

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.06.2015

CORAM:

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

Civil Miscellaneous Appeal Nos.192 and 243 of 2015
&
M.P.Nos.1 and 1 of 2015

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

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 in both C.M.As

PRAYER: APPEALS under Section 35G of the Central Excise Act against the order dated 20.11.2014 made in Misc.Order Nos.42011&42012/2014 dated 20.11.2014 in Stay Application Nos.ST/S/40892/2013 & ST/S/40527/2014 in Appeal Nos.ST/41235/2013 & ST/40350/2014 respectively on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

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

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

The above Civil Miscellaneous Appeals are 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 Hon'ble 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.8 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. The brief facts of the case are as follows:

The appellant is engaged in the services of providing cellular telecommunication service. The appellant availed credit on input services under the category of 'Erection, Installation and Commissioning' and 'Commercial or Industrial Construction', which are used for erecting and installing the towers and cell sites at various places. The appellant also availed credit of excise duty on inputs and capital goods used for providing output service including part of towers and shelter/prefabricated buildings. The credit so availed on input services and capital goods is utilized for payment of service tax on output service.

3. Two show cause notices were issued for the period April 2010 to March 2011 and April 2011 to March 2012 proposing to disallow

cenvat credit pertaining to input services relating to erection and installation of the towers, shelters and construction services and on capital goods pertaining to towers and shelter materials. It also proposes to impose penalty and interest.

4. The said show cause notices were rebutted by the appellant/assessee, however, the Adjudicating Authority upheld the demand in the following manner:

Period	April 2010 to March 2011	April 2011 to March 2012 (Rs.)	Total (Rs.)
Credit denied on input services of Erection installation and commissioing services and construction services	10,84,20,979/-	1,40,09,596/-	12,24,30,575/-
Credit denied on capital goods	6,59,11,023/-	6,70,372/-	6,65,81,395/-
Total	17,43,32,002/-	1,46,79,969/-	18,90,11,970/-

5. Aggrieved by the order of the Adjudicating Authority, the assessee filed appeals before the Tribunal along with applications for waiver of pre-deposit. That applications were decided by the Tribunal by a common Order dated 20.11.2014 in the following manner:

"5. After hearing both sides, we find that the decision of the Hon'ble Madras High Court as stated by the learned Advocate is in the context of eligibility of CENVAT Credit on capital goods, namely, of various items used in civil construction, which is absolutely necessary for establishing manufacturing units of cement. We find that the eligibility of CENVAT credit on input, input services and materials depending upon each facts of the case. But the Hon'ble Bombay High Court directly on the issue before us held in favour of the Revenue on the first issue of denial of CENVAT Credit on tower and civil material. The learned Advocate on the second issue emphasized that the Tribunal in the case of Navaratna S.G. Highway Properties Pvt. Ltd. (supra) held that input service credit on Construction or Renting of Immovable Property would be eligible. In that case, the Tribunal

followed the decision of the Hon'ble Andhra Pradesh High Court in the case of Commissioner Vs. Sai Storage Pvt. Ltd. reported in 2011 (23) S.T.R. 341 (A.P.).

6. Prima facie, we find that the first issue is no longer in favour of the applicant and the issue no.2 is an arguable matter. In view of the above discussion and considering the submission of both sides and the plea of financial hardships, we direct the applicant to make a pre-deposit of Rs.8,00,00,000 (Rupees Eight Crores) within a period of eight weeks. Compliance to be reported on 22nd January, 2015."

6. Aggrieved by the order of the Tribunal ordering pre-deposit, the appellant is before this Court.

7. Mr.R.Parthasarathy, learned counsel appearing for the appellant/assessee contended that with regard to the first issue relating to denial of cenvat credit on tower and shelter material, the Bombay High Court in the case of Bharti Airtel Vs. Commissioner of Central Excise, Pune reported in 2014 (35) STR 865 (Bom.) held against the assessee. He relied on the other decisions of the Madras High Court to canvass the issue in favour of the assessee. With regard to the second issue relating to benefit of cenvat credit on input services on erection, commissioning of installation service and construction service, learned counsel relied upon the 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) and the decision of the Ahmedabad Bench Tribunal 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.) and submitted that the assessee is entitled to cenvat credit.

8. The next contention of the learned counsel appearing for the appellant is that the appellant is facing financial hardship. In support of this plea, he relied upon the grounds raised before the Tribunal, wherein it was stated that the accumulated loss is Rs.12,632.40 crores. The grievance of the appellant is that the Tribunal did not consider the said loss and ordered pre-deposit. He relied on the decision of the Tribunal granting full waiver of pre-deposit in respect of the assessee's own case in Miscellaneous Order No.42453 to 42456 of 2013 dated 09.10.2013. Hence, he submitted that the order of the Tribunal may be set aside.

9. Per contra, learned Standing Counsel appearing for the first

respondent submitted that the tower should not be treated as excisable goods and hence the materials used in erection of such towers/shelters are not eligible to be treated as inputs for the purpose of availing Cenvat Credit. He further submitted that tower could not be considered as telecom equipment or as part of any telecom equipment. It is basically a structural support to certain equipment and is not used in the premises of the provider of output service. He also submitted that the erection, commission and installation and constructions are not related to output services of telecom services provided by the assessee. Hence, the assessee had incorrectly availed the Cenvat Credit on inputs services used in relation to towers and shelters. On a total demand of 18.90 crores, the Tribunal had only ordered pre-deposit of Rs.8.00 crores, which is less than 50% of the demand. He further submitted that the issue is squarely 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.). Hence, he submitted that the order of the Tribunal may be confirmed.

10. Heard learned counsel appearing for the appellant/assessee and the learned Standing Counsel appearing for the Revenue and perused the materials placed before this Court.

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.

In the result, these appeals are ordered in the above terms. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/- सतगमने नयते
Assistant Registrar (CO)

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Sub Assistant Registrar

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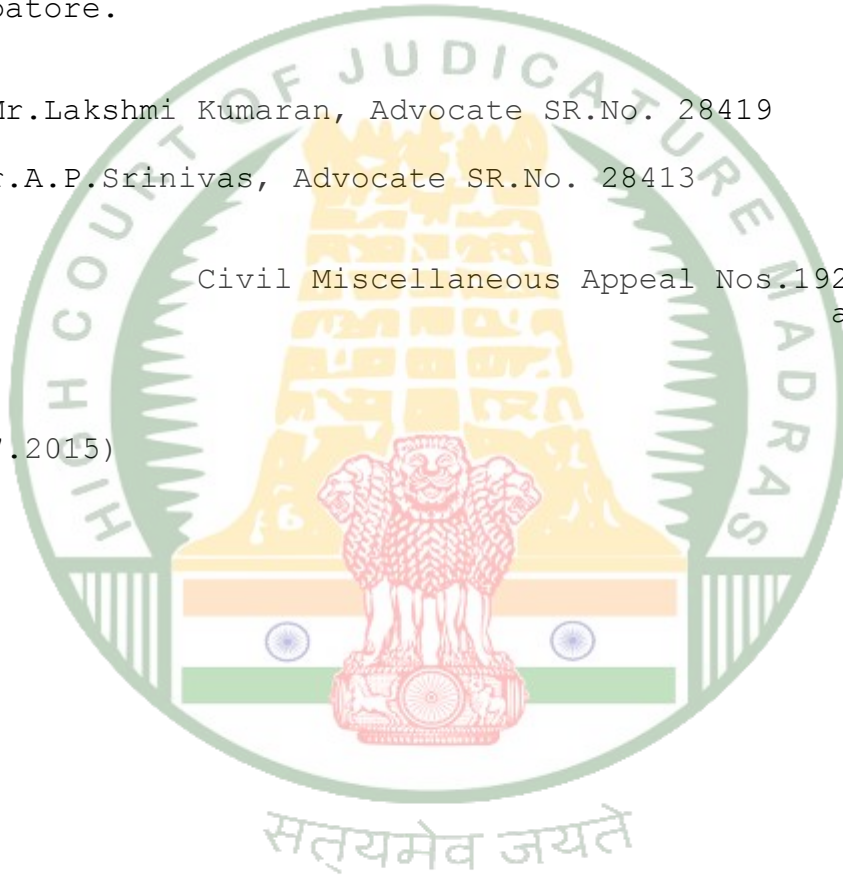
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2 CCs to Mr.Lakshmi Kumaran, Advocate SR.No. 28419

1 CC to Mr.A.P.Srinivas, Advocate SR.No. 28413

Civil Miscellaneous Appeal Nos.192 and 243 of 2015
and connected MPs

SAI (CO)
PSI (13.07.2015)



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