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**(2014) 12 AHC CK 0125**

**In the Allahabad High Court**

**Case No :** Central Excise Appeal Nos. 20, 21, 22 and 27 of 2014

Shukla & Brothers

APPELLANT

Vs

Customs, Excise & Service Tax Appellate Tribunal

RESPONDENT

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**Date of Decision :** 04-12-2014

**Acts Referred:**

Central Excises and Salt Act, 1944 — Section 34, 35, 35(G), 35F  
Customs Act, 1962 — Section 129  
Finance Act, 1994 — Section 83

**Citation :** (2015) 1 ADJ 48 : (2015) 37 STR 916

**Hon'ble Judges :** Rakesh Srivastava, J; Krishna Murari, J

**Bench :** Division Bench

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**Judgement**

Krishna Murari, J.—These four appeals under Section 35(G) of the Central Excise Act, 1944 (hereinafter referred to as the Act, 1944) are directed against the identical orders dated 26.2.2013 passed by Customs, Excise and Service Tax Tribunal, New Delhi (for short the Tribunal) refusing to allow full waiver of pre-deposit of outstanding demand of tax and penalty as prescribed under Section 35F of the Act, 1944 and directing to deposit 40% of the demand to maintain the appeals. The orders dated 11.4.2013 dismissing the appeals for non-compliance of orders passed under Section 35F are also subject-matter of challenge in these appeals. Since all the four appeals have been filed by the same appellant and are based on same set of facts raising common question of law, as such, they have been heard together and are being decided by this common judgment.

2. Factual matrix of the case, in brief, relevant for the purpose of the case are as under.

3. The appellant claims to be a proprietorship firm having a registration for service tax under the category of "Construction Work". It is further claimed that the appellant is a service provider of maintenance/sanitation services at the factory premises of M/s. HAL Korwa, Amethi. It is also alleged that the service rendered by the appellant comes under the category of sanitation, on account of

which, it has no liability for payment of service tax as the sanitation service does not fall within the net of service tax, but under some confusion and misguidance, it was issued registration under ST-2 in the category of "Civil Structure Construction Work". Four notices were issued requiring it to show-cause why outstanding of service tax and short payment of service tax, primary education cess, secondary and higher education cess alongwith interest and penalty, as per the provisions of service tax laws, be not recovered from it. The said notices were in respect of the outstanding tax liability and shortage in payment of tax and cess for different periods. Appellant submitted its show-cause. The Assessment Commissioner Excise, Raibareilly and Lucknow passed the orders in original on different dates confirming the demand. Aggrieved by the same, the appellant filed four appeals before the Commissioner (Appeals) challenging the orders in original, which were rejected. The appellant thereafter filed appeals before the Customs and Excise and Service Tax Appellate Tribunal, Principal Bench, New Delhi.

4. By virtue of Section 83 of Chapter V of the Finance Act, 1994, the provisions of Act, 1944 have been made applicable to the Service Tax, as they apply in relation to a duty of excise.

5. Section 35F of the Act, 1944 reads as under.

"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 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."

6. A perusal of the aforesaid provisions goes to show that Section 35 of the Act, 1944 prescribes condition of pre-deposit of duty demanded and the penalty levied for maintaining the appeal by the assessee. However, under proviso, the Tribunal has been vested with the powers to dispense with such deposit, on forming an opinion that such deposit may cause undue hardship, subject to such conditions as it may deem fit to impose in order to safeguard the interest of the revenue.

7. It is well-settled that right of appeal is a creature of Statute and if the legislation in its wisdom has imposed certain condition such as pre-deposit for the purpose of maintaining the appeal, normally the Court cannot interfere unless the condition imposed for the exercise of such right are so onerous so as to amount to unreasonable restrictions rendering the said right almost illusory as observed by the Hon'ble Supreme Court in the case of Seth Nand Lal and Another Vs. State of Haryana and Others, . However, in cases where the legislature has conferred the power upon the appellate authority to waive the condition for maintaining the appeal in a particular situation, the question which arises for consideration is whether the appellate authority is bound to examine as to whether the case of waiver has been made out after examining the issues and condition/situation.

8. This question is no longer res integra and has been examined and is being examined by the Courts everyday.

9. Delhi High Court in the case of Sri Krishna Vs. Union of India (UOI), , has observed as under.

"8. Mr. M.L. Bhargava, the learned Counsel for the respondent submitted that the impugned order being a discretionary order is not liable to be interfered with in exercise of writ jurisdiction of this Court. He relied on the decision of the Supreme Court in South India Coir Mills, Poochakkal Vs. The Additional Collector of Customs and Central Excise and Another, and Workmen of Oswal Weaving Factory Vs. State of Punjab, . Suffice it to observe that while disposing of an application under Section 129 of the Customs Act, 1962 the Tribunal is obliged to adhere to the question of undue hardship. The order of the Tribunal should show if the pleas raised before it, have any merit prima facie or not. If the appellant has such a prima facie strong case as is most likely to exonerate him from payment and still the Tribunal insists on the deposit of the amount it would amount to undue hardship."

10. A Division Bench of this Court in the case of ITC Limited Vs. CC (Appeals) and CE and Others, , held as follows.

"While considering the application for stay/waiver of a pre-deposit, as required under the law, the Court must apply its mind as to whether the appellant has a strong prima facie case on merit. In case it is covered by the judgment of a Court/Tribunal binding upon the Appellate Authority, it should apply its mind as to whether in view of the said judgment, the appellant is likely to succeed on merit. If an appellant having strong prima facie case, is asked to deposit the amount of assessment so made or penalty so levied, it would cause undue hardship to him, though there may be no financial restrain on the appellant running in a good financial condition. The arguments that appellant is in a position to deposit or if he succeeds in appeal, he will be entitled to get the refund, are not the considerations for deciding the application. The order of the Appellate Authority itself must show that it had applied its mind to the issue

raised by the appellant and it has been considered in accordance with the law. The expression "undue hardship" has a wider connotation as it takes within its ambit the case where the assessee is asked to deposit the amount even if he is likely to exonerate from the total liability on disposal of his appeal.

Dispensation of deposit should also be allowed where two views are possible. \_\_\_\_\_ Undoubtedly, the interest of the Revenue cannot be jeopardized but that does not mean that in order to protect the interest of the Revenue, the Court or authority should not exercise its duty under the law to take into consideration the rights and interest of an individual. \_\_\_\_\_ "

11. Uniform view of the various High Courts of the country on the question has been that while considering provisions of pre-deposit of duty and penalty, the authority concerned has to examine the question whether the appellant has a good prima facie case so as to justify the dispensation of requirement of pre-deposit of the disputed amount of duty and penalty and the authority must exercise its discretion to dispense with such requirement particularly in a case where appellant satisfies the appellate authority that his case is squarely covered by the decision of a competent Court binding on it and in such cases, asking the appellant to deposit the duty demanded and the penalty levied would cause undue hardship to the appellant. Reference may be made to the decision of Karnataka High Court in the case of M/s. BPL Sanyo Utilities and Appliances Limited, Bangalore Vs. Union of India and others, , Calcutta High Court in the case of J.N. Chemical (Pvt.) Ltd. Vs. CEGAT, , Madras High Court in the case of Andhra Civil Construction Company Vs. CEGAT, , Allahabad High Court in the case of Hindustan Ferro & Industries Ltd. v. CESTAT, New Delhi, 2006 (205) ELT 153 (All).

12. It may also be relevant to quote the following observation of the Hon''ble Apex Court in the case of Indu Nissan Oxo Chemicals Ind. Ltd. Vs. Union of India (UOI) and Others, .

"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 matter 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."

13. The Hon''ble Supreme Court again in the case of Bhavya Apparels Private

Limited and Another Vs. Union of India (UOI) and Another, , has observed as under.

"The learned Additional Solicitor General very fairly submits that a part of the goods is in custody of the respondents. If that be so, in our opinion, it was obligatory on the part of the Tribunal to take that factor into consideration in making the order of pre-deposit. Furthermore, while exercising its jurisdiction the tribunal was also required to apply its mind in regard to the question of undue hardship on the part of the appellants upon considering existence of a prima facie case. Merit of the case ordinarily should not otherwise be gone into unless the question on the face of it appears to be concluded."

14. Thus, phrase "undue hardship" has been interpreted to be not only exclusively related to economic hardship but would also cover a case where appellant has a strong prima facie case. For a good or strong prima facie case, it is not necessary for the appellant to satisfy the tribunal that his case is foolproof and is bound to succeed. Strong prima facie case would mean that the case is an arguable one and fit for trial, or prima facie covered by a binding precedent. In such a situation, the tribunal is under a legal obligation to consider the application of waiver taking into account the undue hardship which would require examination of prima facie case, on merits. In the case of I.T.C. Ltd. v. Commissioner of Central Excise and Customs (Appeals) and others, ILR 2000 Kar. 25, the Karnataka High Court while examining the issue of the pre-deposit under Section 35 of the Act, after considering various pronouncements of the Hon"ble Apex Court and High Courts has held as under:

"While considering the case of "undue hardship", the authority is required to examine the prima facie on merits of the dispute as well. Pleading of financial disability would not be the only consideration. Where the case is fully covered in favour of the assessee by a biding precedent like that of the judgment of the Supreme Court, jurisdictional High Court or a Special Bench of the Tribunal, then to still insist upon the deposit of duty and penalty levied would certainly cause undue hardship to the assessee. Absence of the financial hardship in such a case would be no ground to decline the dispensation of pre-deposit under the proviso to Section 35F. The power to dispense with such deposit is conferred under the authorities has to be exercised precisely in cases like this type and if it is not exercised under such circumstances then this Court will require it to be exercised. Such like cases where two views are not possible then the condition of pre-deposit before the appeal is heard on merits, can be dispensed with. In case two views are possible on interpretation, based on conflicting judgments of the Tribunal or different High Courts in the absence of the judgment of the jurisdictional High Court then the authorities may pass the order under proviso to Section 35F of the Act keeping in view the facts of the case in hand."

15. Learned counsel for the appellant contends that the impugned order refusing to waive the 100% of the tax levied and the penalty imposed and directing to deposit 40% of the demanded amount is cryptic, without recording any reasons

either in respect of prima facie case set up by the appellant or considering the issue of undue hardship and, thus, is rendered patently illegal. It is further pointed out that the fact that an objection dated 27.12.2009 has been filed by the appellant with respect to registration issued in Form ST-2 under category of Civil Structure Construction Work without verifying the actual service being provided by the appellant relating to maintenance/sanitation service and repair, which was exempted from payment of service tax being outside the service tax net, has not been taken into consideration while passing the impugned orders. It is further submitted that the orders rejecting the appeals for non-compliance of deposit of 40% under Section 35F of Act, 1944 is also rendered illegal and deserves to be set aside.

16. In reply, learned counsel appearing for the respondents contended that the appellant being registered under ST-2 category, has rightly been assessed and there was no good reason for any waiver of the condition of pre-deposit, still the Tribunal waived 60% of the amount demanded and, thus, the impugned orders do not call for any interference. It is also submitted that there was no prima facie case in favour of the appellant for waiver and, thus, the issue of undue hardship does not merit any consideration and the Tribunal has committed no illegality in passing the impugned orders.

17. We have considered the argument advanced by the learned counsel for the parties and perused the record.

18. The impugned order directing the appellant to deposit 40% of the demand is sans any reason. The order is cryptic running into six lines recording that such cases of maintenance, repair and cleaning service have been heard earlier also and the appellant was directed to deposit 40% of the service tax demanded and report compliance by 11.4.2013. There is no other reason recorded in the order. Neither there is consideration, even worth the namesake of any prima facie case of the appellant nor there is any reason, much less finding with respect to the undue hardship.

19. Hon'ble Apex Court in a recent judgment in the case of Mehsana Dist. Co-op. Milk P.U. Ltd. Vs. Union of India (UOI), , while considering the provisions of Section 34 of the Act, 1944, has held as under.

"The issue here relates to the order passed by the Commissioner (Appeals), Central Excise and Customs, under Section 35F of the Central Excise Act, 1944. By the impugned order, the appellants have been directed to deposit an amount of Rs. 30 lakhs by way of pre-deposit. The reasoning given in support of such order is wholly unsatisfactory. The appellate authority has not at all considered the prima facie merits and has concentrated upon the prima facie balance of convenience in the case. The Appellate Authority should have addressed its mind to the prima facie merits of the appellants' case and upon being satisfied of the same determined the quantum of deposit taking into consideration the financial hardship and other such relevant factors.

We accordingly set aside the decision of the High Court as well as the impugned order dated 14.8.2002 and remand the matter back to the appellate authority for redetermining the issue under Section 35F of the Act after affording an opportunity of hearing to the parties.

The appeal is allowed without any order as to costs."

20. In view of the settled position of law by authoritative pronouncements of the Hon"ble Apex Court, it was incumbent upon the Tribunal to have addressed the issue of prima facie case of the appellant and also that of undue hardship.

21. We find that the Tribunal has failed to consider the same much less return any findings on the two issues.

22. For the aforesaid facts and reasons, we are of the considered view that the impugned orders passed by the Tribunal on the waiver application, are not liable to be sustained and are set aside. As a consequence, the impugned orders passed by the Tribunal dismissing the appeals for non-compliance of the condition of pre-deposit also stands set aside. As a result, all the four appeals stand allowed and the matter stand remitted back to the Customs, Excise and Service Tax Appellate Tribunal, New Delhi for redetermining the issue and passing fresh orders on the applications for waiver of the condition of pre-deposit prescribed by Section 35 of the Act, 1944 and the appeals itself thereafter.