THE HON’BLE THE CHIEF JUSTICE SRI KALYAN JYOTI SENGUPTA
AND
THE HON’BLE SRI JUSTICE SANJAY KUMAR

C.E.A.No.10 of 2015

DATED:10.02.2015

Between:
M/s. ABC Engineering Works,
Vijayawada.

… Appellant

And

Commissioner of Central Excise,
Guntur.

….Respondent

THE HON'BLE THE CHIEF JUSTICE SRI KALYAN JYOTI SENGUPTA
AND
THE HON'BLE SRI JUSTICE SANJAY KUMAR

C.E.A. No. 10 of 2015

Judgment: (per the Hon'ble the Chief Justice Sri Kalyan Jyoti Sengupta)

This appeal is admitted on the following substantial question of law.

> 1. Whether the learned Tribunal failed to exercise its jurisdiction though the prima facie case of financial hardship with the material document was read out and not considered the element of hardship as framed under the law ?

We have heard learned counsel for both the parties.

We are in disagreement with the finding of the learned Tribunal that financial hardship is not a criteria for considering the prayer for waiver of pre-deposit of Service Tax. It is wrong to hold that only the prima facie case is the criteria in the matter of waiver of pre-deposit. By virtue of Section 86(7) of Service Tax, the provision of Section 35-F of the Central Excise Act is applicable. We therefore set out both the provisions of the law.

Section 86(7) of the Service Tax :

> "Subject to the provisions of this Chapter, in hearing the appeal and making orders under this Section, the Appellate Tribunal shall exercise the same powers and follow the same procedure as it exercises and follows in

hearing the appeals and making orders under the Central Excise Act, 1944 (1 of 1944)."

Section 35-F of the Central Excise Act, 1944 :

"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 of 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 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."

It will appear from the first proviso of Section 35-F of the Central Excise Act, that the appellate authority has to consider the question of undue hardship in case of waiver of pre-deposit. This consideration not only confined to the penalty levied, but also to the duty as well. According to us, undue hardship would also include financial hardship as well, for, if the assessee can establish that he does not have any means, the aforesaid protection of law should be made applicable.

It appears, the learned Tribunal, as rightly contended by the learned counsel for the appellant has not considered this aspect at all. Hence, we set aside the impugned order of the learned Tribunal and restore the application for waiver of pre-deposit to its file and direct the learned Tribunal to decide the application for waiver of pre-deposit along with the materials submitted on the ground of financial hardship recording reasons. Let this entire exercise be completed within one month from the date of communication of this order.

The appeal is accordingly allowed.

K.J. SENGUPTA, CJ

SANJAY KUMAR, J

10th February, 2015

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