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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jan-25-1995

Reported in : (1995)LC287Tri(Delhi)

Appellant : Subhash Gupta

Respondent : Collector of Customs

Judgement :

1. This is an application for waiver of pre-deposit of penalty of Rs. 50.00 lakhs levied on the petitioner under Section 112-A of the Customs Act, 1962, the Act for short, under the impugned order passed by the Collector of Customs, Bombay dt. 31-8-1994.

2. Sh. N.R. Kantawala, the Id. Advocate submitted that proceedings were instituted against the petitioner on the ground that the petitioners imported Steel Wire Rods duty free under DEEC scheme and without utilizing the imported goods in the export, sold the same in the market and the proceedings eventually under the impugned order appealed against. The Id. Counsel submitted that initially in respect of the same transaction, a show cause notice was issued on 8-8-1989 alleging illegal diversion of goods imported duty free, to the extent of about 3000 MT of Steel Wire Rods in which the penalty of Rs. 20.00 lakhs was levied on the petitioner. The petitioner preferred an appeal before the Tribunal and took out an affidavit and pleaded undue hardship on financial grounds and the Tribunal on going the averments of petitioner's affidavit and accepting the plea of financial hardship passed Order No. 10/92A, dt. 7-1-1992 granting waiver of pre-deposit of

penalty. The Id. Counsel submitted that the financial position of the petitioner has now only become worse and not better since then and in support of the plea of acute financial hardship, the petitioner has sworn to an affidavit in support of the petition seeking waiver of the pre-deposit of penalty in the present case. The Department has not filed any counter-affidavit nor put-forth any acceptable legal plea contrary to the averments of the Affidavit. The Id. Counsel therefore, submitted that consistent with order of the Tribunal referred to (supra) and also having regard to the averments of the Affidavit, the petitioner would become entitled to the grant of waiver of pre-deposit of penalty on grounds of financial hardship as otherwise a very valuable and substantive right of appeal would become illusory.

3. The Id. Counsel further submitted that so far as the present impugned order is concerned, a show cause was issued on 11th March, 1992 alleging illegal diversion of about 2000 MT of goods in question and the impugned Order dated 31-8-1994 was passed levying a penalty of Rs. 50.00 lakhs. The Id. Counsel submitted that when the Department finally chooses to institute the proceedings of original diversion of 3000 MT goods in question and the proceedings resulted in an order of adjudication, it would not be legally permissible for the Dept. to initiate proceedings once over on the identical facts and levy of excessive and exorbitant penalty of Rs. 50.00 lakhs on allegedly smaller quantum of imported goods illegally diverted. The Id. Counsel submitted that on the application of principles of Order 2 of Rule 2 and on the principles of Doctrine of Issues Estoppel, the present impugned order would prima facie stand vitiated and would be un-sustainable in law and on facts.

4. The Id. Counsel further submitted that the present petitioner at the relevant time of import was not the Managing Director of the petitioner's company but was only a Director and when the Department has chosen to impose under impugned order a huge penalty of Rs. 1.00 crore on the company which is possessed of substantial assets like Plant, Machinery, Building and Land etc., levy of penalty on the petitioner is not sustainable prima facie on the evidence available on record. The Id. Counsel further urged that the reasons given in the impugned order by the Id. Collector for levy of huge penalty is that the goods imported were not available for

confiscation and assailed the correctness of these reasonings and contended that mere non-availability of the goods for confiscation would not be a ground for levy of excessive and exorbitant penalty. The Id. Counsel finally submitted that earlier appeal dt. 29-9-1991 is pending and the petitioners have no objection to the Tribunal after granting waiver of pre-deposit to direct the Registry to list this appeal also for early hearing along with the earlier Appeal.

5. Sh. B.K. Singh, the Id. SDR submitted that the plea of the Id.

Counsel that the issue of show cause notice relating to impugned order is not legally valid and is not sustainable in law and on facts is not correct. It was urged that the second show cause notice deals only of about 7 Bills of Entry relating to import of goods in question which admittedly did not found a part of earlier proceedings and, therefore, there is absolutely no question of applicability of either principles of Doctrine of Res judicata or issue of estoppel or broad principles under the Order 2 of Rule 2 of Criminal Procedure Code. The Id. SDR further submitted that non-availability of goods in question for purpose of confiscation would be relevant factor to be taken into consideration in fixing the quantum of penalty. The Id. SDR took us to Pages 81 and 82 of the impugned order and contended that there is a clear evidence on record to bring home a charge against the petitioner justifying the levy of penalty. The Id. SDR also drew our attention to Section 112 of Customs Act which would empower the adjudicating authority to levy penalty not exceeding 5 times the value of goods depending upon the facts and circumstances of case and gravity of charge against the person concerned. The Id. SDR placed reliance on the ratio and ruling of Tribunal in the case of Maharashtra Tubes Ltd. v. CC, Bombay, reported in 1994 (1) RLT-23 (CEGAT) and urged that in respect of clandestine sales of the goods imported in contravention of law it would not be possible or practicable for the department to realise the money in question and, therefore, plea of financial hardship in such circumstances by the person concerned should not be accepted.

6. We have considered the submissions made before us. In our view, the various legal pleas canvassed by the Id. Counsel for the petitioner can be considered only at the time of final disposal of appeal since this would involve consideration of

evidence and legal niceties indepth not permissible at this interlocutory stage. We take note of the fact that in respect of the import of identical goods and in support of similar proceedings and levy of penalty of Rs. 20.00 lakhs the Bench of the Tribunal take note of plea of financial hardship by the petitioner as set out in the petitioner's Affidavit granted waiver of pre-deposit.

For purpose of convenience, we would like to extract the findings of the Tribunal as under :- "Sh. V. Lakshmikumaran, the Id. Advocate appearing for the appellant while arguing submitted that the impugned order implicates others also apart from the applicant. His stay application may be considered separately because he is basing his case entirely on the financial condition of the applicant. The stay application is duly supported by an Affidavit. It has been stated that since the applicant left the Asian Wire Ropes Ltd. in September, 1988 [he] is neither having any business nor is employed anywhere. He has not even filed income tax and wealth tax returns since 1985 as there was no taxable income. The appellant has absolutely no resources whatsoever to pay the huge penalty of Rs. 20 lakhs imposed on him.

The appellant does not have any immovable property and have any balance in the bank accounts. In view of the aforesaid position learned Advocate has stated that even though he has got a good and prima facie case on merits but he would pray for allowing the stay application purely on the basis of financial condition as mentioned above. Sh. S.K. Singhal, the Id. JDR does not have any evidence to rebut the financial condition of the applicant as made out in the subject stay application even though the application has been filed as early as on 20-11-1991. Having regard to the financial condition of the applicant, we are of the view that it would be an undue hardship if the applicant are directed to pre-deposit the amount of penalty of Rs. 20 lakhs. Accordingly, in the interest of justice, we dispense with the pre-deposit of aforesaid amount of penalty and also stay the recovery thereof by the Revenue during the pendency of this appeal." 7. We note that the Department admittedly did not file any counter-affidavit nor the department have any instructions contra with reference to the financial soundness or solvency of the petitioner in that case. We further note that petitioner also enclosed a detailed affidavit in support of plea of financial hardship in present stay application also and

relevant portion of which reads as under :- "I say that since I have left the Asian Wire Ropes Ltd. in Sept.

1988. I was neither having any business nor was employed anywhere. I say that I have not even filed any Income-tax or Wealth-tax returns since 1985 as there was no taxable income. I say that I have no resources whatsoever to pay huge penalty of Rs. 50 lakhs imposed on me. I say that I do not have any immovable property anywhere in India and I do not have any Bank balance." 8. The Id. SDR has not been able to produce before us any evidence contrary to the above averments. It is not well settled that valuable and substantive right of appeal cannot be whittled down if a person is able to substantiate the plea of undue hardship. To a specific query from the Bench, the Id. Counsel for the petitioners submitted that the petitioner is now not even a Director of the company and is eking out his livelihood at the hands of his children. Therefore without expressing any opinion in the merits of the issue we are inclined to think that on grounds of financial incapacity and undue hardship pleaded by the petitioner in Affidavit in regard to which department has no instructions or evidence contra, we are inclined to think that the petitioner would be entitled to the grant of waiver of pre-deposit of penalty. We also take into consideration the plea of the Id. Counsel that the company in question against which there is a levy of penalty of Rs. 1.00 crore is said to be possessed of assets such as Plant and Machinery, Building and land etc. which can be proceeded against. We further, note that the earlier appeal of the petitioner relating to import of similar goods wherein waiver is granted by the Tribunal as referred to above is also likely to be taken up before long. We note that facts referred to in the ruling in the Tribunal relied upon by the SDR are distinguishable from the facts and present case. Therefore on grounds of financial hardship for the reasons set out above we grant waiver of pre-deposit of penalty pending disposal of appeal. Registry is directed to list the above appeal along with the connected appeals for being heard together.