(2004) 03 BOM CK 0096

In the Bombay High Court

Case No : Writ Petition No. 411 of 2004

Universal Ferro and Allied Chemicals Ltd. APPELLANT

Vs

Customs, Excise and Service Tax Appellate Tribunal and Another RESPONDENT

Date of Decision : 17-03-2004

Acts Referred:
Central Excises and Salt Act, 1944 — Section 35B, 35F

Citation : (2004) 5 BomCR 642 : (2005) 102 ECC 68 : (2004) 3 MhLj 219

Hon'ble Judges : R.M. Lodha, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : J.F. Pochkhanwala, instructed by Amarchand and Mangaldas, for the Appellant; R.V. Desai and P.S. Jetley, for the Respondent

Judgement

R.M. Lodha, J.—Heard.

2. Rule. Returnable forthwith.

3. Mr. Jetley, advocate appearing for the respondents waives service.

4. The petitioner preferred three appeals being appeal Nos. E/2691, 2692 and 2693 before the Customs, Excise and Service Tax Appellate Tribunal aggrieved by the common order dated 25-6-2003 passed by the Commissioner, Central Excise and Customs, Nagpur. In appeal No. E/2691, the petitioner took out application E/Stay-1793/2003 for waiver of pre-deposit of duties and penalties and stay of recovery thereof. In appeal No. 2692, the application E/Stay-1794/2003 was taken out while in appeal No. 2693/2003, application E/Stay-1795/2003 was taken out by the petitioners for waiver of pre-deposit of duties and penalties and stay of recovery thereof. The case for waiver of pre-deposit of duties and penalties was sought to be set up by the petitioners on the ground that they have prima facie case and if waiver of pre-deposit was not granted, that would cause undue hardship as their accumulated losses as on 31st March, 2002 amounted to Rs. 4400.92 lacs. The accumulated losses, according to the

petitioner far exceed paid up capital of Rs. 100 lacs and reserves of Rs. 1109.93 lacs. Besides that, it was submitted that the petitioner company was a B.I.F.R. company. The Tribunal considered the said applications and observed that the petitioner had undertaken a job work for TISCO and the issue whether such clearances to DTA were covered under para 9.9(b) of the policy was debatable. The Tribunal also held that the issue regarding eligibility to the concessional rate of duty under Central Excise Notification 8/97 has also to be gone into. However, the Tribunal held that the applicants could not make out a strong prima facie case in their favour for the Tribunal to waive pre-deposit of duty and penalty fully. The Tribunal passed the order directing the petitioner to deposit a sum of Rs. 1 crore towards the duty in the application being application E/ Stay-1793/2003 and a sum of Rs. 40 lakhs in the application E/Stay-1794/2003 within 12 weeks from the impugned order. In application E/Stay-1795/2003, the pre-deposit of penalty was completely waived and recovery stayed pending the appeal. The petitioner had filed this writ petition taking exception to the order of Tribunal whereby the petitioner has been ordered to deposit a sum of Rs. 1 crore towards the duty in application E/Stay-1793/2003 and a sum of Rs. 40 lakhs in the application E/Stay-1794/2003.

5. We are, thus, only concerned with the order passed by the Tribunal in respect of the application being E/Stay-1793 in appeal E-2691/2003 and the application E/Stay-1794 in appeal E-2692/2003. The aforesaid appeals have been preferred by the petitioners u/s 35B of the Central Excise Act, 1944. Section 35F of the Act of 1944 reads thus --

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 [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. It would be, thus, seen that the appellant before the Tribunal by virtue of Section 35B read with Section 35F is required to deposit with the adjudicating authority the duty demanded or the penalty levied for maintaining the appeal. However, the Tribunal is competent to dispense with such deposit if it is of the opinion that the deposit would cause undue hardship imposing such condition as

would safeguard the interest of the revenue.

7. In Vijay Prakash D. Mehta and Another Vs. Collector of Customs (Preventive), Bombay, , the Apex Court dealing with the identical provisions contained in sections 129A and 129E of the Customs Act, 1962 held thus --

"5. The aforesaid section provides a conditional right of appeal in respect of an appeal against the duty demanded or penalty levied. Although the section does not expressly provide for rejection of the appeal for non-deposit of duty or penalty, yet it makes it obligatory on the appellant to deposit the duty or penalty, pending the appeal, failing which the Appellate Tribunal is fully competent to reject the appeal. See, in this connection, the observations of this Court in respect of Section 129 prior to substitution of Chapter XV by the Finance Act, 1980 in Navinchandra Chotelal Vs. Central Board of Excise and Customs and Others, . The proviso, however, gives power to the Appellate Authority to dispense with such deposit unconditionally or subject to such conditions in cases of undue hardships. It is a matter of judicial discretion of the Appellate Authority.

8. The aforesaid observations, in our opinion, have no application to the instant case. Here the right that was granted, was a right held with a condition. There was no question of change of that right. In the instant case the only substantive right is the right of appeal as contemplated under Sections 129A and 129E of the Act and that right is a conditional one and the Legislature in its wisdom has imposed that condition. No question of whittling down that right by an alteration of procedure arises in this case.

11. These observations cannot be applied to the facts of this case. Here we are concerned with the right given u/s 129A of the Act as controlled by Section 129E of the Act, and that right is with a condition and thus a conditional right. The petitioner in this case has no absolute right of stay. He could obtain stay of realization of tax levied or penalty imposed in an appeal subject to the limitations of Section 129E. The proviso gives a discretion to the authority to dispense with the obligation to deposit in case of "undue hardships". That discretion must be exercised on relevant materials, honestly, bona fide and objectively. Once that position is established it cannot be contended that there was any improper exercise of the jurisdiction by the Appellate Authority. In this case it is manifest that the order of the Tribunal was passed honestly, bona fide and having regard to the plea of undue hardship as canvassed by the appellant. There ;was no error of jurisdiction or misdirection."

8. Applying the same principles to the provisions of Section 35B and 35F of the Act of 1944, it can be observed that right of appeal contemplated u/s 35B is conditional upon compliance of Section 35F. The power given to the Appellate Tribunal to dispense with such deposit unconditionally or subject to such conditions in cases of undue hardship, though discretionary, must be exercised on the relevant materials, honestly, bona fide and objectively. Obviously the party applying for dispensation of pre-deposit must not only show the prima facie

cases in this favour but must also to establish undue hardship show that the particular burden which he is required to observe or perform is out of proportion to the nature of the requirement itself and the benefit which the applicant would derive from compliance with it. This is what was said by Delhi High Court in Amrit Banaspati Co. Ltd. Vs. Union of India (UOI) and Others, .

"7. Section 35F of the Act deals with deposit pending appeal of duty demanded or penalty levied. Proviso deals with power of appellate authority to dispense with such deposit if it is of the opinion that deposit would cause "undue hardship", imposing such conditions as would safeguard interest of Revenue. Assessee has to establish that undue hardship would be caused to it and while deciding the stay application the authority has to keep in view two aspects i.e. n(a) form an opinion that deposit would cause undue hardship to the assessee and (b) safeguard interest of revenue if it considers dispensing with deposit desirable, by stipulating conditions. "Opinion" means something more "than mere retaining of gossip or of hearsay, it means judgment of belief, that is a belief or a conviction resulting from what one thinks on a particular question. If a man is to form an opinion, and his opinion is to govern, he must form it himself on such reasons and grounds as seem good to him. Per Lord Brawell in All croft v. London (Bishop) 1891 RC 666. Opinion is judgment of belief based on grounds short of proof "Hardship" connotes something harsher and more severe than trifling inconvenience, and negligible loss of profit or temporary loss of a commercial opportunity. Language used in Section 35F is not merely "hardship"; it is undue hardship. For a hardship to become "undue" it must be shown that the particular burden which is required to be observed or performed is out of proportion to the nature of the requirement itself and the benefit which the applicant would derive from compliance with it."

9. We find ourselves in respectful agreement with the aforesaid view of Delhi High Court.

10. Now we turn to the impugned order. The Tribunal observed that couple of issues raised in the appeal were debatable and required to be gone into. Yet it observed that the applicants have not made out a strong prima facie case in their favour for the Tribunal to waive pre-deposit of duty and penalty fully. This is not a proper approach for consideration of application u/s 35F. What is required to be made out by the applicant for dispensation of pre-deposit wholly or partly is to show that prima facie case exists in this favour in the appeal. Besides that, the applicants are required to show undue hardship and as observed by the Supreme Court, this aspect has to be examined by the Tribunal objectively. The objective consideration by the Tribunal on the issue of undue hardship presupposes the decision supported by reasons to obviate arbitrariness. The reasons need not be elaborate but must satisfy that the discretion so exercised by the Tribunal is not arbitrary, capricious or unreasonable. The impugned order falls short of this legal requirement as it cannot be discerned from the order as to which factors were considered by the Tribunal while examining the aspect of undue hardship and

how the discretion directing the applicants to deposit a sum of Rs. 1 crore in application E/Stay-1793/2003 and a sum of Rs. 40 lakhs in E/Stay-1794/2003 was exercised and how the interest of revenue has been safeguarded.

11. The impugned order with regard to the two applications E/Stay-1793/2003 in appeal No. E/2691/2003 and E/Stay-1794/2003 in appeal No. E.2692/2003, thus, cannot be sustained and matter needs to be reconsidered by the Tribunal.

12. We, accordingly, quash and set aside the order dated 15-12-2003 in respect of applications E/Stay-1793/2003 and E/Stay-1794/2003. Both the applications viz. E/Stay-1793/2003 in appeal No. E/2691/2003 and E/Stay-1794/2003 in appeal No. E/2692/2003 are restored to the file of the Customs, Excise and Service Tax Appellate Tribunal for fresh consideration and disposal in accordance with law.

13. Rule is disposed of accordingly. No costs.

The parties may be provided ordinary copy of this order duly authenticated by Court Associate on payment of usual copying charges.