

THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

STA No.34 of 2014 (O&M)

Reserved on: 14.05.2015

Date of decision: 29.05.2015

M/s Kapsons Electro Stampings

....Appellant

Versus

Commissioner of Central Excise & another

.....Respondents

**CORAM: HON'BLE MR.JUSTICE S.J.VAZIFDAR, ACTING CHIEF JUSTICE
HON'BLE MR.JUSTICE G.S.SANDHAWALIA**

Present: Mr.Jagmohan Bansal, Advocate, for the appellant.

Mr.Sunish Bindlish, Advocate, for the respondents.

G.S.Sandhawalia J.

1. The instant appeal, filed under Section 83 of the Finance Act, 1994 (for short the 'Finance Act') read with Section 35 G of the Central Excise Act, 1944 (for short, the 'Act'), is directed against the order dated 20.11.2014 (Annexure A-13), passed by the Customs, Excise & Service Tax Appellate Tribunal, New Delhi (for short, the 'Tribunal'). Vide the said order, the Tribunal has refused to interfere in the order of the Commissioner (Appeals) dated 31.01.2013 (Annexure A-10) wherein pre-deposit on the entire amount was ordered, during the pendency of the first appeal.

2. The questions of law that arises for consideration is as under:

“a) Whether in the light of amended Section 35F order to deposit entire amount of adjudicated service tax is justified?

b) Whether order passed by the Id. Tribunal is perverse and contrary to facts and circumstances of the case?

c) Whether the impugned order is justified when the appellant has strong prima facie case on merits?”

3. The reasoning given by the Tribunal was that the rent note executed by the appellant showed that the building, plant and machinery along with other infrastructure had been rented out and therefore, fell within the renting of immoveable property and was, thus, exigible to service tax.

4. A perusal of the paperbook would show that a show cause notice dated 19.06.2009 was issued to deposit the service tax amounting to ₹10,28,160/- along with interest on account of the fact that during the audit conducted on M/s Kapsons Industries, Jalandhar, it was found that lease deed had been entered into on 01.04.1997 (extended on 29.03.2001) for leasing out plant and machinery, equipments, jigs and fixtures, dies, office equipments, furniture and fittings to the said unit ₹7,00,000/- per month being the lease amount, out of which, ₹55,000/- was allegedly for the land and building and the balance was for the use of other facilities. Accordingly, the appellant was asked to send the deposit particulars along with the documentary evidence and pay service tax upto 30.06.2009. On 10.08.2009, the appellant submitted the details of the lease/rent receipts from 01.04.2008 to 30.06.2009 and vide notice dated 30.05.2011 (Annexure A-6), it was asked to deposit the service tax of ₹46,04,320/- along with interest. The final audit report further raised various dues and violations which had been made by the appellant.

5. Accordingly, an order dated 15.12.2011 (Annexure A-9) was passed by the Adjudicating Authority, wherein a finding was recorded that a sum of ₹2,80,00,000/- had been received as rent and the service tax liability was worked out at ₹31,86,820/- as the appellant had not got himself registered nor paid service tax and there was violation of Section 68, 69, 70, 73(1) of the Finance Act read with Rule 7(4) of the Service Tax Rules, 1994. Accordingly, the extended

period under Section 73(1) of the Act was invoked and it was held that it was also liable to pay interest on the evaded service tax, apart from the demand of ₹31,86,820/- along with penalty of ₹200/- per day, during which, such failure continued, apart from the penalty of ₹5000/- and an equivalent penalty also under Section 78.

6. The appellant filed an appeal before the Commissioner (Appeals) and filed an application praying for waiver of the penalty as prescribed under Section 35F of the Act. The plea taken that the service tax was not liable to be paid since the rent amount had been divided into two heads, one of land and building and the other for plant and machinery, was rejected as the same had never been disclosed during the audit. The plea that the demand was time barred was also rejected as the fact had never been disclosed to the Department on its own and was only detected by the audit team. In the absence of any undue hardship, the Commissioner (Appeals), directed the appellant to pay the entire amount of service tax confirmed against it and waived off in full the requirement of pre-deposit of interest and penalties imposed under the impugned order. The said amount was to be deposited within 15 days. The appellant, thereafter, challenged the said order by filing CWP No.4800 of 2013, which was disposed of with the observations that an appeal should be filed before the Tribunal. Resultantly, the impugned order has been passed whereby the Tribunal has declined to interfere in the discretion exercised by the Commissioner (Appeals).

7. Counsel for the appellant has vehemently submitted that the order impugned whereby there was reference to the valuation of the plant and machinery on one side and the value of the land and building on the other, has been taken on a exaggerated basis whereas the approved valuer's report only showed an amount of ₹72,26,186/-. It was, accordingly, submitted that the rent was not in ratio to the value of the assets of plant and machinery and that the

Commissioner (Appeals) was not justified by denying the relief regarding the pre-deposit.

8. Counsel for the revenue, on the other hand, supported the order and submitted that the discretion exercised was not lightly to be interfered with and under the provisions of the Act, the service was taxable and only on account of the audit of M/s Kapsons Industries, the factum of the violation had been detected and in such circumstances, no question of law arises which would require consideration by this Court.

9. The unamended provisions of Section 35F of the Act provide that the Appellate Tribunal should take into account the factum of undue hardship of the appellant and may dispense with such deposit, subject to the conditions it may deem fit, to impose, so that the interest of the Revenue can be safeguarded. The said provisions read as under:

“SECTION 35F. 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 revenue.”

10. In the present case, as noticed, the renting of immovable property had been brought in to the service net w.e.f. 01.06.2007 vide notification dated 22.05.2007. The explanation to Section 65(90a) of the Finance Act provide that renting of immovable property includes use of immovable property, factories,

office buildings, warehouses plus for use in the course or furtherance of business or commerce. Sub-section (105)(zzzz) also provides that taxable service means providing of any service by renting of immoveable property. The argument that as per the amended lease deed dated 29.03.2011, the building was only let out for ₹55,000/- per month and the rest of the amount was only on account of the rent of the immoveable plant and machinery, which was moveable and not covered under the Act, *prima facie*, cannot be accepted. The Adjudicating Authority has noticed that a consolidated ledger account is being maintained and that there is no break-up for the different heads of land and building and the plant machinery and the agreement dated 29.03.2011 was not registered under the Registration Act, 1908. The Commissioner (Appeals) has, *prima facie*, considered the stand of the appellant and granted the benefit of waiver regarding the pre-deposit of interest and penalties imposed and noticed that there was no undue hardship.

11. The amended rent deed whereby the rent was fixed at ₹7,00,000/- per month, which was divided into two accounts, for land and building to the tune of ₹55,000/- and ₹6,45,000/- for the use and other facilities, does not show any details as to which of the plant and machinery had been leased out for the huge rental of ₹6,45,000/- per month. Relevant portion of the agreement reads as under:

“In consideration of the sum of Rs. 10.00 Lacs (Rupees Ten Lacs only) paid as interest free deposit by the Lessee to the Lessor (receipt whereof the Lessor hereby acknowledge) and in consideration of the Lease Rent hereby reserved and pursuant to the covenants agreed to between the parties and hereinafter after mentioned “The Lessor” hereby conveys, grants and dismiss by way of lease, the plant & machinery, equipments, jigs & fixtures, Dies, office equipments, furniture and fittings and other infrastructural facilities as particularly described in the schedule attached hereto together with all attachments, whatever belonging to and hereto together with all attachments, whatsoever belonging to and hereto enjoyed by the Lessor unto 'The Lease' from, the first

day of April, 1997 for a period of ten years during which period 'The Lessee' shall pay the sum of Rs. 7,00,000 (Rupees Seven Lacs only) per month as divided into Rs. 55,000.00 (Rupees fifty five thousand only) per month for the use of land & building and the balance of Rs. 6,45,000.00 (Rupees six lacs forty five thousand only) per month for the use of all other facilities as rent w.e.f. 1st April, 2001 in advance on or before the 10th of the month aforementioned in each year at the office or the premises as 'The Lessor' may require or fix in this behalf from time to time."

12. Counsel for the appellant has admitted that the property is spread over one acre of land in Jalandhar and in such circumstances, the submission that it was not covered under the definition of immovable property and does not come within the ambit of service tax, cannot be accepted. This Court would not interfere in the discretion which has been exercised by the authorities under the Act, in view of the facts and circumstances of the present case. The authorities were able to detect the amount of evasion of tax on the basis of the audit conducted on a sister concern and the extended period of limitation had been invoked. Under Section 35G of the Act, this Court would only interfere if there is a substantial question of law involved and the appeal is only to be heard on the questions so formulated. Admittedly, the adjudicating order was passed on 15.12.2011, well before the amendment came on 06.08.2014 and even the order of the Commissioner (Appeals) was passed on 31.01.2013, well before the amendment and therefore, question No.1 does not arise in the facts of the case.

13. Keeping in view the above discussion, this Court is of the opinion that the substantial questions of law which have been raised by the appellant, do not arise for consideration of this Court in an appeal against an order of pre-deposit. The issues raised require consideration at the hearing of the appeal. Moreover, needless to clarify that the observations herein and in the impugned order would not affect the parties at the hearing of the appeal.

14. In such circumstances, this Court is not inclined to interfere with the discretion which has been exercised and where the benefit of pre-deposit has been restricted to a reasonable amount, in favour of the appellant. However, since an interim order had been passed in favour of the appellant on 24.12.2014 that the appellant would deposit a sum of ₹8 lacs towards service tax, which is stated to have been deposited, liberty is granted to the appellant to deposit the balance outstanding amount within a period of 2 months, from the date of this order.

15. The appeal is, accordingly, dismissed.

(S.J.Vazifdar)
Acting Chief Justice

(G.S.Sandhawalia)
Judge

29.05.2015
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