THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN
AND
THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

C.E.A.NO. 4 OF 2016

ORDER: *(Per Hon'ble Sri Justice M.Satyanarayana Murthy)*

The assessee filed this appeal under Section 35G of the Central Excise Act, 1944 challenging the order passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Bengalore bearing interim order No.152 of 2015 in Appeal No.ST/3612/2015 dated 05.08.2015.

The parties to the appeal are hereinafter referred to as "assessee" and "department" for convenience sake.

The assessee is a holder of service tax registration No.AAFFA7383KST001 under Section 69 of the Finance Act, 1994 for payment of service tax. The assessee, a partner ship firm, is carrying on business of 'Site Preparation Services' to M/s Singereni Colleries Company Limited and 'Survey and Exploration Services' to M/s Oil and Natural Gas Corporation (ONGC). Apart from these two, the assessee providing services to certain other customers also for consideration. The services provided by the appellant fall under Section 65 (97a) and the same are liable for service tax under Section 65 (105) (zzza) of the Act from 16.06.2005.

For the period 2007 - 2008 to 2010 - 2011, the adjudicating authority, vide its order dated 28.09.2012 bearing original No.91/2012 directed the appellant to deposit a sum of Rs.11,73,95,057/- towards short payment of the service tax along with interest thereon since the petitioner deposited only Rs.1.98

crores towards service tax payable for the said period.

Aggrieved by the order of adjudicating authority, an appeal was preferred by the assessee raising several contentions more particularly contending that the claim of the department is barred by limitation since notice was issued beyond one year. During the pendency of the appeal, assessee sought for waiver of pre-deposit by filing a separate application as the assessee has already paid Rs.1.98 crores towards service tax for the period in dispute. The assessee also furnished copies of the income tax returns, profit & loss account statements and balance sheets for the periods ending on 31.03.2009, 31.03.2010 and 31.03.2011 before the tribunal to establish its financial difficulties as the assessee was incurring loss continuously for the period in dispute.

The Tribunal while dealing with the said application of the assessee, concluded that the assessee has failed to establish *prima facie* case and dismissed the said application on the ground that the assessee failed to prove undue hardship. Questioning the same, the assessee preferred C.E.A.No.10 of 2015, the same was allowed by this Court on 10.02.2015 directing the Tribunal to decide the application for waiver of pre-deposit, afresh. In pursuance of the direction issued by this Court, the Tribunal passed the impugned order on 05.08.2015 directing the assessee to deposit further sum of Rs.4.00 crores within 12 months from the date of passing the order. The Tribunal did not consider the income-tax returns and other material produced before it in proper perspective and passed the impugned order by ignoring the material on record.

The order is challenged on various grounds mainly contending that the Tribunal did not consider the financial hardship, which is a primary requirement to waive the pre-deposit.

Though sufficient material was produced before the Tribunal, the Tribunal erroneously concluded that the current assets and the provision covering the current liabilities are more than the required pre-deposit and declined to waive pre-deposit of service tax.

At the stage of admission, the matter was heard. During hearing, learned counsel for the assessee Sri A.V.A.Siva Kartikeya would contend that the assessee cannot sell the property for pre-deposit of the amount as the assessee is in financial difficulties and the Tribunal without considering the profit & loss account statements, balance sheets erroneously passed the impugned order. It is further contended that since the assessee is running in loss for the past few years, it is not in a position to deposit the amount as directed by the Tribunal and it is an arduous task for the assessee to meet such demand and the assessee would face 'undue hardship' in case the pre-deposit is not waived as per the proviso to Section 35-F of the Central Excise Act, 1944 and prayed to allow the appeal by setting aside the order passed by the Tribunal, which is under challenge in the appeal.

Considering specific contention of the assessee and the material on record including the order under challenge the point that arises for consideration is

> ***"whether the assessee would suffer undue hardship if the pre-deposit under Section 35-F of the Central Excise Act, 1944 is not waived in Appeal No.ST/3612/2015?"***

The main grievance of the assessee is that the business of the assessee is running in loss and if pre-deposit is not waived, the assessee would be put to undue hardship. The assessee is undoubtedly a partnership firm, whose liability is joint and several and the partners are also liable for payment of the debts due and

statutory liabilities to the department including the respondent herein as per Section 25 of the Partnership Act.

According to Section 35-F of the Central Excise Act the assessee is under obligation to make pre-deposit of disputed service tax unless it is waived. According to proviso to Section 35-F of the Central Excise Act, 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. According to the proviso, it is the obligation of the authorities to protect the interest of revenue while waiving the pre-deposit and the pre-deposit may be waived subject to proof of “undue hardship” that would be suffered by the assessee. In the present facts and circumstances, the Tribunal directed to deposit a sum of Rs.04.00 crores in compliance of Section 35-F of the Central Excise Act. Therefore, to claim waiver of pre-deposit, it is for the assessee to establish that the assessee would be put to undue hardship, if pre-deposit is not waived.

Section 35-F of the Central Excise Act and Section 129-E of the Customs Act makes pre-deposit mandatory in order to avail the remedy of an appeal before the CESTAT. The first proviso, an exception to the general rule, conferred power on the CESTAT, to dispense with such deposit "**subject to such conditions as may be imposed so as to safeguard the interests of revenue**" if the demand "would cause undue hardship."

Thus, it is evident from the proviso to Section 35-F of the Central Excise Act and Section 129-E of the Customs Act, it is the

duty of the assessee to establish that if pre-deposit is not waived, the assessee would be put to undue hardship. While granting such waiver of pre-deposit, the authorities concerned must keep in mind, the interest of revenue also (**The Commissioner of Central Excise, Guntur Commisionerate, Guntur v. M/s. Sri Chaitanya Educational Committee, Poranki, Vijayawada, represented by its Managing Director**[1]).

In **"Indu Nissan Oxo Chemicals Industries Limited v. Union of India**[2]**"** and in M/s. Sri Chaitanya Educational Committee, Poranki, Vijayawada's case (referred supra), it is made clear that the petitions for stay should not be disposed of as a matter of routine, unmindful of the consequences flowing from the order requiring the appellant to deposit full or a part of demand. Therefore, assessee has to made out a *prima facie* case, but that itself would not justify passing of interim order of waiver of pre-deposit. But if, on a cursory glance, it appears that the demand raised has no legs to stand, it would be undesirable to require the appellant to pay the full or a substantial part of the demand. There can be no rule of universal application in such matters, and the order should be passed keeping in view the factual aspects involved in the case. The Tribunal does not have the license 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 citizens faith in the impartiality of public administration, interim relief can be granted.(**Benara Valves Ltd. v. Commissioner of Central Excise**[3] and M/s. Sri Chaitanya Educational Committee, Poranki, Vijayawada's case (referred supra)).

At the same time, besides proof of *prima facie* case; balance of convenience and irreparable loss must also be taken in to consideration by the Tribunal or the authorities concerned to safeguard the interest of the revenue and impose certain conditions as my be

required as held in "***Union of India v. Adani Exports Limited***[4]"

Before adverting to the facts of the case, it is appropriate to advert to the requirement specified in proviso to Section 35-F of the Central Excise Act and Section 129-E of the Customs Act, 1952. The basic requirement to waiver of pre-deposit is 'undue hardship' to such person.

The word 'undue hardship' is not defined either under Customs Act or Central Excise Act. But the word "undue" means - More than necessary; wrongful, illegal, improper, wrong, unconscionable, immoderate, gratuitous, exorbitant, disproportionate, excess, redundancy. Similarly the word "hardship" means - Privation, suffering (hardship resulting from the regulation). Ordeal, adversity, oppression, woe, grief, unhappiness, agony, misery, difficulty, travail, misfortune, tribulation, burden, encumbrance, trial, torment, stress, cross, peril, blow, severity, desolation, harm, damage, casualty, deprivation, grievance, bane, destitution, suffering, pain as per West's Legal Thesaurus/Dictionary.

If both the words 'undue and hardship' are read conjointly, it is nothing but more than necessary suffering or exorbitant or difficulty. This Court, while dealing with the similar issue in batch of Appeals C.E.A.No.45 of 2015 and batch (B.Hima Bindu v. Commissioner of Customs) held that while considering the application, seeking waiver of pre-deposit, these twin requirements should be kept in view. Use of the word "undue" would mean something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant. Undue means something which is not merited by the conduct of the claimant, or is disproportionate to it. For a hardship to be undue, it must be shown that the burden to observe or to perform

is out of proportion to the nature of the requirement, and the benefit which the applicant would derive from its compliance. Undue hardship is a matter within the special knowledge of the applicant, and must be established by him. A mere assertion of undue hardship would not suffice. The expression "undue hardship" is, ordinarily, related to economic hardship. The Tribunal is required to consider the question whether or not a direction to deposit the amount would cause undue hardship. Without considering the said question, it cannot go into the merits of the appeal itself. (***Bhavya Apparels (P) Ltd. v. Union of India***[5];)

Thus, it is clear from the law declared by the Apex Court and this Court in this regard, it is for the assessee to prove his financial condition as on the date of demand since it is within his exclusive knowledge and at the same time the Tribunal has to protect the interest of the revenue, while waiving the pre-deposit in view of the proviso to Section 35-F of the Central Excise Act.

While dealing with such applications for stay, the Tribunal has to exercise its discretion judiciously and keeping in mind the principles laid down in M/s Sri Chaitanya Educational Committee, Poranki, Vijayawada's case, which are as follows.

1. The applications 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;
2. Three aspects to be focused while dealing with the applications for dispensing of pre-deposit are: (a) prima facie case, (b) balance of convenience, and (c) irreparable loss;
3. Interim orders ought not to be granted merely because a prima facie case has been shown;
4. The balance of convenience must be clearly in favour of making of an interim order and there should not be the slightest indication of a likelihood of prejudice to the interest of public revenue;

5. While dealing with the applications twin requirements of consideration i.e., consideration of undue hardship, and imposition of conditions to safeguard the interests of revenue have to be kept in view;
6. When the Tribunal decides to grant full or partial stay, it has to impose such conditions as may be necessary to safeguard the interests of the revenue. This is an imperative requirement; and
7. An appellate Tribunal, being a creature of the statute, cannot ignore the statutory guidance while exercising general powers or expressly conferred incidental powers.

In the present facts before us, the main grievance of the assessee is that the assessee is running in loss for the last many years prior to the demand and on the date of demand for payment of duty or service tax. To substantiate the said contention, the assessee produced profit & loss account statements and Balance sheets. As seen from the Balance Sheets, the assessee is running in loss. Even for the Financial Years 2008-2009, 2009-2010 and 2010-2011, the assessee has incurred loss of Rs.4,56,94,147/-, Rs.2,39,58,099/- and Rs.29,94,802/- respectively. Besides that, in Profit and Loss account, the assessee claimed depreciation to an extent of Rs.6.80 crores. The Profit and Loss account discloses that Sundry Debtors are to the tune Rs.8.58 crores, and Loan and Advances to the tune of Rs.11.35 crores. The depreciation claimed to the extent of Rs.6.80 crores is only for accounting purpose and there will not be any outflow of money for claiming depreciation. That apart Sundry Debtors are more than Rs.8.50 crores besides loans and advances to a tune of Rs.11.35 crores. Considering the profit and loss account statements and balance sheets furnished before the Tribunal, the Tribunal concluded that the claim under the head of Depreciation to a tune of Rs.6.80 crores is only for accounting purpose and there was no outflow of money to claim

depreciation.

The reasoning recorded by the Tribunal to decline the waiver of pre-deposit is based on accounting procedure of the assessee, even otherwise the loan and advances of the assessee is Rs.11.35 crores besides Sundry Debtors to a tune of Rs.08.58 crores. The assessee can realise the amount from the Sundry Debtors and loans and advances, and make pre-deposit as required under Section 35-F of the Central Excise Act. Therefore, the reasoning recorded by the Tribunal to decline waiver of pre-deposit is in accordance with law for the reason that the assessee himself disclosed the claim for depreciation to a tune of Rs.6.80 crores, Sundry Debtors to the tune of Rs.8.58 crores and loans and advances of Rs.11.35 crores. Even otherwise, the assessee is a partnership firm, the partners are liable to pay statutory dues to the Government. Therefore, the order of the Tribunal does not indicate that the assessee can sell away the assets and make pre-deposit. Therefore, the contention of the assessee that to make pre-deposit, it has to sell its fixed assets to comply with the requirement under Section 35-F of the Central Excise Act is not based on any material.

On an overall consideration of the material on record, the assessee possessed sufficient means to comply with the requirement of Section 35-F of the Central Excise Act and that the assessee would not be put to financial hardship for compliance of the same.

By applying the principles laid down in M/s Sri Chaitanya Educational Committee, Poranki, Vijayawada's case, it is for the Tribunal or any authority to consider *prima facie* case, balance of convenience and irreparable loss, which are pre-requisites for grant of order under the proviso to Section 35-F of the Central

Excise Act. Here the assessee possessed sufficient assets and sundry debtors to meet the liability under Section 35-F of the Central Excise Act. The only grievance of the assessee in the appeal before the appellate authority is that the notice issued by the respondent is barred by limitation.

The period of assessment is from the year 2007-2008 to 2010-2011. According to Section 11-A of the pre-amended Central Excise Act, the limitation to issue show cause notice is within one year from the date of short levy or short payment or erroneous refund or when erroneous refund is made, but, a proviso annexed to it permits the department to issue show cause notice within five years from the date of such short levy, short payment of erroneous refund due to fraud, collusion or any wilful misstatement or suppression of facts or contravention of any of the provisions of the Act or the rules made thereunder. Thus, the limitation to issue notice is five years. In case, the assessee gives misstatement or suppresses the turnover without disclosing the actual services rendered by it for payment of service tax. In the present case, a show-cause notice dated 12.03.2012 was issued explaining as to how the assessee suppressed the amount without declaring the income from various sources. In paragraph 19 of the show cause notice, it is made clear that the assessee has suppressed the fact of provision of taxable service in the Service Tax-3 return and also contravened the provisions of Finance Act and Service Tax Rules with an intent to evade payment of service tax. Thus, the case on hand *prima facie* falls within the ambit of provision to Section 11-A of Central Excise Act and thereby, the contention of the petitioner that it is barred by limitation is not a ground to find out *prima facie* case in favour of the assessee. However, this issue can be decided finally in the appeal pending before the competent

authority, uninfluenced by the incidental observations made herein above, as we adverted to the question of limitation only to find out *prima facie* case.

It is for the Court to record a finding that whether the assessee has made out *prima facie* case and balance of convenience in its favour, sustain irreparable loss in case no interim order i.e. waiver of pre-deposit is not granted.

Prima facie case means an arguable case or a case to go for trial. In the present case on hand, the assessee though disputed the demand on the ground of limitation, but unable to satisfy this Court *prima facie* that the demand is barred by limitation at this stage. However, it is open to the assessee to raise the question of limitation in an appeal. Therefore, in view of reason in earlier paragraphs, we find no *prima facie* case or a case to go for trial or arguable case in favour of the assessee.

Since the assessee failed to establish *prima facie* case in its favour, the other two requirements i.e. balance of convenience and irreparable loss need no further consideration in this matter.

On an overall consideration of the entire material available on record, the reasoning recorded by the Tribunal does not suffer from any inherent defect or illegality warranting interference by this Court, much less giving rise to substantial question of law which is pre-requisite under Section 35-G of the Central Excise Act and Section 130 of Customs Act. To be 'substantial', a question of law must be debatable, not previously settled by the law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. It will depend on the facts and circumstance of each case whether a

question of law is a substantial one, the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and the impelling necessity of avoiding prolonging the life of any lis. (**Boodireddy Chandraiah v. Arigela Laxmi**[6] **and Santosh Hazari v. Purushottam Tiwari**[7]**)**

The Apex Court reiterated the same principle while deciding the issue what is substantial question of law in "***Union of India v. Ibrahim Uddin***[8]".

In view of the meaning of substantial question of law, the facts and circumstances of the present case would not give rise to question of law much less substantial question of law warranting interference of this Court. Hence, we find that the appeal is devoid of merit and deserves to be dismissed. Accordingly, the point is held in favour of the respondent and against the assessee.

In the result, the appeal is dismissed confirming the order passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Bengalore in interim order No.152 of 2015 in Appeal No.ST/3612/2015 dated 05.08.2015. No order as to costs. Consequently, miscellaneous petitions, if any, pending in this Writ Petition shall stand dismissed.

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JUSTICE RAMESH RANGANATHAN

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JUSTICE M.SATYANARAYANA MURTHY

16.06.2016.
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THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

C.E.A.No.4 OF 2016

Order of the bench delivered by the

Hon'ble Sri Justice M.Satyanarayana Murthy)

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16.06.2016

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[1] (Judgment of A.P. High Court Division Bench in CEA No.301 of 2010 dated 19.01.2011)

[2] (2007) 13 SCC 487

[3] (2009) 20 VST 297 (SC) = (2006) 13 SCC 347

[4] (2007) 13 SCC 207

[5] (2007) 10 SCC 129

[6] (2007) 8 SCC 155

[7] 2001(3) SCC 179

[8] (2012) 8 SCC 148