

Alkarma Vs. Commissionier of Central Excise and anr.

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Court : Delhi

Decided On : Nov-29-2005

Reported in : 127(2006)DLT629; 2008(222)ELT493(Del)

Judge : T.S. Thakur and; B.N. Chaturvedi, JJ.

Acts : Central Excise Tarrif Act, 1985; [Central Excise Act, 1944](#) - Sections 35F

Appeal No. : WP. (C). 10623/2005

Appellant : Alkarma

Respondent : Commissionier of Central Excise and anr.

Advocate for Def. : Jyoti Singh, Adv.

Advocate for Pet/Ap. : Ashish Bhagat, Adv

Judgement :

T.S. Thakur, J.

1. Issue Rule.

2. Ms. Jyoti Singh appears for the respondents and agrees to the final disposal of this writ petition at this stage itself.

3. The petitioner is engaged in the manufacture of Aluminum doors and window frames, curtain walls, claddings, structural glazing and composite claddings, which, according to the respondents, falls under Chapter 76 and Chapter 70 of the 1st Schedule of the Central Excise Tarrif Act, 1985. On receipt of a certain report alleging clandestine manufacture and removal of the aforesaid excisable good from the office-cum-factory premises of the petitioner, the Anti-Evasion Branch of the Central Excise Commissioner, Delhi appears to have conducted a search. A scrutiny of the records recovered from the said premises pertaining to various contracts undertaken by the petitioner, reveals that the petitioner was manufacturing and clearing the goods in excess of the value on which central excise duty was paid from the year 1997-98 onwards. Statement of Shri Sanjiv Chaudhary, one of the partners of the petitioner, was also, in the course of these investigations, recorded, which eventually culminated in the issue of two show-cause notices dated 7.11.2002 and 8.5.2003.

4. By the first of these show-cause notices, the petitioner was called upon to show cause as to why central excise duty amounting to Rs. 4,55,48,984/- should not be demanded from it on account of clearance of goods during the last five years, i.e., 1997-98 to 2001-2002 by willful suppression of the true value of the said goods. The second show-cause notice similarly called upon the petitioner to show cause as to why a differential amount of duty of Rs. 36,43,053/- be not recovered from it. Both these show-cause notices were adjudicated upon by the Commissioner culminating in a total demand of Rs. 4,91,92,037/- apart from a penalty of an equivalent amount levied on the petitioner. A further penalty of Rs. 50 lacs was also levied upon one of the partners of the petitioner.

5. It is not in dispute that the petitioner, has aggrieved by the common order dated 31.3.2004 passed on the basis of the said two show-cause notices preferred an appeal which is pending before the Customs, Excise & Service Tax Appellate Tribunal. In the meantime, the petitioner was served with two more notices dated 17.6.2004 and 18.6.2004 calling upon it to show cause why a sum of Rs. 1,12,93,323/- be not recovered from it on account of differential excise duty payable on the goods cleared from its factory during the period 1.4.2003 to 30.9.2003.

6. The above show-cause notices were also confirmed in terms of an adjudication order passed by the Commissioner of Central Excise, Delhi-I on 30th of November, 2004, by which the petitioner was held liable to pay a sum of Rs. 1,12,93,323/- and a penalty of an equivalent amount apart from a penalty of Rs. 20 lacs levied upon the partner of the petitioner. The petitioner has aggrieved by the said order preferred an appeal before the Tribunal and filed an application under Section 35-F of the [Central Excise Act, 1944](#) seeking waiver of the deposit of the duty amount and the penalty levied upon it. The Tribunal has vide its order dated 4.5.2005 partly allowed the said application and directed the petitioner to pre-deposit a sum of Rs. 75 lacs within a period of eight weeks from the date of the said order. Upon payment of the said amount, the Tribunal has waived the pre-deposit of the balance of the duty and the penalty amount levied against the petitioner. The petitioner has in the present writ petition assailed the validity of the said order.

7. When this petition came up for hearing before this Court, initially the petitioner was directed to deposit a sum of Rs. 20 lacs within a period of eight weeks. The Court further directed that the appeal preferred by the petitioner shall not upon such a deposit being made be dismissed by the Tribunal for non-compliance of its order dated 4.5.2005.

8. In obedience to the order mentioned above, the petitioner appears to have deposited a sum of Rs. 5 lacs on 9th of September, 2005 and a further sum of Rs. 3 lacs on 13th of October, 2005. It had, in the meantime, filed CM.10712/05 seeking extension of time fixed by this Court for payment of the balance amount. Before the said application could come up for orders after notice to the other side, the appeal preferred by the petitioner before the Tribunal appears to have been taken up and dismissed on 6th of September, 2005. It is in that background that the petitioner has filed CM.12044/05 under Order VI Rule 17 seeking permission to amend the writ petition so as to challenge the order of dismissal of the appeal passed by the Tribunal. The petitioner has along with the said application filed an amended writ petition also.

9. Learned counsel for the petitioner submitted that the balance of the amount which the petitioner was required to deposit in terms of the orders of this Court

dated 29.6.2005 has also been deposited by the petitioner on 28th of November, 2005. He urged that the deposits made by the petitioner till date comes to Rs. 20 lacs which, according to the learned counsel, was sufficient to meet the ends of justice keeping in view of the nature of the controversy raised in the appeal before the Tribunal, as also the orders passed by the Tribunal in the earlier appeals pending before it arising out of the earlier two show-cause notices issued to the petitioner. He urged that the financial condition of the petitioner does not allow the petitioner to deposit a substantial amount like Rs. 75 lacs directed to be deposited by the Tribunal. It was submitted that the issue that fell for consideration before the Tribunal in the appeals was covered in favor of the assessed by the decision of the Tribunal in 'Mahavir Aluminium Limited v. Commissioner of Central Excise, New Delhi-III', , and the decision of the Supreme Court in the matter of 'Collector of Central Excise, Thane & Madras v. Ajit India Private Limited', 2000 (119) E.L.T. 274 (SC). It was submitted that the order passed by the Tribunal directing the petitioner to pre-deposit a sum of Rs. 75 lacs was unfair and unjust having regard to the fact that the petitioner had declared its profit for the previous year at Rs. 10 lacs which has declined to Rs. 6 lacs for the next year.

10. It was argued on behalf of the respondents by Ms. Singh that waiver of pre-deposit by the Tribunal was in terms of the proviso to Section 35-F, a matter entirely in the discretion of the Tribunal. She urged that the Tribunal had, in the instant case, exercised its discretion along judicial lines and that there was neither any arbitrariness nor any perversity in the prima facie view taken by the Tribunal to warrant any interference by this Court. She submitted that the petitioner had continued to persist in its default inasmuch as despite the previous order holding the petitioner liable to pay a duty amount of Rs. 5 crore or so, it had continued to remove the goods without payment of the excise duty due on the same. The Tribunal was in that view justified in demanding a substantial amount of deposit from the petitioner.

11. Section 35-F of the [Central Excise Act, 1944](#) requires the party against whom duty demand has been raised to pre-deposit the entire amount so demanded before its appeal against the order under challenge can be heard by the Tribunal. That appears to be the ordinary rule inasmuch as any appeal against

determination and demand of duty can be heard only if the duty is deposited by the person desirous of appealing against any such order. The first proviso to Section 35-F, however, vests the Appellate Tribunal with the power to dispense with such pre-deposit imposing such conditions as it may deem fit with a view to safeguarding the interests of the Revenue. It is evident from a plain reading of the proviso that the power vested in the Tribunal is discretionary and has to be exercised having regard to the nature of the controversy and the facts and circumstances of each case. But it is equally well settled that discretion, howsoever wide, can never be exercised in a fanciful or whimsical fashion. Interference with the exercise of discretion by a statutory Tribunal may, therefore, be warranted only in case the writ court comes to the conclusion that such exercise has not done complete justice between the parties or has ignored a consideration that ought to have been kept in view while the Tribunal passed the order under challenge.

12. Having said so, the question in the present case is whether the Tribunal was justified in the peculiar facts and circumstances of this case to direct pre-deposit of a sum of Rs. 75 lacs out of a total demand of Rs. 1,12,93,323/- raised under the order passed by the adjudicating authority. The Tribunal has on the same set of facts and circumstances constituting the basis of the present case, waived the pre-deposit of the entire amount of duty and the entire penalty levied upon the petitioner for the previous period, upon the petitioner depositing a sum of Rs. 50 lacs. There is no qualitative difference between the claims made against the petitioner in the two show-cause notices which constitute the basis of the first adjudication order in which the Tribunal passed the said order of waiver of pre-deposit, and the facts of the present case on the basis whereof the Tribunal has made a demand of Rs. 75 lacs. The impugned order by which the Tribunal has demanded a pre-deposit of 75 lacs works out to be the 75% of the duty amount determined against the petitioner. This is much higher in comparison to the pre-deposit demanded in connection with the earlier appeal where the amount of pre-deposit works out to about 10% of the total amount of duty demanded from the petitioner. With the facts forming the basis of the two demands being the same, we see no reason why the same yardstick as adopted in the earlier appeal could not be adopted by the Tribunal in the case at hand. A deposit of Rs. 20 lacs in that

view would suffice and meet the ends of justice having regard to the totality of the circumstances of the case. That does not, however, mean that in so far as the balance of the duty amount is concerned, the petitioner cannot be called upon to adequately secure the said amount by providing proper security. The Tribunal can impose such conditions as it may deem fit to impose in order to safeguard the interests of the Revenue. This is evident from a reading of the proviso itself. In the circumstances, while the order of pre-deposit made by the Tribunal may be modified to the extent of reducing the amount of pre-deposit to Rs. 20 lacs, interest of justice, demands that the balance of the duty amount should be secured by the petitioner by furnishing a property security.

13. In the result, we allow this writ petition and pass the following order:

1. CM.12044/05 seeking permission to amend the writ petition is allowed and the amended writ petition taken on record.

2. The writ petition is partly allowed and the order passed by the Tribunal directing pre-deposit of Rs. 75 lacs modified to the extent that instead of the said amount, the petitioner shall be required to deposit a sum of Rs. 20 lacs, which amount the petitioner has already deposited, as indicated above.

3. The petitioner shall, in addition to the pre-deposit aforementioned, furnish to the satisfaction of the adjudicating authority, namely, the Commissioner of Central Excise, Delhi-I, a property security for the balance amount of the duty, namely Rs. 1,92,93,323/-

4. The security shall be furnished by the petitioner within a period of six weeks from today, whereupon the appeal filed by the petitioner before the Tribunal and dismissed by the Tribunal for non-compliance of the order of this Court shall stand restored. Needless to say that order passed by the Tribunal dismissing the appeal shall stand quashed in case the petitioner furnishes the requisite security as directed above.

5. Subject to the above, the pre-deposit of the balance of the duty amount and the penalty levied upon the petitioner shall remain waived pending final disposal of the

appeals on merits.

6. The Tribunal is requested to expedite the hearing and disposal of the appeals filed by the petitioner to avoid multiplicity of proceedings which is inevitable if the appeals continue to pend making the issue of further show-cause notices to the petitioner inevitable.

14. Nothing said in the body of this order shall be read as expressing any opinion on the merits of the contention urged before this Court or those that may be urged before the Tribunal.

15. duty to counsel for both the parties.

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