AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

TAXC No. 20 of 2018

1. M/s Rishabh Laboratories Private Limited A Company Registered Under The Companies Act 1956 Having Its Office At Kedia Business Park, Plot No. 11, Near Bhansali Marriage Palace, G.E. Road, Tatibandh, Raipur, Chhattisgarh, Through Its Director Mr. Rishabh Chopda, Aged About 34 Years S/o Shri K.C.Chopda R/o Plot No. 8, Recreation Ground, Choubey Colony, Raipur, Chhattisgarh, District : Raipur, Chhattisgarh

2. Mr. Rishabh Chopda S/o Shri K.C.Chopda Aged About 34 Years R/o Plot No. 8, Recreation Ground, Choubey Colony, Raipur, Chhattisgarh, District : Raipur, Chhattisgarh

---- Appellants

Versus

1. Customs Excise And Service Tax Appellate Tribunal Principal Bench, Through Its Registrar, West Block No.2, R.K.Puram, New Delhi 110066

2. The Principal Commissioner CGST And Central Excise GST Bhavan, Dhamtari Road, Tikarapara, Raipur, Chhattisgarh

---- Respondents

For Appellants	:	Shri Siddharth Dubey, Advocate
For Respondents	:	Shri Maneesh Sharma, Advocate

Hon'ble Shri Justice Manindra Mohan Shrivastava

Hon'ble Smt. Justice Rajani Dubey

Order On Board

06/08/2018

Heard.

This appeal was admitted on following substantial question of law -

"Whether the Tribunal having been satisfied with regard to undue hardship and claim of waiver committed perversity in law in not granting full waiver?"

2. The appellant / assessee aggrieved by the order of the adjudicating authority and Commissioner (Appeals) preferred statutory appeal before the Customs, Excise and Service Tax Appellate Tribunal and also moved an application for waiver of pre-deposit with a plea of undue hardship.

3. Initially, an order was passed against the assessee. Another application was moved with the submission that the assessee was not heard. The Tribunal, thereafter, considered the prayer and passed an order of partial waiver of pre-deposit vide impugned order which led the assessee to file this appeal which was admitted on question of law referred to above.

4. The question of law as framed by this Court is only confined to the consideration that whether the Tribunal, having accepted the plea of undue hardship had discretion or obligation under the law to grant full waiver. Though learned counsel for the appellant could not satisfy this Court on this issue of law that full waiver has to be necessarily granted and no discretion is granted by the Tribunal, learned counsel for the respondents brings to the notice of this Court judgment of the Supreme Court in the case of **Benara Valves Ltd. and ors. v. Commissioner of Central Excise and Anr., 2006 (13) SCC 347.** Their Lordships in the Supreme Court examined the legal position with regard to exercise of discretion by the Tribunal in the matter of waiver of pre-deposit on the grounds of undue hardship. It was observed -

> 10. Section 35-F of the Act reads as follows:
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> "35-F. *Deposit, pending appeal, of duty demanded or penalty levied*.-
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> 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:
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> 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."
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> 11. Two significant expressions used in the provisions are "undue

> hardship to such person" and "safeguard the interests of 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 Revenue have to be kept in view.
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> 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 and ors. (AIR 1994 SC 923) 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.
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> 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.
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> 14. The word "undue" adds something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant.
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> 15. The other aspect relates to imposition of condition to safeguard the interest of 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 revenue.”

5. Learned counsel for the appellant, however, submits that where in a particular case, the assessee is in a position to establish before the Tribunal that even the demand itself was not permissible under the law or that the issue has been decided by the judgment of the jurisdictional High Court or the Supreme Court, claim of full waiver is required to be examined, though briefly and the relevant considerations, one of it

being a strong *prima facie* case, ought not to be ignored. In support of this submission, learned counsel for the appellant places reliance upon on following judgments -

I) J.N. Chemical (Pvt.) Ltd. v. CEGAT, 1994 (46) ECC 106

II) Hooghly Mills Company Limited v. Union of India, 1998 SCC OnLine Cal 636

III) Bongaigaon Refinery & Petrochem Ltd. v. Collector of Central Excise (A), Cal., 1992 SCC OnLine Cal 405

IV) M/s. Tijiya Steel Pvt. Ltd. & anr. v. Union of India and ors., 2006 SCC OnLine Cal 416

V) Ruby Rubber Industries v. Commissioner of Central Excise, 1998 (104) ELT 330 (Cal.)

VI) Ceat Ltd. v. Union of India, (2010) 250 ELT 200

VII) S.K.Samanta & co. (P) Ltd. v. Customs, Excise and Service Tax Appellate Tribunal, East Zonal Bench, Kolkata and ors., 2012 SCC OnLine Cal 13142

VIII) L.G. Electronics India Pvt. Ltd v. Commissioner of Central Excise, (2009) 227 CTR (All) 88

IX) Union of India and anr. v. M/s. Intercontinental Consultants and Technocrats Pvt. Ltd, 2018 SCC OnLine SC 196

X) Vijay Prakash D. Mehta and anr. v. Collector of Customs (Preventive), Bombay, (1988) 4 SCC 402

6. In view of the authoritative pronouncement of the Supreme Court in the case of **Benara Valves** (supra), we have no hesitation to hold that even though the Tribunal is satisfied with regard to undue hardship, it has discretion to grant waiver either full or in part. What should be relevant consideration has been indicated in the aforesaid judgment of the Supreme Court.

There cannot be any straight jacket formula. However, in so far as the issue which has fallen for consideration before this Court, the other part of submission would only be relevant to decide whether in the matter of consideration of waiver, the case deserves full waiver or partial waiver of pre-deposit.

We are not inclined to go into the aspect for the reason that in para 3 of the order of the Tribunal, the Tribunal has recorded the submission of the counsel for the appellant as below -

> "3. Learned counsel also submits that if the aforesaid para is read, the appellant if at all is liable to tax, it may only be required to pay service tax demand of Rs.7,03,916/- for the reason of confusion in the interpretation of assessable value of the reimbursed expenses which could not form part of the gross value of taxable services of

> clearing and forwarding agent services. But penalty is not imposable automatically."

If the appellant was pursuing for full waiver, we fail to understand how such submission was made by the appellant before the Tribunal.

7. Learned counsel for the appellant, however, submits that in the interest of justice, he may be granted liberty to raise the issue on this aspect before the Tribunal.

8. Having considered the submission of learned counsel for the parties, as far as this question of law framed by us is concerned, we are inclined to answer in the manner that even though in a given case, the Tribunal has held that a case of undue hardship is made out, it is within the jurisdiction of the Tribunal to grant full or partial waiver of pre-deposit.

9. Having answered the aforesaid substantial question of law, we are inclined to grant liberty to the appellant to approach the Tribunal to satisfy on what relevant considerations it claims full waiver of pre-deposit. We also expect that if any such application is moved by the appellant, the same shall be decided within three weeks from the date of receipt of such application.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Rajani Dubey)
Judge

Deepti