IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.273 of 2016

==

Bihar State Sugar Corporation Limited, a Government Company incorporated under the Companies Act, 1956 having its registered office at Sugar Cane Industry Department, New Secretariat, Patna through its Managing Director.

.... **Petitioner**

Versus

1. Union of India through the Commissioner, Central Excise and Service Tax, Revenue Building, Bailey Road, Patna- 800001.
2. The Customs, Excise & Service Tax, Appellate Tribunal, East Regional Bench, 169, ACJ Bose Road, 7th Floor, Bamboo Villa, Kolkata- 700014 through its Registrar.

.... **Respondents**

==

Appearance :
For the Petitioner/s : Mr. Satyabir Bharti, Advocate
For the Respondent/s : Mrs. Nivedita Nirvikar, Advocate .

==

CORAM: HONOURABLE THE ACTING CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH

CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH)
Date: 04-07-2016

The petitioner seeks quashing of the order, dated 10.4.2015 passed by the Customs, Excise and Service Tax Appellate Tribunal, East Regional Bench, Kolkata, in Service Tax Appeal No.ST/76194 of 2014, whereby the appeal, preferred by the petitioner, under Section 35B of the Central Excise Act, 1944, was dismissed for non-compliance of the amended provisions of Section 35F (as amended by Finance Act 2 of 2014, dated 6.8.2014, requiring pre-deposit of 7 ½% of the Duty demanded or penalty imposed or both) of the said Act. The petitioner has also prayed for holding and declaring that the requirement of mandatory pre-deposit of 7 ½% of Duty, so demanded under the amended provisions of Section 35F, would have no retrospective operation and will not apply to such cases, wherein the right to file an appeal, under section 35B of the Central Excise Act, 1944, has accrued prior to the date, when the amended provisions came into force on 6.8.2014. A further prayer has been made to direct the Appellate Tribunal to hear the stay application preferred by the petitioner and to decide the appeal on merit without insisting on pre-deposit of 7 ½% of the duty/penalty as demanded by the order in appeal.

2. The petitioner is a Government company and is incorporated under the Companies Act, 1956 to manage, operate and control the loss making Sugar and Distillery Unit under the supervision of the Government of Bihar.

3. By the Bihar Sugar Undertakings (Acquisition) Act, 1985, various Sugar Industries, in the districts of Gopalganj, West Champaran, East Champaran and Muzaffarpur, were acquired and taken over by the Government of Bihar. In order to revive the closed Sugar Cane factories, the State Government invited tenders for lease of closed sugarcane units of Bihar State Sugar Corporation Limited on long term lease of 60 years. On the lease so executed, the Service tax was imposed. The Commissioner, Central Excise and Service Tax, Patna, by the impugned order, dated 23/26.5.2014, demanded Service

Tax of Rs. 14,59,61,300.00. Being aggrieved, the petitioner filed an appeal before the Customs, Excise and Service Tax Appellate Tribunal, East Regional Bench, Kolkata, under Section 35B of the Central Excise Act, on 20th August, 2014.

4. However, the Appellate Tribunal by order, dated 10.4.2015, dismissed the appeal as the petitioner failed to deposit 7 ½% of the duty/penalty as required under the amended provisions of Section 35F, which came into force, on 6.8.2014, much before filing of the appeal.

5. The petitioner submits that under the unamended Section 35F of the Central Excise Act, there was no requirement to deposit any amount as duty/penalty prior to filing of appeal. However, for the first time, in view of the amended provisions, a pre-deposit of 7 ½% of duty was required w.e.f. 6.8.2014.

6. The main contention of the petitioner is that the amended provisions would not apply to such cases, where right to appeal has accrued on 26.5.2014 i.e., prior to date on which the amended provisions came into force i.e., 6.8.2014. In the case of the petitioner, the right to appeal accrued on 26.5.2014, the date of order of demand of service tax on which date there was no requirement to make a pre-deposit of delay under section 35F, which was amended only on 6.8.2014 making a pre-deposit of 7 ½% of duty as a condition

precedent for filing of an appeal. Hence, according to the petitioner, its right to appeal has accrued prior to 6.8.2014 and, as such, no mandatory pre-deposit of 7 ½% of duty can be insisted upon. Such liability would occur only in the cases, where the order in appeal has been passed subsequent to 6.8.2014. The petitioner, in support of his submission, has relied upon the decisions of the Supreme Court in the case of ***Nahar Industrial Enterprises Limited vs. Hong Kong and Shanghai Banking Corporation, reported in (2009) 8 SCC 646,*** and ***Garikapati Veeraya v. N. Subbiah Choudhry (A.I.R. 1957 SC 540).***

7. On the other hand, learned counsel for the Union of India opposes the writ application and submits that no appeal, under section 35B, can be entertained unless a pre-deposit of duty/penalty is deposited in accordance with the amended Section 35F of the Central Excise Act.

8. We have heard learned counsel for the parties.

9. The amended provisions of Section 35F states, in clear terms, that no appeal shall be entertained by the Tribunal or the Commissioner (Appeals) under sub-section (1) of Section 35 or under sub-section (1) of Section 35B unless a pre-deposit of duty/penalty is deposited in accordance with the amended Section 35F of the Central Excise Act. As per the provisions, the amended provisions were not applicable only in two circumstances, namely, (a) the amount required

to be deposited shall not exceed rupees ten crores and (b) it shall not apply to stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

10. Neither the amended Section nor its proviso states that the rigor of Section would not apply to cases, where right to appeal had accrued prior to 6.8.2014, but not preferred or availed of. The petitioner could have filed the appeal before the amended provisions came into force on 6.8.2014, but it did not avail the opportunity and, as such, it cannot claim, now, exemption on the ground that its right to appeal had accrued prior to the amended provision. Reliance, placed by the petitioner in the case of ***Nahar Industrial Enterprises Limited (supra)*** and in the case of ***Garikapati Veeraya (supra)***, would be of no help as no vested right of appeal has been taken away, but the same has been regulated under the law by incorporating amendment in old provisions.

11. It is, therefore, clear that there is no infirmity, in the order of the learned Appellate Tribunal, in not entertaining the appeal *dehors* the pre-deposit of 7 ½% of duty/penalty. However, in the facts and circumstances of the present case, we grant liberty to the petitioner to move afresh the learned Appellate Tribunal along with petition, seeking condonation of delay, after pre-deposit of required duty/penalty. In case the petitioner files an appeal, the respondents

shall condone the delay in filing the appeal inasmuch as the petitioner was pursuing its remedy before this Court under writ jurisdiction.

12. With the aforesaid observations and directions, this writ application stands disposed of.

13. No order as to costs.

(Samarendra Pratap Singh, J)

I. A. Ansari, ACJ: I agree

(I. A. Ansari, ACJ)

Md. Jamaluddin Khan

AFR/NAFR	NAFR
CAV DATE	21-06-2016
Uploading Date	11-07-2016
Transmission Date	11-07-2016