

**(2005) 09 AHC CK 0201****Allahabad High Court****Case No:** Civil Miscellaneous Writ Petition No. 1094 of 2005

Triveni Glass Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

**Date of Decision:** Sept. 6, 2005**Acts Referred:**

- Central Excise Rules, 1944 - Rule 173E, 173Q, 53
- Central Excises and Salt Act, 1944 - Section 11A, 35B, 35F
- Constitution of India, 1950 - Article 14, 226

**Hon'ble Judges:** Arun Tandon, J**Bench:** Single Bench**Advocate:** Bharatji Agrawal and Manish Goyal, for the Appellant; Ramesh Chandra Shukla and K.C. Sinha, for the Respondent**Final Decision:** Dismissed**Judgement**

Arun Tandon, J.

Heard Sri Bharatji Agrawal Senior Advocate, assisted by Sri Masnish Goyal Advocate on behalf of the petitioner, Sri Ramesh Chandra Shukla Advocate on behalf of respondents.

2. Petitioner M/s Triveni Glass Limited Iradatganj, Allahabad is a company engaged in manufacturing of sheet glass etc. covered under Heading 70.02 of the Scheduled to the Central Excise Tariff Act. The Officers of the Central Excise Department visited the production unit of the petitioner company on 16<sup>th</sup> July, 1994. On the relevant date the stock of excisable goods was physical checked and the statutory records were scrutinized. The Officers of the Department specifically noticed that several trucks loaded with glass sheets removed from the warehouse were ready to leave the factory premises. However, on verification of the statutory records, it was noticed that the goods loaded in Truck No. RJ-C 6577 had not been entered into the statutory records before being cleared. The Officers on verification of the daily stock

account maintained by the company, in accordance with the provisions of Rule 53 of the Rules of Central Excise Rules, noticed that glass sheets valued at Rs. 1,36,22,656.82 manufactured and stored in different warehouses of the company had not been recorded in the statutory daily production account. The discrepancies noticed with regards to glass sheets manufactured on daily basis viz-a-viz the figure reflected in RT-12 suggested suppressed production. Similarly, discrepancies were also noticed as per the statement of the assessee before the Assistant Development Officers (Glass), Director General of Technical Development and the total production as per the RT-12 register. The Department therefore, being satisfied that the statutory records, maintained by the petitioner, could not be relied upon to determine the total production, proceeded to determine the normal production under Rule 173E of the Central Excise Rules, 1944 on the basis of the production capacity of the plant, as was disclosed by the General Manager Technical and Plant Manager, having decades of experience in the manufacturing of glass sheets.

3. Accordingly a show cause notice was issued to petitioner company on 12<sup>th</sup> July, 1995. The company was required to show cause as to why a total sum of Rs. 20,95,88,296/- may not be recovered under proviso to Section 11A as well as penalty be not imposed in terms of Rule 173Q and as to why an order for confiscation of seized goods be not passed.

4. Pursuant to the show cause notice none of the noticees submitted their reply despite time being granted, and opportunity of personal hearing being afforded. None of them availed the said opportunity. On the basis of the material on record, the Commissioner of Central Excise, Allahabad vide order-in-original dated 30<sup>th</sup> December, 2004 confirmed the duty demand of Rs. 20,95,88,296/- and imposed a penalty of Rs. 21,95,88,296/- on the petitioner along with other various amount by way of penalty on other noticees, who were the Director and other Officers of the petitioner company.

5. Feeling aggrieved by the aforesaid order of the Commissioner, the petitioner company along with the Director and its Officers preferred separate appeals u/s 35B of the Central Excise and Salt Act 1944 along with an application for waiver of the predeposit of the disputed amount u/s 35F proviso of the 1944 Act. The appeals filed by the petitioner company and its Officer/Director has been registered as Appeal Nos. E/I376-82, 1394/05-B. The application filed by the petitioner company and Director/Officers for waiver of the predeposit of the disputed amount have been decided under order of The Customs, Excise & Service Tax Appellate Tribunal, New Delhi dated 17<sup>th</sup> June, 2005. The Tribunal by means of the said order has partly allowed the application filed by the petitioner company and has required the petitioner company to deposit a sum of Rs. 10 crores towards the demand of duty and in addition thereto to deposit 50% of the penalty, imposed under the order in appeal, within eight weeks from the date of the order. It is against this order of the Tribunal, deciding waiver application of the petitioner company, the present writ

petition has been filed.

6. On behalf of the petitioner the order impugned has been challenged basically on the ground that the Tribunal has not recorded sufficient reasons after taking into consideration the material available on record with regards to undue hardship viz-a-viz the financial status of the petitioner. The contention is canvassed on the strength of the judgments relied upon by the Counsel for the petitioner reported in 1999 (113) E.L.T. 28, 1995(80) E.L.T. 778, 1988(34) E.L.T. 450, 1995 (79) E.L.T. 48, 1994(1) UPTC 205, 1989(44) E.L.T. (Ker) 401 and [Polar Industries Ltd. Vs. The Commissioner of Central Excise and Others](#). It has been vehemently contended that prima facie merits of the case in the appeal have only secondary place. The primary consideration for deciding an application u/s 35F proviso is the financial difficulty, which the petitioner would face in case the company is required to deposit the amount for the appeal being entertained. In the alternative it is submitted that petitioner had also established a prima facie case inasmuch as u/s 173E installed capacity" is only one of the indices, for determining the normal production of the factory. The statement of the Manager, as recorded by officer of the Department on inspection is in variance, as borne out, from the evidence on record. Lastly it is contended that the Tribunal has failed to take into account that there has been violation of the principles of natural justice inasmuch as despite repeated letters of the petitioner (copies whereof are enclosed on pages 266 to 27,0 of the present writ petition), the documents asked for had not been supplied to the petitioner. It is therefore submitted that the order of the Tribunal be set aside and matter be remanded for reconsideration of waiver application.

7. I have heard counsel for the parties and have gone through the records of the writ petition.

8. For the purposes of appreciating the contention raised on behalf of the petitioner, it is worthwhile to reproduce Section 35F of the Act, which is being quoted herein below:

"Section 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 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 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 filling."

9. A bare reading of the aforesaid section could establish that the Appellate Tribunal can waive the predeposit of the disputed duty demanded and penalty imposed only in cases where such deposit would cause undue hardship to the appellant. Such waiver is to be granted on such conditions as the Tribunal may deem fit, to impose, in order to safeguard the interest of revenue.

10. In the opinion of the court, in the said section the word "Hardship" is preceded by the word "Undue". For a to be termed undue, it is but necessary be established that the liability fasten is legally not due. Since Section 35F comes into play at the time of entertainment of appeal for hearing, the liability to be termed undue under the said section must be *prima facie* established as legally not due. It is only after such *prima facie* case being established that the appellant must further prove the financial difficulties (hardship) in case the amount levied/demanded under the order, is required to be deposited for the entertainment of his appeal. *Prima facie* case in such circumstances cannot be said to be the secondary consideration for grant of an order of waiver of predeposit of disputed amount and to that extent the Court records its firm opinion. The scope of Section 35F was subject matter of consideration before the Delhi High Court in the judgment reported in [Usha Udyog and M/s. R.H.L. Profiles Ltd. Vs. Customs, Excise and Gold \(Control\) Appellate Tribunal](#), The Division Bench of Delhi High Court, after referring to the judgment of the Hon'ble Supreme Court in the case of [Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others](#), has held as follows:

"6. Requirement of deposit of the amount in dispute is a condition precedent for entertaining the appeal and not for filing the appeal. Failure to deposit the amount in question would render the appeal incompetent. While considering an application for grant of stay, the concerned authority has to, *inter alia*, consider the following aspects:

- (a) Whether there is *prima facie* case in favour of the assessee.
- (b) the balance of convenience qua deposit or otherwise.
- (c) Irreparable loss, if any, to be caused in case stay is not granted.
- (d) Safeguarding of public interest.

In the [Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others](#), the Apex Court held that normally four factors for grant of stay order should be kept in view i.e. *prima facie* case, which by itself is not enough, balance of convenience, possibility of irreparable injury and safeguarding the public interest."

11. It may be further pointed out that right of appeal is a statutory right and has necessarily to be exercised in strict compliance of the conditions incorporated for such statutory appeal. In cases where the appellant is not ready and willing or is incompetent to comply with the statutory requirements of Section 35F, his appeal is legally not competent. It is needless to point out that failure on the part of appellant "to meet with the requirement of Section 35F renders the appeal incompetent by operation of law.

12. Statutory right of appeal, being a creation of legislature, can always be hedged by such conditions, as may be deemed fit by the legislature. The legislature can, while granting right of appeal, lay down the condition of predeposit of the tax/excise. The legislature can put restriction on such rights and may so curtail it. There is nothing wrong if under a statute right of appeal is given with some restriction being imposed thereon. The right to appeal is substantive right and not mere matter of procedure, such rights are neither absolute nor ingredient of interest of justice. The right can be exercised only in terms of the conditions where ever so imposed by the Statute. In physical statute like Central Excise and Salt Act, which mandate deposit of disputed amount as a condition precedent for entertaining the appeal, is a an authority itself of legislation and Article 14 has no application. In support of the same, reference may be had to the judgment of Hon'ble Supreme Court in the case of *Anand Mills Company Limited v. State of Gujarat*; reported in 1976 SC 1234 and [\*State of Bombay Vs. Supreme General Films Exchange Ltd.,\*](#)

13. Section 35F also casts a duty upon the Appellate Tribunal to impose such conditions while granting waiver, as may be necessary to protect/safeguard the interest of Revenue. Such obligation cast under the statutory provisions have to be taken care of by the Appellate Tribunal whenever an application u/s 35F seeking waiver comes up for consideration before the authority.

14. The Court may now consider the judgments referred to on behalf of the petitioner. The judgment reported in [\*Shree Bal Kishan Agarwal Glass Inds. Pvt. Ltd. Vs. CEGAT,\*](#) has held that even where the Tribunal has come to a conclusion that the appellant has no *prima facie* case in merit in the appeal, yet the Tribunal has to consider the financial hardship u/s 35F for grant of waiver. In the opinion of the Court the said judgments neither refer to the scope of Section 35F nor the law laid down by the Hon'ble Supreme Court, referred to above, has been taken note of. Therefore, the said judgments is not being followed by this Court.

15. So far as the judgment reported in [\*Mitter Sain Industries Vs. Customs, Excise and Gold \(Control\) Appellate Tribunal and Another,\*](#) is concerned, the said judgment does not deal with an issue as to whether the petitioner had made out a *prima facie* case for grant of waiver or not and therefore the said judgment is clearly distinguishable. In the facts and circumstances of this case the facts of the present case.

16. So far as the judgment reported in Kanpur Cigarettes Ltd. Vs. Collector of Central Excise, is concerned, suffice it to point out that in paragraph 5 of the said judgment it has specifically been noticed that the Tribunal in the order impugned had observed that the appellant (petitioner) had made out a strong *prima facie* case for waiver of predeposit and therefore the said judgment also not. help to the petitioner.

17. The judgment of the Hon"ble Supreme Court in the case of Polar Industries Ltd. Vs. The Commissioner of Central Excise and Others, relied upon by the petitioner has no application in the facts of the present case and reference, as the Hon"ble Supreme Court had passed the order only in the peculiar facts of that case. In view of the aforesaid, none of the judgments relied upon by the counsel for the petitioner are of any assistance to the petitioner, so far as the legal issues raised in the present writ petition are concerned.

18. From the judgment of the Tribunal it is apparently clear that sufficient reasons have been recorded for disbelieving the records maintained by the petitioner company. The Tribunal has recorded its satisfaction that the Officers of the Central Excise Department were *prima facie* justified in determining the normal production of the petitioner industry under Rule 173E of the Central Excise Rules, 1944. The said determination has been done with reference to the material evidence on record, which included the statement of General Manager (Technical) and Plant Manager disclosing the production capacity of the petitioner industry.

19. The contention with regards to violation of principles of natural justice on the ground of non-supply of the documents (by the Assessing Authority) asked for by the petitioner with reference to the letters at pages No. 268, 269 and 27, also not well founded. It may be pointed out that by means of the letter at pages No. 268 and 271, the petitioner has only asked for one page of Annexure-61 (to the specific page 174). Before this Court the petitioners have not been able to demonstrate as to how their reply to the show cause notice could have been prejudiced " by non-supply of the said one page of an Annexure asked for by the petitioner. In the opinion of the Court, the plea with regard to violation of principles of natural justice *prima facie* appears to be a camouflage for seeking interference by this Court.

20. The finding of the Tribunal in the impugned order, to the effect that there was sufficient material before the adjudicating authority for recording a finding against the assessee as well as persons who had played a role in the evasion of duty, cannot be said to be arbitrary or unjustified or based on no evidence..

21. It would be appropriate to refer to the judgment of Hon"ble Supreme Court reported inn Pyloff Packaging Pvt. Ltd. Vs. Union of India (UOI) and Others, wherein it has been held that an order declining to grant waiver of pre-deposit or a percentage thereof is a discretionary order and this Court would not ordinarily interfere with such an order and it is only in the rarest of the rare case, when due to

improper exercise of discretion, the interests of justice get defeated that the Court would grant appropriate relief. For ready reference relevant portion of paragraph 5 of the judgment is being quoted herein below:

"5. An order declining to grant waiver of pre-deposit or a percentage thereof is a discretionary order and this Court would not ordinarily interfere in such an order. It is only in the rarest of the rare case, when due to improper exercise of discretion, the interests of justice get defeated that this Court would grant appropriate relief."

22. In the facts of the present case, the Court is satisfied that the discretion exercised by the Tribunal does not call for any interference in the present writ proceedings. This case is not one of the rare of the rarest cases for any interference being made by this Court under Article 226 of the Constitution of India.

23. It would not be out of place to notice that having regard to the financial hardship faced by the petitioner, the Tribunal in its discretion has called upon the petitioner to pay only Rs. 10 crores against the demand of over 21 crores of rupees towards duty. Similarly in respect of total penalty amount of Rs. 22 crores, the petitioner company has been asked to deposit only 50% of the said disputed penalty for the appeal being entertained. Thus the Tribunal has granted waiver qua predeposit of the deposited amount to the extent of nearly Rs. 22 crores in favour of the petitioner under the impugned order.

24. Writ petition lacks merit and is accordingly dismissed.

25. However, in the facts and circumstances of the case, this Court is of the opinion that interest of justice would be served if the petitioner is permitted to furnish security other than cash or bank guarantee in respect of the 50% of the total amount of penalty imposed by the assessing authority (required to be paid in cash under the order of the Tribunal). This concession is being granted in favour of the petitioner, having regard to the financial position of the company as disclosed from the balance sheet on record and in the background that the petitioner company has no available liquid cash to deposit nearly Rs. 11 crores (50% of total penalty imposed) in cash.

26. Since the time for deposit of Rs. 10 crores of duty demanded as has provided under the impugned order of the Tribunal has already run out, it is provided that petitioner may deposit the said sum of Rs. 10 crores in cash within one month from today and may also furnish security other than cash or bank guarantee with the same period to the satisfaction of the assessing authority in respect of 50% of the total penalty imposed by the assessing authority as condition precedent for entertainment of his appeal. In case of compliance of the directions as aforesaid, the order of the Tribunal dismissing the appeal dated 19<sup>th</sup> August, 2005, because of non-deposit of the amount as directed in the impugned order, shall be recalled. The appeal filed by the petitioner shall be entertained and shall be decided on merits by the Tribunal at the earliest possible, preferably within four months from the date a

certified copy of this order is filed before the Tribunal.

27. Writ petition stands dismissed subject to the observations made herein above.