(2009) 01 BOM CK 0097

In the Bombay High Court

Case No : Writ Petition No. 390 of 2009

Wardha Coal Transport Pvt. Ltd. APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 14-01-2009

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35F
Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 129(E)
Finance Act, 1994 — Section 86

Citation : (2009) 3 BomCR 306 : (2009) 223 CTR 458 : (2009) 164 ECR 313 : (2009) 13 STR 490 : (2009) 21 STT 28 : (2009) 21 VST 144

Hon'ble Judges : Ranjana Desai, J;J.F. Devadhar, J

Bench : Division Bench

Advocate : V. Shridharan and Prakash Shah, instructed by PDS Legal, for the Appellant; R.V. Desai and Rajinder Kumar, for the Respondent

Judgement

Ranjana Desai, J.—Rule. Rule made returnable forthwith.

2. Learned Counsel for the respondents waive service. By consent of the parties, matter is taken up for final hearing forthwith.

3. The petitioners are an ex-servicemen company incorporated under the Companies Act, 1956. The petitioners and similar other companies are incorporated pursuant to a Memorandum of Understanding entered into with the Ministry of Energy and the Ministry of Defence. The shares of the petitioners are held by war widows and disabled soldiers.

4. In the present petition filed under 226 of the Constitution of India, the petitioners are challenging the order dated 8-10-2008 passed by the Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench at Mumbai (''tribunal'' for short) in Appeal No. ST/167/08-Mum., wherein the Tribunal has directed the petitioners to deposit a sum of Rs. 30 lacks as a condition for hearing the appeal filed by the petitioners against the order in original dated 1-5-2008 passed by

respondent No. 2.

5. The basic question in this case is whether the definition of "cargo handling service" under the Finance Act, 1994 includes the kind of activities undertaken by the petitioners. The petitioners case is that their activities are not covered by the said definition and hence the same are not chargeable to service tax. The Assistant Commissioner of Central Excise, Nagpur returned a finding vide order-in-original dated 1-5-2008 that the services rendered by the petitioner''s fall under the category of ''cargo handling services'' and hence chargeable to service tax. The petitioners carried on appeal to the tribunal u/s 86 of the Finance Act, 1994. The petitioners filed an application for waiver of prede-posit u/s 35F of the Central Excise Act, 1944. By the impugned order, the demand for complete waiver was rejected. Hence, this writ petition.

6. We have heard at some length learned Counsel for the petitioners. He submitted that the Tribunal has erred in rejecting the application for complete waiver of pre-deposit filed by the petitioners. He drew our attention to the order passed in Application No. ST/S/914/08 in Appeal ST/116/08, dated 29-7-2008 passed by the Tribunal in 2009 (13) S.T.R. 425 and contended that in that case in some what similar situation, the tribunal has ordered full waiver of pre-deposit of the amount in question and stayed recovery pending the appeal. Learned Counsel submitted that the petitioners have a strong prima facie case. He drew our attention to the judgment of the tribunal in (2008) 13 STJ 241 , wherein the Tribunal has considered the question involved in the instant case and come to a conclusion that the type of cargo handling activities undertaken by the petitioners are not covered by the definition of "cargo handling service" under the Finance Act, 1994. Learned Counsel submitted that, therefore, the Tribunal erred in rejecting the application of the petitioners.

7. We have heard Mr. R.V. Desai, learned senior Advocate for the respondents. Mr. Desai submitted that the present case can be distinguished from the facts which were before the Tribunal in Sainik Mining & Allied Services Ltd.''s case (supra). Learned Counsel drew our attention to the Assistant Commissioner''s order wherein it is noted that the Director of the petitioners has admitted that the cargo handling services were rendered by the petitioners. Mr. Desai further submitted that u/s 35(F) of the Central Excise Act, 1944 for waiver of pre-deposit, the petitioners have to establish a prima facie case as well as undue hardship. He submitted that the petitioners have failed to establish undue hardship. He submitted that there is no averment about undue hardship even in the present Writ Petition. He relied upon the judgment in Indu Nissan Oxo Chemicals Ind. Ltd. Vs. Union of India (UOI) and Others, , wherein while considering a similar provision contained in Section 129(E) of the Customs Act, 1962, the Supreme Court has observed that in the said provision two significant expressions are used namely, "undue hardship" and "safeguard the interests of revenue". Therefore, while dealing with such matters, the Court is required to consider undue hardship of a person and safeguarding the interest of revenue.

Learned Counsel further pointed out that the Supreme Court also observed that the question of undue hardship is within the special knowledge of the applicant for waiver and has to be established by him and that undue hardship is caused when the hardship is not warranted by the circumstances. Learned Counsel submitted that the petitioners have failed to establish undue hardship and, therefore, the application has been rightly rejected by the Tribunal.

8. It is not possible for us to agree with Mr. Desai. It is pertinent to note that in similar fact situation in SSV Coal Carriers Pvt. Ltd., the Tribunal has granted the prayer for waiver of pre-deposit. Similarly, in Kartikay Bulk Movers Pvt. Ltd. v. Commissioner of Central Excise, Nagpur delivered on 7-10-2008, where also the facts were somewhat similar, waiver of pre-deposit has been granted. Moreover, the Tribunal in Sainik Mining & Allied Services Ltd.''s case (supra) has come to the conclusion that service tax liability does not arise in such cases. Learned Counsel for the petitioners is right in contending that the petitioners have a prima facie case. We may usefully refer to the observation of the Supreme Court in Indu Nissan Oxo Chemicals Industries Ltd.''s case (supra), wherein the Supreme Court has observed that:

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 leg to stand, it would be undesirable to require the assessee to pay full or substantive part of the demand....

9. Viewed in the light of above observations, we are of the opinion that the impugned order deserves to be set aside and is set aside accordingly. Once the Tribunal has granted full waiver atleast in two similarly situated cases, it would not be proper to take a different view and deny full waiver of pre-deposit. Accordingly, we direct waiver of pre-deposit of the amounts in question and stay recovery thereof pending appeal.

10. We make it clear that observations made by us touching the merits of the case are prima facie observations and the Tribunal shall decide the appeal independently on its own merits and in accordance with law.

11. Rule is made absolute in the above terms with no order as to costs.

