
(2011) 11 MP CK 0083

In the Madhya Pradesh High Court

Case No : Writ Petition No. 5314 of 2011

M/s Caparo Engineering India P. Ltd. and Others

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 22-11-2011

Acts Referred:

Citation : (2011) 11 MP CK 0083

Hon'ble Judges : S.S. Kemkar, J;Prakash Shrivastava, J

Bench : Division Bench

Judgement

Prakash Shrivastava, J.—This Writ Petition is directed against the order dated 28/4/2011 passed by the Customs Excise and Service Tax Appellate Tribunal on Excise Stay Application No.498/2010 in Excise Appeal No.486/2010, rejecting the petitioners' prayer for waiver of the requirement of pre-deposit.

2. In short, the petitioner is involved in the business of manufacturing of automobile parts and doing job work of the various manufacturers. The petitioner had entered into an agreement with the Principal M/s. Eicher Motors Pvt. Ltd for manufacture of automobile cabin parts. In terms of the agreement, the petitioner had received certain amounts as "operational expenses" in the form of liquidated damages for the failure on the part of the principal to lift agreed quantity from the petitioner. According to the petitioner, the said amount was received not against the supply of goods but against the non supply of goods, therefore, it was not part of the assessable value. The Commissioner after giving show cause notice had passed the order dated 22/9/2009 holding that the said amount received by the petitioner was nothing but an additional consideration. The petitioner had preferred an appeal along with the stay application before the CESTAT and the Tribunal by the impugned order dated 28/4/2011 has rejected the petitioner's prayer for waiver of the requirement of pre-deposit and directed the petitioner to deposit the entire amount within eight weeks.

3. Learned counsel appearing for the petitioners" submitted that the Tribunal has not considered the correct position in law while passing the impugned order. He

submitted that the tribunal has committed an error in forming the prima-facie opinion that the operational compensation received by the petitioner is part of the price of the goods without considering the judgments on the point which were cited before the Tribunal and without taking note of the consistent view of the tribunal in this regard. He submitted that requiring the petitioner to pre-deposit the duty which is otherwise not payable, amounts to undue hardship. He has referred to various judgments in support of his submissions.

4. Learned counsel for respondents has supported the impugned order of the Tribunal and submitted that the view taken by the Tribunal does not suffer from any error.

5. We have heard the learned counsel for parties and perused the record.

6. The judgment in the matter of 1992 (40) ECR 1 13 Collector Vs. Spring Fresh Drinks reported in 1997 (92) ELT A70 (SC) , 2000 (117) ELT 647 , 2001 (134) ELT 224 , CCE; Belgaum Vs. Praxair India Ltd reported in 2008 (223) ELT 596, 2004 (95) ECC 169 CCE; Bombay Vs. Ram Decorative & Industries Ltd reported in 2000 (124) ELT 659 (Tribunal) and 1998 (75) ECR 450 relied upon by counsel for the petitioner before this Court support his submission that the operational compensation amount received by the petitioner cannot be treated as part of the price of goods. The judgments in the matter of Mehsana Dist. Co-op. Milk P.U. Ltd. Vs. Union of India (UOI), , LG Electronics India Pvt. Ltd Vs. Commissioner of C. Excise, Noida reported in 2009 (16) STR 136 (All) and Kinetic Honda Motor Ltd. Vs. Union of India (UOI), support the submission of counsel that the Tribunal is required to address its mind to the prima facie merits of the matter and examine in that light if the direction to pre deposit will cause undue hardship or not. The judgment in the matter of Bongaigaon Refinery and Petrochem. Ltd. Vs. Collr. of C. Ex. (A), supports his submission that the discretionary power must be exercised in favour of the assessee in the absence of good reasons to the contrary and undue hardship is not confined to financial hardship alone but covers prima facie strong case also.

7. Learned counsel for respondents has placed reliance upon the judgment of the Supreme Court in the matter of Indu Nissan Oxo Chemicals Ind. Ltd. Vs. Union of India (UOI) and Others, , but according to that judgment also if it appears that the demand raised has no leg to stand, it would be undesirable to require the assessee to pay full or substantive part of the demand.

8. On the perusal of the impugned order of the Tribunal, we have noticed that though the Tribunal had taken note of the judgment in the case of 2007 (114) ECC 133 (Tribunal-Bang), cited by the counsel for the petitioner, but the Tribunal has failed to consider its effect. In the matter of Jindal Praxair (supra) the Tribunal's South Zonal Bench, Bangalore, after referring to other judgments of the tribunal has taken the view that the NTOP charges payable, on the buyer failure to take the minimum quantity assured by them, are not in the nature of additional consideration and they are not includable in the assessable value.

9. The impugned order of the Tribunal also shows that the Tribunal after finding that it was not a case of total waiver from the requirement of pre-deposit, did not consider the issue of partial waiver.

10. Therefore, we are of the considered opinion that the Tribunal committed an error in not appreciating the effect of the judgment cited by the counsel for the petitioner before it and that the prayer for dispensing with the requirement of pre-deposit need to be examined afresh by the tribunal after considering the judgments which have been noted above and other judgments if any cited before tribunal in the course of arguments.

11. For the reasons mentioned above, the impugned order dated 28/4/2011 cannot be sustained and is hereby set aside with a direction to the Tribunal to decide the petitioners application for stay/dispensing with the requirement of pre-deposit afresh, after giving an opportunity of hearing to the parties and after considering the observations made above, by passing a reasoned speaking order.

12. The Writ Petition is accordingly disposed of.

No cost.