sundareswaran, learned standing counsel appearing for the respondent.

6. At this juncture, it is apposite to refer to 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 35-F of the Act reads as follows:

"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 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."

10. 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.

11. 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.

12. 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.

13. The word "undue" adds something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant.

14. 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."

7. This Court, on the facts of the case, as put forth by the appellant, is not inclined to take a different view from the one taken by the Appellate Tribunal on the issue as to whether discharge of service tax liability by the principal contractor would entail the appellant to claim discharge from its liability as the said issue has to be decided by the Appellate Tribunal in the appeal. Further, we find that the Tribunal, did not order the entire amount, but has exercised its

discretion and ordered pre-deposit of Rs. 30,00,000/- (Rupees Thirty Lakh only), considering the undue hardship of the appellant.

8. However, insofar as the plea of undue hardship is concerned, specific plea has been taken by the appellant herein in grounds (f) and (g) to the effect that the financial position of the appellant company is in dire straits and if pre-deposit as ordered by the Appellate Tribunal is not interfered with, it would result in denial of right of appeal and, therefore, grave hardship and prejudice would be caused to the appellant.

9. This Court, on a consideration of the above plea of financial hardship, deems it fit and proper to modify the order of the Tribunal so as to enable the appellant in this case to pursue the appeal without suffering on account of the liability of pre-depositing a huge amount. The substantial plea made by the appellant is that the main contractor has discharged the service tax liability and, therefore, the said liability need not be fastened on the appellant. But, this Court is of the view that the said issue that has to be considered by the Tribunal only in the appeal. However, the payment of service tax liability by the main contractor, which is a prima facie case, put forth by the appellant, enures to the benefit of the appellant. Therefore, this Court is inclined to modify the order with regard to pre-deposit.

10. 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 24.9.2013; and

(ii) Consequently, the order of the Tribunal dated 24.9.2013 is modified to the effect that the appellant shall make a pre-deposit of Rs. 15,00,000/- (Rupees Fifteen Lakh only) within eight weeks from today, as a condition precedent for hearing the appeal and subject to such compliance, as stated in the order of the Tribunal dated 24.9.2014, the pre-deposit of balance amount, interest and penalty demanded shall remain waived and its collection shall stand stayed during the pendency of the appeal before the Tribunal."

In the result, this appeal is partly allowed in above terms. Consequently, connected miscellaneous petition is closed. However, there shall be no order as to costs.