(2011) 11 AP CK 0019

In the Andhra Pradesh High Court

Case No : Writ Petition No. 29510 of 2011

Sri Chaitanya Educational Committee — APPELLANT

Vs

Commissioner of Customs and Central Excise and Another — RESPONDENT

Date of Decision : 15-11-2011

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35F
Constitution of India, 1950 — Article 226
Finance Act, 1994 — Section 65(105)(zzc), 73, 73(1), 73C, 86

Citation : (2012) 53 VST 262

Hon'ble Judges : V.V.S. Rao, J;Sanjay Kumar, J

Bench : Division Bench

Advocate : T. Rajendra Prasad, for the Appellant; V. Gopala Krishna Ghokhale, for the Respondent

Final Decision : Dismissed

Judgement

V.V.S. Rao, J.—The petitioner assails two notices of attachment u/s 87(c) of the Finance Act, 1994 (the Act, for brevity) dated October 28, 2011 and October 29, 2011 issued by the second respondent for recovery of service tax and penalty thereon as assessed by the Commissioner of Customs, Central Excise and Service Tax for the years 2003-04 to 2006-07. The petitioner runs commercial training/coaching centres all over Andhra Pradesh. As per section 65(105)(zzc) of the Act, imparting of training/coaching is a service taxable u/s 73 of the Act. Be that as it is, against the order-in-original (OIO) passed by the primary authority, the petitioner went in appeal u/s 86 of the Act. Section 86 of the Act read with section. 35F of the Central Excise Act, 1944, requires a person who files appeal against the order-in-original to deposit the duty/penalty demanded. But, the Commissioner (Appeals) or the Appellate Tribunal is empowered to pass orders to dispense with such pre-deposit if it would cause any undue hardship. So as to avail of the said benefit, the petitioner filed Application No. 478 of 2009 seeking waiver of the pre-deposit. By an order dated June 14, 2010, the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) waived the condition of pre-deposit.

The Revenue then filed an appeal before this court. The same being Central Excise Appeal No. 301 of 2010 was disposed of by a Division Bench comprising one of us (V.V.S.R., J.), by order dated January 19, 2011 The Commissioner of Central Excise Vs. Sri Chaitanya Educational Committee, . While setting aside the order of the CESTAT, this court remitted the matter for de novo consideration. Prior thereto, the competent authority passed orders u/s 73C of the Act provisionally attaching immovable property of the petitioner valued approximately at Rs. 27 crores.

2. After the remand by this court, the CESTAT passed orders on April 18, 2011 2011 (23) S.T.R. 481 again granting waiver of pre-deposit and stayed recovery. This was again assailed in Central Excise Appeal No. 110 of 2011 by the Revenue. A Division Bench of this court allowed the appeal on October 19, 2011 Commissioner of Central Excise Vs. Sri Chaitanya Educational, directing the CESTAT to entertain the appeal of the petitioner on condition of deposit of Rs. 80 crores (rupees eighty crores only) u/s 35F of the Central Excise Act. A week thereafter, the second respondent issued the impugned notices.

3. The counsel for the petitioner would urge that section 73C of the Act enables the Central Excise Officer to provisionally attach the property belonging to the person to whom notice is served u/s 73(1) and, therefore, any notice of attachment directly u/s 87(c) is illegal and arbitrary. The petitioner runs many coaching/training centres and if the movables like buses, vans and other vehicles as well as furniture are attached, the petitioner and its students would suffer hardship. This court permitted the petitioner to pay Rs. 80 crores (rupees eighty crores only) as a condition for the CESTAT to entertain the appeal. As per rule 21 of the Writ Proceedings Rules, 1977, if no time is prescribed by the court, it is presumed that the petitioner has two months time from the date of receipt of the order, and the notice of attachment even before the expiry of the period granted by this court is highly arbitrary and illegal. These contentions are refuted by the senior standing counsel for the Revenue.

4. In the background facts, the points that would arise for consideration are whether the appeal filed by the petitioner against the order-in-original, dated June 11, 2009, passed by the Commissioner, Customs can be said to be pending and whether the pendency of such appeal bars the exercise of jurisdiction u/s 87(c) of the Act?

5. Both the questions need not detain us any longer. While allowing the appeal filed by the Revenue, this court observed as under:

Having carefully considered the competing interests of the Revenue and the hardship that is likely to be occasioned to the respondent/assessee in case the entire amount of service tax and penalty as determined by the primary authority by the order dated June 11, 2009 is directed to be deposited, we direct that the respondent shall deposit 1/3rd of the amount of service tax and penalty, which comes to about Rs. 80 crores as pre-deposit u/s 35F of the 1944 Act in its appeal preferred u/s 86 of the Service Tax Act. On such deposit, the Tribunal shall entertain the appeal of the respondent preferred against the order of the Commissioner, Customs, Excise and Service Tax, Guntur dated June 11, 2009.

6. As mandated by this court, the Tribunal shall entertain the appeal only if the condition imposed by this court is fulfilled by the petitioner. The condition imposed is that the petitioner should deposit Rs. 80 crores (rupees eighty crores only) u/s 35F of the Central Excise Act in compliance with section 86 of the Act. Admittedly, the amount has not been deposited so far. The fact that the petitioner has got some more time to comply with the order passed by this court or that he has other remedies to avail of against the order passed by this court cannot be a mitigating factor in favour of the petitioner.

7. Section 87 of the Act in plain terms empowers the Central Excise Officer to proceed to recover the amount of demand by one or more modes mentioned therein. Section 87(c) empowers the Central Excise Officer to distrain any movable and immovable property until the amount payable is paid. The power is not circumscribed by any condition. The condition precedent is that the amount of service tax levied remains payable when the power is exercised. The pendency of an appeal before the CESTAT or the Commissioner (Appeals) or before this court does not in any manner whittle down the power u/s 87(c) of the Act. Admittedly, as of now, the petitioner has not complied with the order of this court dated October 19, 2011 in Central Excise Appeal No. 110 of 2011 (Commissioner of Central Excise Vs. Sri Chaitanya Educational, and there is no stay operating. Therefore, the amount demanded by the Commissioner vide the order-in-original dated June 11, 2009 remains payable and part of the said amount has to be paid as ordered by this court in Central Excise Appeal No. 110 of 2011. The hardship vehemently pleaded by the counsel for the petitioner or the consequences that would follow pursuant to the attachment orders cannot in any manner regulate the exercise of power u/s 87(c) of the Act nor exercise of discretion by this court under article 226 of the Constitution of India. The writ petition, for the above reasons, is dismissed without any order as to costs.