(2011) 07 AP CK 0096

In the Andhra Pradesh High Court

Case No : Writ Petition No''s. 12189 and 12218 of 2011

V. Rajagopal	APPELLANT
Vs	
Commr. of Cus., C. Ex. and S.T. (Appeals-III), Hyderabad	RESPONDENT

Date of Decision : 14-07-2011

Acts Referred:
Central Excises and Salt Act, 1944 — Section 35F
Imports and Exports (Control) Act, 1947 — Section 4I, 4M
Income Tax Act, 1961 — Section 142(2A)

Citation : (2012) 275 ELT 50 : (2012) 28 STR 305 : (2013) 58 VST 24

Hon'ble Judges : Raja Elango, J;A. Gopal Reddy, J

Bench : Division Bench

Advocate : A. Rajashekar Reddy, for the Respondent

Judgement

A. Gopal Reddy, J.—These two writ petitions are arising out of the same facts and as common issue is involved, they are heard together and being disposed of by this common order.

2. Vice-President of M/s. Sanghi Polymers Pvt. Limited filed W.P. No. 12189 of 2011 and M/s. Sanghi Polymers Pvt. Limited filed W.P. No. 12218 of 2011 assailing the correctness of the order passed by the Commissioner of Customs, Central Excise and Services Tax (Appeals III)-first respondent herein, dated 23-3-2011, whereby the first respondent waived the condition for entertaining the appeals and restricted the pre-deposit amount of penalty to 10% and 50% respectively as per the first proviso to Section 35F of the Central Excise Act, 1944 (for short ''Act''). In both the cases, petitioners pleaded that due to the financial constraints of the company, the pre-deposit amount of penalty has to be dispensed with for entertaining the appeals.

3. Learned counsel for the petitioners contends that by relying upon the statement recorded in a case filed against the dealer of the petitioner-company namely M/s. Victor Hi-Tech at Madurai, proceedings were initiated by the Joint Commissioner of Central Excise, Madurai dated 31-3-2009 against the said

dealer and also the writ petitioner-company. Aggrieved by the order of the Joint Commissioner, Central Excise, four appeals were preferred namely, A. Nos. 223 to 225 & 232 of 2009 before the Commissioner of Central Excise (Appeals), Madurai, that the said appeals were allowed on 21-7-2010 setting aside the order of the Joint Commissioner and remitted the matter to the said authority for passing appropriate orders. Under the same set of facts, present proceedings were initiated by the Additional Commissioner of Central Excise, Hyderabad by the impugned order dated 20-12-2010 imposing the penalty against the Vice-President and also M/s. Sanghi Polymers Pvt. Limited (petitioners herein), against which, the impugned appeals are preferred and therefore, the learned appellate tribunal-first respondent herein ought to have provided an opportunity of hearing to the petitioners before passing the impugned orders in view of the peculiar facts of the case. It is contended that as the impugned order is passed in violation of principles of natural justice, the matter may be remitted to the first respondent for providing an opportunity to the petitioners for explaining their case.

4. On the other hand, Sri A. Rajashekar Reddy, learned standing counsel for Central Government contended that at the time of waiving the pre-deposit amount, the merits of the appeal cannot be gone into by the appellate authority. It is contended that no hearing is necessary when the petition filed for writing the pre-deposit amount has been decided by the Appellate Tribunal as held by the Supreme Court and also by this Court in Commissioner of Central Excise, Guntur v. Sri Chaitanya Educational Committee - 2011 (22) S.T.R. 135 (A.P).

5. It is the sole contention of the learned counsel for the petitioners that in view of the remand order passed by the Appellate Tribunal at Madurai Bench in A. Nos. 223 to 225 & 232 of 2009, dated 21-7-2010 in similar set of facts, the order passed by the primary authority i.e. Additional Commissioner of Central Excise, Hyderabad dated 20-12-2010 is liable to be set aside in the impugned appeals by the first respondent and therefore, insisting the petitioners for pre-deposit amount of penalty by the first respondent would cause undue hardship.

6. It is now well Settled that when the order impugned is subject-matter of an appeal before the statutory authority, this Court cannot go into the validity of the order so passed. The Apex Court in Union of India and another Vs. M/s. Jesus Sales Corporation, considering the similar provision namely Section 4-M(I) and third proviso of Imports and Exports (Control) Act, 1947 held that the provisions requiring pre-deposit of the amount of penalty or tax imposed before the appeals are heard are of two types, that there are some statutory provisions which specifically prescribe and provide that before the appeals are heard, the amount of tax or penalty imposed have to be deposited, and that no discretion has been left by the statute to question in the appellate authority to waive such deposit taking into consideration the hardships of the appellants. There are some provisions which vest power in the appellate authorities to waive deposit unconditionally or with conditions. When the discretion has been vested in the

appellate authority to dispense with such deposit unconditionally or subject to such conditions, as it may impose in its discretion taking into consideration the undue hardship which it is likely to cause to the appellant. Therefore, it is difficult to hold that if the appellate authority has rejected the prayer of the appellant to dispense with the deposit unconditionally or has dispensed with such deposit subject to some conditions without hearing the appellant, on perusal of the petition filed on behalf of the appellant for the said purpose, the order itself is vitiated and is liable to be quashed being violative of the principles of natural justice. When the appellate authority has been vested with the discretion to dispense with such deposit unconditionally or on conditions, then it has to apply its mind on that question like a quasi-judicial authority taking into consideration all the facts and circumstances of the case including the undue hardship which has been pointed out on behalf of the appellant. In view of the settled position that whenever a statutory authority has to form an opinion on a question, it does not mean that it has to be formed in a subjective or causal manner. That opinion must be formed objectively on relevant considerations. Same is the position in respect of the exercise of discretion. The framers of the Act require such appellate authority to exercise its discretion in a reasonable and rational manner taking into consideration the relevant facts and circumstances of a particular appeal while considering the question as to whether the deposit of the amount of the penalty be dispensed with unconditionally or subject to the conditions. Holding so, the Apex Court held that the direction given to deposit 25o/) of the amount of the penalty which has been imposed against the party is a reasonable order which should not have been held to be invalid by the High Court merely on the ground that before passing the said order the party-respondent therein was not given oral hearing, which amounted to violation of the principles of natural justice.

7. The judgment of the Apex Court in Sahara India (Firm), Lucknow Vs. Commissioner of Income Tax, Central-I and Another, on which reliance placed by the learned counsel for the petitioners is with regard to the assessment order passed u/s 142(2-A) of the Income Tax Act. The question that fell for consideration therein is whether or not an opportunity of hearing be afforded to an assessee before ordering special audit in terms of Section 142(2-A) of the Act. Considering the provisions, it was held that the exercise of the power u/s 142(2-A) of the Act leads to serious civil consequences and therefore, even in the absence of express provision for affording an opportunity of pre-decisional hearing to an assessee and in the absence of any express provision in Section 142(2-A) barring the giving of reasonable opportunity to an assessee, the requirement of observance of principles of natural justice is to be read into the said provision, but the same should be in prospective in nature but it should not be retrospective. Since the order complained therein is the order of original authority, wherein the special audit was undertaken, the Supreme Court was of the view that hearing should be provided as the said material could not be produced subsequent to the audit, which has to be considered before the special

audit is finalized. The same is not the situation in the case on hand.

8. All the contentions advanced by the learned counsel for the petitioners including the order passed by the Madurai Bench were considered by the primary authority i.e. Additional Commissioner of Central Excise, Hyderabad in its order dated 20-12-2010 which is the subject-matter of appeal before the first respondent. In view of the same, this Court cannot go into the merits of the order passed by the primary authority which imposed the penalty. The first respondent considered the grounds of appeal and waived the condition for entertaining the appeals by restricting the pre-deposit amount to 10% and 50% respectively. No infirmity is discernable with the impugned order passed by the first respondent.

9. The writ petitions are accordingly dismissed. No order as to costs.

