

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.07.2015

CORAM:

THE HONOURABLE MR.JUSTICE R.SUDHAKAR
and
THE HONOURABLE Ms.JUSTICE K.B.K.VASUKI

Civil Miscellaneous Appeal No.1236 of 2015
&
M.P.No.1 of 2015

M/s.Aircel Ltd.,
rep. by its Assistant General Manager (Taxation)
CODISSIA Towers, No.7A, Huzur road,
Coimbatore - 641 018.

...Appellant

versus

1. The Commissioner of Central Excise,
Customs & Service Tax,
No.6/7, ATD Race Course Road,
Coimbatore - 641 018.
2. Customs, Excise and Service Tax Appellate Tribunal
South Zonal Bench, Shastri Bhavan,
No.26, Haddows Road,
Chennai - 600 006.

...Respondents

PRAYER: APPEAL under Section 35G of the Central Excise Act against the order dated 20.04.2015 made in Misc.Order Nos.40611 of 2015 in Stay Application No.ST/S/41060/2013 in Appeal No.ST/41425/2013 respectively on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai, against the order of the Customs, Excise and Service Tax Appellate Tribunal, Chennai, in Stay Appln. No. ST/S/2013, against the order of the Commissioner of Central Excise, Customs and Service Tax, 6/7, A.T.D.Street, Race Course Road, Coimbatore - 641 018, dated 10.05.2012 in C.No.V/TCS/15/65/2010 ST ADJ., against the order of the Commissioner of Central Excise, Customs and Service Tax, Coimbatore - 641 018, show cause notice No.023/2010 (Commr.) dated 17.09.2010.

For Appellant : Mr.R.Parthasarathy
For Respondent : Mr.A.P.Srinivas - R1
R2 - Tribunal

C O M M O N J U D G M E N T
(Judgment of the Court was delivered by R.SUDHAKAR, J.)

This Civil Miscellaneous Appeal is filed as against the order of the Tribunal ordering pre-deposit raising the following substantial questions of law:

"1. Whether in the facts and circumstances of the case, the Appellate Tribunal was correct in ignoring the decisions of this Hon'ble Court being the jurisdictional High Court, but following the decision of the Bombay High Court which is passed without considering the decision of the Hon'ble Supreme Court in the case of Jawahar Mills Limited?

2. Whether the Tribunal was right in ordering pre-deposit without considering the pleas of financial hardship raised by the appellant in proper perspective?

3. Whether in the facts and circumstances of the case, the Tribunal was justified in directing the appellant to pre-deposit Rs.12 crores, being the credit of duty paid on tower parts and shelters and on input services used for erection and installation of towers and shelters?

4. Whether in the facts and circumstances of the case, the Appellate Tribunal was right in holding that the appellant did not make out a prima facie case for total waiver of pre-deposit?

5. Whether in the facts and circumstances of the case, the impugned order of the Tribunal is sustainable in law?"

2. Learned counsel appearing for the appellant as well as the learned Standing Counsel appearing for the respondent submit that in an identical circumstance, this Court, by order dated 11.06.2015, disposed of the Civil Miscellaneous Appeals in C.M.A.Nos.192 and 243 of 2015, modifying the pre-deposit ordered by the Tribunal.

3. It is seen that in an identical circumstance, in respect of the same appellant, this Court, by order dated 11.06.2015 in

C.M.A.Nos.192 and 243 of 2015, has considered the issue raised in this appeal and held as follows:

"11. It is seen that the Tribunal in this case, agreed with the contention of the Revenue that the first issue relating to Cenvat Credit on tower and shelter materials is covered by the decision of the Bombay High Court in the case of Bharti Airtel Vs. Commissioner of Central Excise, Pune reported in 2014 (35) STR 865 (Bom.) and that is justified. Insofar as the second issue relating to input services is concerned, it is stated that the said issue is arguable. We find that on this issue, there appears to be a decision of the Andhrapradesh High Court in the case of Commissioner of Central Excise, Visakhapatnam-II Vs. Sai Sahmita Storages (P) Ltd. reported in 2011 (270) E.L.T.33 (AP). In any event, on this arguable issue, the Tribunal, Ahmedabad Bench had earlier granted waiver of pre-deposit in the case of Navratna S.G.Highway Properties Pvt. Ltd. Vs. Commissioner of service Tax, Ahmedabad reported in 2012 (28) STR 166 (Tri.Ahmd.). Therefore, insofar as the claim of cenvat credit in respect of input services of erection, commissioning or installation service and construction services, the appellant had prima facie case on hand.

12. The next contention is relating to financial hardship. It is seen that the appellant had raised a ground of financial hardship stating that the accumulated loss of the appellant company is to the tune of Rs.12,632.40 crores. We find much force in the plea of the appellant regarding undue hardship and financial difficulty in pursuing the appeal on payment of the pre-deposit as ordered by the Tribunal. The same, therefore, requires to be modified considering the prima facie case of the appellant as above.

13. At this juncture, it is apposite to refer to a decision of the Supreme Court in Benara Valves Ltd. v. CCE, (2006) 13 SCC 347, wherein it has been held as under:

"8. 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 legs to stand on, it would be undesirable to require the assessee to pay full or substantive part of the demand. Petitions for stay should not be disposed of in a routine manner unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand. There can be no rule of universal application in such matters and the order has to be passed keeping in view the factual

scenario involved. Merely because this Court has indicated the principles that does not give a licence to the forum/authority to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest. Where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizen's faith in the impartiality of public administration, interim relief can be given.

9. It has become an unfortunate trend to casually dispose of stay applications by referring to decisions in *Siliguri Municipality v. Amalendu Das*, (1984) 2 SCC 436 and *CCE v. Dunlop India Ltd.*, (1985) 1 SCC 260 cases without analysing factual scenario involved in a particular case.

10. Section 35-F of the Act reads as follows:

"35-F. 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 the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, 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 the 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."

11. Two significant expressions used in the provisions are "undue hardship to such person" and "safeguard the interests of the Revenue". Therefore, while dealing with the application twin requirements of considerations i.e. consideration of undue hardship aspect and imposition of conditions to safeguard the interests of the Revenue have to

be kept in view.

12. As noted above there are two important expressions in Section 35-F. One is undue hardship. This is a matter within the special knowledge of the applicant for waiver and has to be established by him. A mere assertion about undue hardship would not be sufficient. It was noted by this Court in S. Vasudeva v. State of Karnataka, (1993) 3 SCC 467 that under Indian conditions expression "undue hardship" is normally related to economic hardship. "Undue" which means something which is not merited by the conduct of the claimant, or is very much disproportionate to it. Undue hardship is caused when the hardship is not warranted by the circumstances.

13. For a hardship to be "undue" it must be shown that the particular burden to observe or perform the requirement is out of proportion to the nature of the requirement itself, and the benefit which the applicant would derive from compliance with it.

14. The word "undue" adds something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant.

15. The other aspect relates to imposition of condition to safeguard the interests of the Revenue. This is an aspect which the Tribunal has to bring into focus. It is for the Tribunal to impose such conditions as are deemed proper to safeguard the interests of the Revenue. Therefore, the Tribunal while dealing with the application has to consider materials to be placed by the assessee relating to undue hardship and also to stipulate conditions as required to safeguard the interests of the Revenue."

14. For the foregoing reasons, we pass the following order:

- (i) On the questions of law raised, we are of the view that the Tribunal was not justified in ordering the pre-deposit in the manner stated in its order dated 20.11.2014;
- (ii) Consequently, the order of the Tribunal dated 20.11.2014 is modified to the effect that the appellant shall make a pre-deposit of Rs.6,65,81,395/-, which is relatable to credit denied on capital goods; and
- (iii) It is made clear that the appellant shall make a predeposit of 50% of Rs.6,65,81,395/- within a period of four weeks from the date of receipt of a copy of this order and the balance 50% shall be made within a period of four weeks thereafter and subject to such compliance, the pre-deposit of balance amount demanded shall remain waived and its

collection shall stand stayed during the pendency of the appeal before the Tribunal.

4. It is relevant to note that except the demand raised in this matter, other facts in the present appeal and the one decided by this Court are one and the same and there is no dispute in this regard. The issues raised in this appeal are also no different from the one decided by this Court in C.M.A.Nos.192 and 243 of 2015 dated 11.06.2015. It is to be noted that the demand raised in this matter with regard to the cenvat credit on tower and shelter material is Rs.10,39,78,568/- and with regard to the cenvat credit on input services related to towers and shelters is Rs.5,65,16,665/-.

5. We, therefore, following the above-said decision of this Court, pass the following order:

(i) On the questions of law raised, we are of the view that the Tribunal was not justified in ordering the pre-deposit in the manner stated in its order dated 20.04.2015;

(ii) Consequently, the order of the Tribunal dated 20.04.2015 is modified to the effect that the appellant shall make a pre-deposit of Rs.10,00,00,000/-, (Rupees ten crores only) which is relatable to credit denied on capital goods; and

(iii) It is made clear that the appellant shall make a pre-deposit of Rs.10.00 crores in three instalments, i.e., Rs.4.00 crores (Rupees four crores only) on or before 31.07.2015; Rs.3.00 crores (Rupees three crores only) on or before 31.08.2015 and the balance Rs.3.00 crores (Rupees three crores only) on or before 30.09.2015 and subject to such compliance, the pre-deposit of balance amount demanded shall remain waived and its collection shall stand stayed during the pendency of the appeal before the Tribunal.

In the result, this appeal is ordered in the above terms. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS-II)

//True Copy//

Sub Assistant Registrar

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To

1. The Commissioner of Central Excise,
Customs & Service Tax,
No.6/7, ATD Race Course Road,
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RV (CO)
PSI (22.07.2015)



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