(1995) 03 DEL CK 0046

In the Delhi High Court

Case No : Civil Writ Petition No. 1494 of 1994 and C. M. No. 2477/94

Swaraj Majda Limited APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 13-03-1995

Acts Referred:

Citation : (1995) 2 AD 300 : (1995) 33 DRJ 438 : (1995) 59 ECR 276 : (1995) 80 ELT 242 : (1995) ILR Delhi 567

Hon'ble Judges : Dr. M.K. Sharma, J;D.P Wadhwa, J

Bench : Division Bench

Judgement

D.P. Wadhwa, J.—The petitioner, a sick industrial company under the Sick Industrial Companies (Special Provisions) Act, 1985, (SICA) filed this petition under Article 226 of the Constitution seeking quashing of the order dated March 17, 1994 of the Customs, Excise & Gold (Control) Appellate Tribunal, New Delhi, (CEGAT) passed u/s 35F of the Central Excises and Salt Act, 1944, (for short ''the Act'') whereby the petitioner was directed to deposit duty amount of Rs. 1.40 crores as a pre-deposit for the appeal to be heard. Rest of the demand was, however, stayed. Petitioner is engaged in the manufacture of chassis for motor vehicles. It says when the chassis are cleared from its factory premises it pays duty under Heading 87.06 of the Central Excise Tariff whether the chassis sold to individual buyers or given to an independent body builder. In the present case, the body builder is Sutlej Coach Builders Pvt. Ltd. It is stated that M/s. Sutlej Coach Builders Pvt. Ltd. fabricates the body on the chassis and then clears the fully built vehicle on payment of excise duty under Heading 87.02 to the depot of the petitioner. It is thereafter that the petitioner effects sale of the fully built vehicle. Petitioner says that both the chassis as well as the fully built vehicles suffer appropriate excise duty at two different stages, and that the demand of the respondents seeking Central Excise Duty once again on the invoice price of the fully built vehicles from the petitioners on the ground that the petitioners were owners of the fully built vehicles was not legal. Petitioner says it cannot be treated as manufacturer of fully built vehicle and draws support from judgment of the Patna High Court in the case of Tata Engineering and Locomotive Company Ltd. and Another Vs. Union of India(UOI) and Others, . It is on account of the duty demand of Rs. 2,75,31,417/- that the petitioner filed an appeal before the CEGAT who, as noted above, directed the petitioner to deposit Rs. 1.40 crores in cash as a pre-condition of hearing the appeal. Aggrieved, the petitioner has filed the present petition.

2. At the outset, it was submitted by Mr. Sorabjee, learned counsel for the petitioner, that the petitioner was a sick industrial company under the SICA and that in view of the judgment of this Court in M/s. Rubber Reclaim Company v. Union of India, CWP No. 220/93, date of decision 30 July 1993, the CEGAT was wrong in putting any condition of pre-deposit of the excise duty for any amount. This order in Rubber Reclaim Company is a brief order is as under :-

"30-7-1993

Present : Mr. V. Sridharan with Mr. A. R. Madhorao and Mr. R. H. Pancholi, for the petitioner.

Mr. V. K. Shali, for the respondent.

O. M. 5550/93 & CW 220/9 :

The petitioner is a sick undertaking. In this view of the matter u/s 22 of the Sick Industries Act, 1985, the petitioner is not liable to pay the amount so long as if remains sick undertaking. Similar view has been taken by Calcutta High Court in Indian Jute and Industries Ltd. Vs. Collector of C. Ex. (Appeals), . Accordingly, the writ petition is allowed and the Tribunal is directed to hear the petitioner''s appeal without any pre-deposit. With this order, this writ petition is disposed of.

July 30, 1993. Sd/- Chief Justice Sd/- Judge."

3. Reliance has also been placed on a decision of the Calcutta High Court in Indian Jute and Industries Ltd. Vs. Collector of C. Ex. (Appeals), . In Rubber Reclaim Company Ltd. this Court merely said that since the petitioner company was a sick undertaking in view of Section 22 of the SICA it was not liable to pay any amount so long as it remained sick undertaking. In Indian Jute and Industries case the Collector (Appeals) had refused to grant any stay and the Court said that the Collector had not made any enquiry about the sickness of the company and about the position of the assets and liabilities of the company.

Section 35F of the Act reads as under :-

"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 Collector (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 Collector (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."

4. It will be, thus, seen that to exercise discretion under proviso to this section, the appellate authority has to form an opinion that deposit of duty demanded would cause undue hardship to the appellant and then it might "dispense with such deposit subject to such conditions" as the appellate authority might deem fit to impose so as to safeguard the interest of the revenue.

Section 22 of the SICA, in relevant part, is as under :-

"22. Suspension of legal proceedings, contracts, etc.-(1) Where in respect of an industrial company, an inquiry u/s 16 is pending or any scheme referred to u/s 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal u/s 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956) or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding-up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a Receiver in respect thereof and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans, or advance granted to the industrial company shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority.

5. It is not disputed that an enquiry, u/s 16 of the SICA is pending and Section 22 of SICA would, Therefore, be applicable. But we have been unable to read into this section that whenever any enquiry u/s 16 is pending there has to be invariably an order dispensing with pre-deposit of the duty of penalty under proviso to Section 35F of the Act. In these circumstances, we, perhaps, would have referred the matter to a Larger Bench but we find that the CEGAT did not go into the question of undue hardship that might be caused to the petitioner in case condition of pre-deposit of duty was not waived. We may also refer to Section 19 of the SICA which deals with re-habilitation or giving financial assistance to a sick industrial company. Here before any concession or sacrifice is called from the Central Government a notice has to issue to the Central Government and there is a procedure prescribed as to how the matter is to be dealt with under the scheme under the SICA for rehabilitation of the sick industrial company. Chapter VII of the Board for Industrial and Financial Reconstruction Regulations, 1987, is also relevant which prescribes the procedure for sanctioning schemes u/s 19 of the SICA. Then there is Section 32 of SICA which says that the provisions of the SICA and of any rules or schemes made there under shall have effect notwithstanding anything inconsistent

therewith contained in any other law except the provisions of the Foreign Exchange Regulation Act and the Urban Land (Ceiling and Regulation) Act, 1976, or in the Memorandum or Articles of Association of the Industrial Company or in any other instrument having effect by virtue of any law other than SICA. These provisions, Therefore, provide a detailed procedure and we are unable to subscribe to the view opinion expressed by this Court in Rubber Reclaim Company that effect of Section 22 of SICA would be automatic and that the appellate authority under the Act must always dispense with deposit of any duty or penalty. It appears to us that Section 22 of the SICA cannot be read to mean that whenever there is a right of appeal provided by statute which right can be exercised on certain conditions like deposit of duty, the conditions stand waived invariably and appeal could be filed and heard without reference to the conditions. The appellate authority under the Act has to see the extent of undue hardship, if any and if it comes to that conclusion then it has to pass such orders as to safeguard the interest of the revenue. Since in the present case the question of undue hardship had not been gone into by the CEGAT in its proper perspective and also the question whether the petitioner had a prima facie case as duty had already been paid on the chassis and thereafter on the whole of the vehicle, we will set aside the order and would direct that appeal be heard by the CEGAT without there being any condition of pre-deposit of the duty. The petition is, Therefore, allowed. There will be no order as to costs.