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Court : Mumbai

Decided On : Jun-28-2011

Judge : D.Y.CHANDRACHUD; ANOOP V. MOHTA, JJ.

Acts : [Central Excise Act, 1944](#) - Section 35F; [Companies' Act, 1956](#) - Section 617; [Constitution of India](#) - Article 226

Appeal No. : CENTRAL EXCISE APPEAL NO.68 OF 2011

Appellant : M/S.Rastriya Chemicals and Fertilisers Ltd.

Respondent : Union of India and ors.

Advocate for Def. : Mr.Pradeep S.Jetly; Mr.Jitendra B.Mishra, Advs.

Advocate for Pet/Ap. : Mr.Arshad Hidayatullah; Mr.H.G. Dharmadhikari; Mr.D.A.Bhalerao, Advs.

Judgement :

1. This appeal is directed against an order of the Customs, Excise and Service Tax Appellate Tribunal on an application for waiver of the condition of pre-deposit under Section 35F of the [Central Excise Act, 1944](#). Though six questions of law have been raised, Counsel appearing on behalf of the Appellant has confined the appeal to the following two, namely :

(i) Whether, prima facie when a Public Sector Undertaking is of substantial worth and solvency and able to secure the Revenue by a general bond (in consonance with the binding Central Excise Manual requirements as well as judgments of this Hon'ble Court) can the Tribunal sit in judgment and order a pre-deposit of almost 50%; and

(ii) Whether in facts and circumstances of the case and in law, Respondent No.2, the Tribunal, is justified in not considering the prima facie case made out by the Appellant on the basis of a chart as well as the annexure to the Show Cause Notice wherein the Department has admitted that Naphtha procured under an exemption notification was in short supply and the gap of steam is bridged by using steam generated out of natural gas; whereas in earlier proceedings the Tribunal has considered this aspect of use of natural gas and remanded the matter to re-calculate the demand on the basis of charts submitted by the Appellant.

2. The appeal is admitted and is taken up for hearing and final disposal on the request of Counsel appearing on behalf of the Appellant and the Respondents.

3. The Appellant is a Public Sector Undertaking and is a Government Company within the meaning of Section 617 of the [Companies' Act, 1956](#). The Appellant engages in the manufacture of fertilizers and other chemicals, falling under Chapter Heading 29 and 31 of the Central Excise Tariff Act, 1985. The Appellant has a factory at Thal, in the District of Raigad. and has set up a Steam Generation Plant, which is operated by the use of fuels

such as Naphtha and natural gas. The Steam Generation Plant is fired and heated by the use of Naphtha, which is procured by availing of an exemption under Notification 4/97 dated 1 March 1997 and natural gas procured from the Gas Authority of India Ltd. Under the exemption notification dated 1 March 1997, a nil rate of duty has been prescribed inter alia for Naphtha and Natural Gasoline Liquid for use in the manufacture of fertilizer or ammonia, falling under Chapter Heading 27. The annexure to the notification contains conditions 3 and 4 subject to which the exemption has been provided. Condition 3 prescribes that the exemption shall be subject to proving to the satisfaction of an officer not below the rank of the Assistant Commissioner of Central Excise that "such goods are cleared for the intended use specified in column (3) of the table." Use in this case is the manufacture of fertilizer or ammonia. Condition 4 is that where such use is elsewhere than in the factory of production, the procedure set out in Chapter X of the Central Excise Rules, 1944 must be followed.

4. In the present case, a notice to show cause was issued to the Appellant on 29 August 2001. Evidently, several rounds of proceedings took place in pursuance of the notice to show cause and the Tribunal was called upon to remand the proceedings back to the adjudicating authority on more than two occasions. Eventually, on 27 January 2010, the adjudicating authority passed an order, adjudicating the claim of the Appellant and holding that the Appellant was not entitled to the benefit of the exemption. The Appellant filed an appeal before the Tribunal together with an application for waiver of pre-deposit. The Tribunal by its order, which is impugned in these proceedings, directed the Appellant to deposit an amount of Rs.2 crores and report compliance by 19 August 2011.

5. On behalf of the Appellant two submissions have been urged. Firstly, it has been submitted that the Appellant was entitled to a complete waiver of the requirement of pre-deposit for the reason that it is a Central Government Undertaking. Secondly, it has been urged that the order of the Tribunal would indicate that the appeal before the Tribunal involves a serious question for consideration including as to whether the Appellant has duly fulfilled the conditions prescribed by the exemption notification. Counsel submitted that Tribunal launched upon a detailed enquiry into the merits of the case in the manner that it was disposing of an appeal finally. At the stage of consideration of the application for a waiver of pre-deposit, the Tribunal was only required to consider as to whether a prima facie case was made out, which requires a serious evaluation at the final hearing of the appeal.

6. On the other hand, Counsel appearing on behalf of the Revenue has supported the order of the Tribunal by submitting that each one of the submissions, which was urged before the Tribunal has been carefully considered and hence, it is urged that no case for interference in the appeal would arise.

7. At the outset, it would be necessary for the Court to consider as to whether the Appellant is justified in its submission that the mere fact that it is an Undertaking of the Central Government and a Government Company within the meaning of Section 617 of the [Companies' Act, 1956](#) would justify the grant of a complete waiver of the requirement of pre-deposit. Section 35F provides that where in any appeal under the 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 the 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. The Appellate Tribunal is, however, empowered to dispense with the requirement of deposit subject to such conditions as it may deem fit to impose, so as to safeguard the interest of Revenue, if it is of the opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person. The provisions of law structure any order of dispensation on the existence of undue hardship. Those provisions have been consistently interpreted and applied in judicial precedent. The element of a prima case on merits and financial hardship are relevant considerations in determining an application for the grant of dispensation. When the Tribunal grants an order of waiver or dispensation, it is within its jurisdiction to impose a condition that would safeguard the interest of the Respondent. The mere fact that an Undertaking is a Government Company within the meaning of Section 617 of the [Companies' Act, 1956](#), is not sufficient to enable the Appellant to an order dispensing with pre-deposit. A government company under Section 617 of the Companies Act, 1956 has a distinct corporate personality and is a juristic

entity. The government may in many cases own the entire share capital but that is not necessarily so in all cases particularly as economic policy moves into areas of disinvestment. Moreover, even where the entire share capital is owned by the Central Government, the company still retains a juristic character and cannot be equated with the Union of India. Where a government company is engaged in activities in the priority sector that, as the Supreme Court held, is an important consideration in determining whether an order of deposit will adversely affect the public interest. Similarly, the fact that a government company carries on activities which have an important element of public interest, such as the implementation of the Directive Principles of State Policy is a relevant factor. But in an era of deregulation, an enterprise which carries on commercial activities cannot be exempt from a requirement of pre-deposit only on the ground that a part of its share capital is owned by government. The requirement of pre-deposit has been enacted to ensure that litigants do not by protracting litigation, delay the realisation of the revenue dues of government. The need to safeguard the interests of the revenue is integral to legislation requiring pre-deposit. That need has to be carefully balanced with the concerns of justice to the appellant in each case. Hence, the discretion of the Tribunal cannot be placed into a strait jacket. Each case has to be judiciously evaluated. We have adverted to some of the considerations but they are illustrative and not exhaustive. The Excise Manual does not preclude the exercise of discretion by the Tribunal nor can it so be construed. In each case, the Tribunal as Appellate Authority has to apply its mind judiciously to the circumstances which are mandated by the statute and determine as to whether a case of undue hardship within the meaning of the proviso to Section 35F has been made out.

8. On behalf of the Appellant, it is sought to be urged that this Court in several decisions has taken the view that an order of waiver or dispensation is warranted where the Appellant is a Central Government Undertaking. In this regard, reliance was placed on the judgment of a Division Bench in Hindustan Petroleum Corporation vs. Union of India.¹ That was a case 1 2010(256) ELT 731 (Bom.) which arose before this Court in a Petition under Article 226 of the Constitution, challenging an order of the Tribunal, directing the Petitioner to pre-deposit a sum of Rs.3.75 crores towards duty within a stipulated period. Reliance was sought to be placed on the Excise Manual of the CBEC. While disposing of the Petition, the Division Bench made the following observations:

"Suffice it to say that the instructions issued by the Board contained in the Excise Manual pressed into service by the petitioner ought to have been given due consideration by the Tribunal when the same was brought to its notice. However, we do not find any reference to the said aspect of the matter in the impugned order. It is not in dispute that the Petitioner is a Government of India undertaking. Solvency is beyond doubt. The question sought to be raised in appeal, no doubt, needs serious consideration by the Tribunal, however, one cannot say that no prima facie case was made out by the petitioner for complete waiver of the pre-deposit. As a matter of fact, as per the instructions of the Board, petitioner is exempted from furnishing any security.

In the above facts and circumstances of the case, ends of justice would be met by directing the petitioner to execute a general bond with the jurisdictional Assistant Commissioner/Deputy Commissioner."

These observations of the Division Bench would indicate that the Court had due regard to several circumstances, namely:

- (i) The instructions issued by the Central Board of Excise and Customs, which according to the Court, should have been considered by the Tribunal;
- (ii) That the Petitioner was a Government of India Undertaking whose solvency was beyond doubt; and
- (iii) The fact that the question, which was sought to be raised in the appeal, required serious consideration by the Tribunal. It is upon evaluating the totality of all these circumstances that the Division Bench came to

the conclusion that the Petitioner should be directed to execute a general bond with the Jurisdictional Assistant Commissioner/Deputy Commissioner. The provisions of the Manual were only one circumstance which the Bench observed that the Tribunal should have considered. A Special Leave Petition against the judgment of this Court was dismissed by the Supreme Court on 5 April 2010 (Union of India vs. Hindustan Petroleum Corporation Ltd.)² In a subsequent order of the Division Bench dated 16 September 2009 in Bharat Petroleum Corporation Ltd. v. Union of India,³ the earlier decision in HPCL (supra) was followed. Another Division Bench followed the first decision in HPCL (supra) in Union of India Vs. Hindustan Petroleum Corporation Ltd.⁴ Counsel appearing on behalf of the Appellant

² 2010 (257) ELT A22 (S.C.)

³ Writ Petition 7478 of 2009

⁴ Central Excise Appeals (L) 52 and 53 of 2010 decided on 15 September 2010. placed reliance on the judgment of the Supreme Court in Bharat Petroleum Corporation vs. Commissioner of Sales Tax (Civil Appeal No.4933 of 2008 decided on 7 August 2008). In that case, the issue which arose for determination in a pending statutory appeal before the Assistant Commissioner of Sales Tax was, whether the sale of Superior Kerosene Oil by Bharat Petroleum Corporation Ltd. to another oil company through the Public Distribution System was exempted from sales tax in terms of an exemption notification issued by the Government of Orissa. In an application for stay, the Appellant was called upon to effect a deposit of Rs.20 lakhs by the High Court. The Supreme Court held thus:

"Normally, this Court does not interfere in interim matters particularly when the matter concerns levy of tax. However, this is a peculiar case for two reasons, i.e., BPCL Ltd. is a public sector company in a priority sector which is obliged to sell kerosene via PDS route. The demand is for Rs.1.34 Crores (approx.) and, in the circumstances, we are of the view that to call upon BPCL at this stage to deposit a huge amount of Rs.1.34 crores (approx.) would have serious effect on the PDS sales. On the other hand, we are satisfied that BPCL is a substantial company. It is in a sound financial position and it can discharge its liability at a later date, if need be." (emphasis supplied).

These observations would indicate that two circumstances weighed with the Supreme Court. The first was that the Appellant was a Public Sector Undertaking, engaged in a priority sector. The Appellant was obliged to sell kerosene through PDS and an order of deposit would have a serious effect on PDS sales. Secondly, the financial position of the Appellant was sound enough so that it could discharge its liability at a later date if the need arose.

9. All these judgments would indicate that the law is not that a Government Company within the meaning of Section 617 is entitled to an order dispensing with the requirement of pre-deposit merely for the reason that it is a Government Company. The requirement of undue hardship within the meaning of proviso to Section 35F has to be evaluated by the Tribunal by following the well settled principles. Undoubtedly, where the Appellant is a Government Company which is in sound financial position that would be a material consideration which has a bearing on the safeguarding of the interests of the Revenue. Similarly, the fact that the Company in question, is a Government Company which engages in an important public project, having a bearing on the public interest, would be a relevant consideration. The question as to whether the appeal raises an issue which requires serious consideration is again a matter which has to be judiciously evaluated by the Tribunal prima facie at the stage when an application for dispensation of pre-deposit is made.

10. In the present case, the Appellant has contended that it is entitled to the benefit of the exemption notification on the ground that the Naphtha that is acquired is for the intended use of manufacture of fertilizers. In this regard, in order to support its case, the Appellant placed reliance on a judgment of the Supreme Court in State of Haryana vs. Dalmia Dadri Cement Ltd.⁵ and more particularly on the following observations contained in paragraph 13 of the judgment :

"We are, therefore, of the view that the real question which we are called upon to determine is whether, in the present case, the cement supplied was intended for use directly in the generation or distribution of electrical energy. If it was so intended, the exemption was attracted but not otherwise. The certificates which we have referred to earlier issued by the Board clearly show that the intention of the Board was that the cement should be used for a purpose directly connected with the generation or distribution of electrical energy. There is 5 2004 (178) ELT 13 (S.C.) no material to show that the certificates were false certificates given by the Board, having another use in mind, or that they were fraudulently obtained by the assessee in collusion with the Board. The mere fact that some of the cement supplied was, in fact, used by the Board for activities not directly connected with the generation or distribution of electrical energy cannot make any difference regarding the availability of the exemption." (emphasis supplied).

11. These observations are relied upon by Counsel appearing on behalf of the Appellant to contend that the mere fact that some part of the Naphtha has been used not for the production of the fertilizers, but in the generation of electricity, would not make any difference to the entitlement of the Appellant to the benefit of exemption notification. Whether the Appellant is justified or otherwise in making that submission is undoubtedly to be determined by the Tribunal at the hearing of the appeal. At the present stage, we are of the view that there is merit in the submission of the Appellant that the contention of the Appellant does require serious consideration in the pending appeal. In that sense, the Tribunal was not justified in launching upon a detailed investigation of the merits of the case of the Appellant which must await the final hearing of the appeal. In this view of the matter, we are of the view that the Tribunal was not justified in directing the Appellant to deposit an amount of Rs.2 crores. We must also bear in mind circumstances that the Appellant is a Central Government Undertaking whose financial condition would enable it to meet any liability that arises on account of the dues of the Revenue.

12. Hence, we set aside the order of the Tribunal requiring pre-deposit of Rs.2 crores and answer the questions of law in terms of the observation contained in this judgment. The Appellant will be entitled to dispensation of the requirement of pre-deposit, subject to the Appellant filing a general bond with the Assistant Commissioner of Central Excise that it would fulfill the demand that may arise upon final adjudication of the appeal.

13. The appeal is accordingly disposed of. There shall be no order as to costs.

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