

Alpine Inds. Vs. Collector of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : May-23-1990

Reported in : (1990)(50)ELT364TriDel

Appellant : Alpine Inds.

Respondent : Collector of Central Excise

Judgement :

1. This misc. application is filed with a prayer to modify the Order No. 45/89-C dated 28-2-1989 passed in stay application No.E/Stay/84/89-C and to waive the predeposit of duty.
2. The applicants by their application E/Stay/84/89 in Appeal No.E/167/89-C sought for dispensing with predeposit of the duty demanded pending disposal of the appeal. During the course of the arguments the appellants brought to the notice of this Tribunal an order passed by the High Court of Delhi wherein the show cause notice dated 31-3-1985 which culminated into the impugned proceedings were challenged. The relevant order dated 12th May, 1988 reads as follows: "Heard the proceeding pursuant to the notice to show cause notice will continue and if any demand is raised it will not be recovered without obtaining orders from this court." It was also pointed out that the writ petition was also pending on the day when the orders were passed in the said petition.
3. The applicants have now come forward with the present application to modify the above order.

(i) that under similar circumstances this Tribunal in "M/s. Somani Steel Ltd. v. CCE in their order No. 521/87-88 dispensed with predeposit of duty demanded. He filed a copy of the relevant order.

(ii) that the condition of predeposit is a step in the recovery of duty which is prohibited by the honourable Delhi High Court by its order referred to above. Therefore, following the order of the Delhi High Court this Tribunal ought to have dispensed with the predeposit of the duty in dispute.

5. We have perused the order No. 521/87-88 of this Tribunal in M/s.

Somani Steel Ltd. v. CCE. The facts are that the appellants namely, Somani Steel Ltd. filed an appeal along with an application for waiver of predeposit of Rs. 4,12,125.71 and during the course of arguments it was brought to the notice of the Tribunal that they have filed a civil misc. writ petition No. 1284/83 before the Calcutta High Court and interim order was passed on 1-11-1983 and 2nd Dec. 1983, staying the realisation of the excise duty on the appellants furnishing security to the satisfaction of the Supdt.

6. This Tribunal after considering the above order and also the order of this Tribunal in M/s. Jai Shree Insulators Ltd. [1987 (28) ELT 279] passed the following order: "We are of the opinion that interests of justice require that waiver of predeposit under Section 35F be granted on the applicants executing a bond on similar terms as directed by the Allahabad High Court in the civil misc. writ petition." In other words this Tribunal dispensed with the predeposit keeping in view the High Court's order.

7. In the instant case also propriety requires that having regard to the order of the Delhi High Court within whose jurisdiction this Tribunal is situated predeposit of duty demanded should be dispensed with. We accordingly dispense with the same.

8. The above order would have disposed of the misc. application, however since the appellants have advanced arguments on the second contention also we are expressing our views on the second issue.

8A. Section 35F provides for the predeposit of the duty and penalty and it reads as follow: "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 Collector (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 Collector (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." 9. From the language used in Section 35F it is clear that the question of predeposit of duty arises only in cases where the goods are not under the control of the Central Excise authorities. Secondly the right to file an appeal is not curtailed and the appellants can still file the same, but the provision says that during the pendency of the appeal predeposit of duty and penalty should be made. Under the proviso power is conferred on the Tribunal to dispense with the predeposit of duty and penalty in dispute, if in its opinion it causes undue hardship to the appellants. The Tribunal is also empowered to impose conditions while dispensing with predeposit of duty and penalty in dispute to safeguard the interest of revenue.

10. The consequences of failure to comply with Section 129(1) of the Customs Act, 1962 which is similar to Section 35F of the CE&S Act by which was considered by the Supreme Court in Navin Chand Chotelal v.CBEC and Others - 1981 (8) ELT 679 (SC): "No doubt Section 129 does not expressly provide for the rejection of the appeal for non-compliance with the requirement regarding the deposit of penalty or duty; but when Sub-section (1) of Section 129 makes it obligatory on an appellant to deposit the duty or penalty pending the appeal and if a party does not comply with either the main sub-section or with any order that may be passed under the proviso the appellate authority is fully competent to reject the appeal of non-compliance with the provisions of Section 129(1). That is

exactly what the first respondent had done in this case.

Accepting the contention of Mr. Trivedi will mean that the appeal will have to be kept on file for ever even when the requirement of Section 129(1) has not been complied with. Retention of such an appeal on file will serve no purpose whatsoever because unless Section 129(1) is complied with, the appellate authority cannot proceed to hear an appeal on merits. Therefore, the logical consequence of failure to comply with Section 129(1) is the rejection of appeal on that ground." 11. In other words failure to comply with Section 35F or any order passed under the proviso results in the rejection of appeal as not maintainable. Therefore, compliance with Section 35F is a condition precedent for the maintainability of the appeal.

12. As stated earlier under the proviso the Tribunal is empowered to dispense with predeposit of the duty and penalty. The proviso itself provides guidelines to dispense with the predeposit of duty and penalty. The guidelines provided are that if the Tribunal is of the opinion that the deposit of duty demanded or penalty levied would cause undue hardship it may dispense with such deposit subject to such conditions as it may deem fit so as to safeguard the interest of the revenue.

13. The power under the proviso is to be exercised by balancing two aspects i.e. avoiding undue hardship to the appellants and safeguarding the interest of the revenue. Undue hardship can be, (1) financial hardship, (2) on merits.

14. As regards the financial hardship, if the appellants are faced with financial hardship in the opinion of the Tribunal, it has no discretion except to dispense with the predeposit unconditionally as any directive directing them to deposit the duty would be futile and makes the appeal not maintainable.

15. As regards the merits if in the opinion of the Tribunal the order of the lower authority is void, if it is passed in violation of principles of natural justice, or that the order under appeal is perverse, or that the impugned order is contrary to the law declared by the Supreme Court, or that it is in contravention of the judgment of the High Court or it is in disregard of express provisions of the Act or the rules, these are some of the instances where predeposit can be dispensed with

unconditionally. In all other cases the Tribunal is empowered to impose conditions if it is of the opinion that it is necessary to safeguard the interest of revenue.

15A. The next aspect to be considered is the recovery of the duty demanded and the penalty levied by the lower authority. In the normal circumstances there is no bar for recovering them in pursuance of the order of the original authority unless the recovery is stayed by the lower authorities.

16. Under the Central Excise Rules there is no provision empowering the Tribunal to stay recovery proceedings in pursuance of the order under appeal. However, the Supreme Court in *ITO v. M.K. Mohd. Kunhi* (AIR 1969 SC 430) held that "but the Appellate Tribunal must be held to have power to grant the stay as incidentally or ancillary to the appellants jurisdiction." Invoking the same proviso this Tribunal staying the recovery proceedings.

17. According to the Supreme Court in *Dunlop India* case [1985 (19) ELT 22] the relevant factors in granting the stay of recovery of the duty demanded and the penalty levied are as follows: 18. This Tribunal is applying the self same criteria laid down by the Supreme Court in *Dunlop India* both for dispensing with predeposit of duty demanded and penalty levied and stay of recovery of the same.

19. The question, therefore, is whether the predeposit of duty demanded and penalty levied is a step in the recovery of the same. The right of appeal is a statutory right and it is open to the Parliament to impose any condition for the maintainability of the appeal and these conditions cannot be absolute so as to fetter the very right of appeal and in order to make the right of appeal effective the proviso was incorporated under the Section. We have also pointed out that predeposit is a condition precedent for the maintainability of the appeal and that said condition is not absolute and it can be dispensed with in accordance with the guidelines laid down in the proviso.

20. As stated the stay of recovery proceedings is granted only in exercise of the incidental power whereas predeposit is dispensed with in exercise of statutory power. Both deal with distinct and separate aspects. Dispensing with predeposit of duty and penalty by itself does not prevent the authority from recovering the duty

and penalty unless the recovery proceedings are also simultaneously stayed. If the predeposit is not dispensed with then the appellants have to deposit the money otherwise the consequence will be the appeal shall stand rejected.

20A. It is true that the criteria for dispensing with predeposit for recovery of duty is the same, however, that does not mean that the condition of the predeposit under Section 35F is a step in the recovery of duty and penalty levied. The issue is to be judged from the consequences that follow on failure to comply with the conditions precedent provided under Section 35F. Therefore, we are of the view that the conditions provided under Section 35F is not a step in the recovery of duty demanded and penalty levied.

21. However, in view of the orders of the High Court staying the recovery proceedings propriety requires that predeposit should be dispensed with. Accordingly, we dispense with predeposit of duty demanded. Hence, we accordingly modify the order.

22. [Contra per : Shri V.P. Gulati, Member (T)]. - I have given a careful thought to the order recorded by learned Sister Ms. S.V.Maruthi and endorsed by learned Brother Shri I.J. Rao. I have not been able to persuade myself to agree with their decision to modify the Order No. 45/89-C dated 28-2-1989 already passed by a Bench of this Tribunal on the Stay application regarding waiver of predeposit of duty. The Bench of the Tribunal while passing the said order took note of the applicants' plea re-urged by the applicants now before us that the Hon'ble High Court had passed an interim order restraining the Department from recovering the duty in the proceedings drawn against the applicants without obtaining the orders of the Hon'ble High Court.

After considering the merits of the applicants' plea that in view of this order of the Hon'ble High Court pre-deposit of duty could not be demanded, the Bench in their Order No. 45/89-C held in para 6 of the order as under: "We have considered the submissions and find that the contention raised by the learned counsel for the applicants has no force. From the ad-interim order passed by the Delhi High Court as reproduced above, it is clear that the Court has made the right of the Department to recover the amount of duty if confirmed after adjudicating the said

show cause notice, conditional by imposing a condition that the demand so confirmed (raised) be not recovered without obtaining the prior orders from the Court. No such restrained order was passed against the Appellate Authority i.e. to say this Tribunal in the instant case. Hence we reject the preliminary submission made by the learned counsel for the applicants." 23. The applicants have not made any fresh plea in law nor have quoted any case law meriting reconsideration of the order already passed. The applicants' only plea for modification of the earlier order of the Bench is that in a similar case where a similar order had been passed by the Hon'ble High Court, the requirement of pre-deposit under Section 35F was waived by the Tribunal on execution of a bond as directed by the Allahabad High Court in that case.

24. The applicants have raised, as mentioned in para 4 of the order recorded above by my learned colleagues, the following two contentions: (1) that under similar circumstances this Tribunal in M/s. Somani Steel Ltd. v. CCE in their Order No. 521/87-88 dispensed with pre-deposit of duty demanded.

(2) that the condition of pre-deposit is a step in the recovery of duty which is prohibited by the Hon'ble Delhi High Court by its order referred to above. Therefore, following the order of the Delhi High Court this Tribunal ought to have dispensed with the pre-deposit of the duty in dispute.

In regard to the second contention the learned Members in the order above, after going into the pleas of the applicants, have held as under and I am in respectful agreement with them: "As stated the stay of recovery proceedings is granted only in exercise of the incidental power whereas predeposit is dispensed with in exercise of statutory power. Both deal with distinct and separate aspects. Dispensing with pre-deposit of duty and penalty by itself does not prevent the authority from recovering the duty and penalty unless the recovery proceedings are also simultaneously stayed. If the pre-deposit is not dispensed with then the appellants have to deposit the money otherwise the consequence will be the appeal shall stand rejected.

It is true that the criteria for dispensing with pre-deposit for recovery of duty is the same, however, that does not mean that the condition of the predeposit under

Section 35F is a step in the recovery of duty and penalty levied. The issue is to be judged from the consequences that follow on failure to comply with the conditions precedent provided under Section 35F. Therefore, we are of the view that the conditions provided under Section 35F is not a step in the recovery of duty demanded and penalty levied." In view of the above, it can, therefore, be stated that the interim order of the Hon'ble High Court restraining the Department from recovery of the duty in terms of the proceedings drawn against the applicants does not come in the way of action under Section 35F of the Central Excises & Salt Act, 1944. The context in which, therefore, the applicants' plea for dispensation of the pre-deposit has to be considered is whether undue hardship will be caused to the applicants in case the pre-deposit of the duty is insisted upon. While considering the case in this context, the relevant factors to be taken into consideration, as held by the Hon'ble Supreme Court in the case of Dunlop India Ltd. [1985 (19) ELT 22] and as mentioned in the above order in para 17, are (i) Prima facie case; (ii) Balance of convenience; (iii) Possibility of irreparable injury and (iv) Safeguarding public interest. The applicants pleaded before the Bench, when their stay application came up for consideration earlier, that the applicants were not pleading any financial hardship as the financial position of the applicants' company was sound. The learned Advocate for the applicants had pleaded before the Bench which heard the Stay application, that the applicants had a strong prima facie case on merits and he had extensively argued in regard to the same. The Bench, after considering the applicants' pleas, held that prima facie no fault could be found in the impugned order and that the contentions raised by the learned counsel for the applicants were contentious issues and could be gone into at length at the time of hearing of the appeal on merits and observed as under: "In a nutshell at this stage it cannot be said that the appellants have such a strong prime facie case as to warrant the dispensation of the mandatory requirement of the pre-deposit of the amount of duty demanded in terms of Proviso to Section 35F of the Central Excises & Salt Act." The Stay application was, therefore, dismissed and the applicants were directed to make the pre-deposit of the amount involved within 6 weeks from the date of receipt of the stay Order No. 45/89-C.25. The point for consideration is whether the order of the Tribunal No. 45/89-C passed after taking into consideration the applicants' pleas both in law as well as on facts needs to be

modified, (i) when the applicants have not shown that any relevant facts were not brought to the notice of the Bench or (ii) when they have not made out any substantive point in law, which may have been omitted to be taken note of by the Bench while passing the earlier Order No. 45/89-C. The only new factor which has been stressed is that in a similar case where a writ petition had been filed before the Hon'ble Calcutta High Court and the Hon'ble Court had passed an interim order staying the realisation of excise duty on the appellants furnishing security to the satisfaction of the Superintendent, this Tribunal passed the following order in that case: "We are of the opinion that interests of justice require that waiver of predeposit under Section 35F be granted on the applicants executing a bond on similar terms as directed by the Allahabad High Court in the civil misc. writ petition." This earlier order of the Tribunal in the background in which it is passed, in my opinion, does not constitute sufficient ground for modifying the Order No. 45/89-C of the Tribunal dismissing the applicants' plea for dispensation of the pre-deposit for the reasons already extracted above. This earlier order of the Tribunal was in the nature of an interim order and can be taken to apply only to the facts and circumstances of that case and it can neither be taken to lay down any law nor it can have any precedential value. The Bench, while passing the Order No. 45/89-C, were aware that the Hon'ble High Court of Delhi had given a direction in the applicants' case that no recovery of the duty should be made without obtaining the orders of the Hon'ble High Court and, after giving reasons, the Bench have held that requirements of pre-deposit under Section 35F were to be complied with notwithstanding the said order of the Hon'ble High Court. The applicants have not found any fault with this order of the Bench and the learned two Members in this case have in fact upheld the view that notwithstanding the High Court's order the requirements of Section 35F were still to be complied with unless the pre-deposit of duty and penalty was dispensed with. This dispensation of the pre-deposit, as mentioned above, has to be in terms of Section 35F as held by the Bench in their earlier Order No. 45/89-C. The applicants have not made out any case in terms of this Section as held in Order No. 45/89 for dispensation of the pre-deposit. Therefore, the question of modifying this order does not arise.

26. The interim order of the High Court of Delhi has restrained the authorities from recovery of the amounts without the permission of the Court. The proper course,

therefore, open to the applicants, after the Bench had passed the Order No. 45/89-C in the Stay application, in case they felt aggrieved with the same, was to approach the Hon'ble High Court. In my view an interim order of a Bench of the Tribunal does not require to be interfered with or modified unless a case is made out that position in law or facts which were relevant for the purpose were not taken note of by the Bench or were omitted to be placed before the Bench for reasons to be explained. In the present case I find no such case has been made out. I, therefore, hold that the earlier Order No.45/89-C passed by the Bench does not require any modification.

27. In accordance with the view of majority we hold that the condition of the predeposit under Section 35F of the Act is not a step in aid of the recovery of duty and penalty levied. However, propriety requires that predeposit should be dispensed with in view of the orders of the High Court staying the recovery proceedings. Accordingly, we dispense with predeposit of the duty demanded and modify the Order No. 45/89-C dated 28th February, 1989.

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