(2012) 11 JH CK 0042

Jharkhand High Court

Case No: Writ Petition (T) No. 2659 of 2012

M/s. Panch Sheel Udyog — APPELLANT

Vs

The Union of India and Others — RESPONDENT

Date of Decision: Nov. 30, 2012

Acts Referred:

- Central Excises and Salt Act, 1944 - Section 35F
- Finance Act, 1994 - Section 65, 83

Citation: (2013) 31 STR 517

Hon'ble Judges: Prakash Tatia, C.J; Jaya Roy, J

Bench: Division Bench

Advocate: M.S. Mittal and Mr. Sumeet Gadodia, for the Appellant; Ratnesh Kumar, Sr. SCC Excise, for the Respondent

Final Decision: Allowed

Judgement

1. Heard learned counsel for the parties. The present matter has peculiar facts, in as much as, the writ petitioner sought exemption from condition of pre-deposit u/s 35F of the Central Excise Act, 1944 as well as u/s 83 of the Finance Act, 1994 for maintaining his appeal under the provisions of the Act of 1944. The petitioner''s said prayer for grant of exemption from the condition of pre-deposit of the entire amount was considered by the Commissioner (Appeals), Central Excise and Service Tax, Ranchi without giving opportunity of hearing to the petitioner under assumption that no hearing of petitioner is required. The said Commissioner vide order dated 19.12.2011, directed, rather say, permitted the petitioner to deposit 50% of the confirmed demand amount so as to fulfill the condition of pre-deposit.

2. The petitioner, being aggrieved against the order of the Commissioner (Appeals), Central Excise and Service Tax, Ranchi, approached this Court by filing writ petition being W.P.(T) No. 441 of 2012 Said writ petition was allowed by the Division Bench of this Court vide order dated 03.02.2012 and the order of the Commissioner (Appeals),

Central Excise and Service Tax, Ranchi was set aside and the said authority was directed to pass fresh order after giving opportunity of hearing to the writ petitioner. The Commissioner (Appeals), Central Excise and Service Tax, Ranchi, after hearing the petitioner, vide impugned order dated 11.04.2012 withdrew that benefit which was given to the writ petitioner when he was not heard and directed the petitioner to deposit full demand amount. Therefore, if petitioner would not have got the opportunity of hearing, he would have to deposit 50% of the confirmed demand created by the impugned order which was under challenge before the appellate authority and when petitioner was given opportunity of hearing, he is directed to pay the entire amount of demand. The petitioner, therefore, is aggrieved against the subsequent order passed by the Commissioner (Appeals), Central Excise and Service Tax, Ranchi dated 11.04.2012.

3. Learned counsel for the writ petitioner vehemently submitted that the appellant was given two contracts, one by TISCO and another by JUSCO. It is submitted that both contracts are similar and they are for providing cleaning service by the writ petitioner. So far as one contract is concerned, that has been treated to be a cleaning service contract by the revenue and tax has been levied accordingly because of the reason that cleaning service was provided for industrial unit which could have been levied. But, so far as another contract is concerned, that contract is also a cleaning service contract but it is not given for any commercial or industrial building or premises and it is for residential colony. According to learned counsel for the petitioner, in present case, the contract in question cannot be said to be a contract falling under the contract for "Management, Maintenance or Repair Service" and in particular, a contract for "Maintenance" in contrast to another contract referred above. According to learned counsel for the writ petitioner, such stand has been taken by the revenue only because of the reason that if, this contract is treated to be a contract for cleaning services, then it will not fall and will not be covered under Clause 24(b) of Section 65 of the Finance Act, 1994 as the contract is for residential premises and colonies which have not been included in the definition of cleaning activity referred above. Therefore, the revenue interpreted the contract and wrongly included the service of the petitioner to be service for "maintenance". Learned counsel for the petitioner drew our attention to the various clauses of the contract and also drew out attention to the facts noted by the original authority in the original order to demonstrate before us that the contract in question is not the contract for maintenance but it was a cleaning activity contract for residential area of the unit who gave the contract to the writ petitioner.

4. Learned counsel for the petitioner vehemently submitted that in view of the position made clear by letter No. B1/6/2005 TRU dated 27.07.2005 also, therefore, there is no tax liability of the writ petitioner. It is submitted that petitioner is asked to pay certain amount which he is not liable to pay, in that situation, it may result into undue hardship because of the demand only. Learned counsel for the petitioner also submitted that there is a strong prima-facie case in favour of the petitioner and

Hon''ble Supreme Court in the case of Benara Valves Ltd. and Others Vs. Commissioner of Central Excise and Another, has considered in detail what is "undue hardship" which is required to be considered while passing orders of interim nature in such type of matters. The said case of Benara Valves Ltd. has been considered by the Division Bench of this Court (in which one of us Justice Prakash Tatia, C.J. was member) in the case of Tata Motors Limited Vs. Union of India & Others (W.P.(T) No. 705 of 2012) decided on 15.02.2012. In the case of Tata Motors (Supra) it appears, inadvertently citation has wrongly been mentioned as (2006) 204 SCC 513 (SC), whereas correct citation is Benara Valves Ltd. and Others Vs. Commissioner of Central Excise and Another, and equivalent citation is Benara Valves Ltd. and Others Vs. Commissioner of Central Excise and Another, . It is submitted that so far as undue hardship and all other considerations are concerned, those were considered by the same lower appellate authority on earlier occasion when it passed the order dated 19.12.2011 and partly allowed the petitioner''s application for exemption from the condition of pre-deposit by directing it to deposit 50% of the confirmed demand. However, when the same authority again considered the matter, then missed the scope of consideration which should be at the time of passing of the interim order. It is submitted that the same authority, in more detail, discussed the merit of the case and did not consider prima facie merit of the case. It is submitted that in view of the fact that virtually similar contract has been considered to be a cleaning service contract by the revenue then in that situation, it was a pure question of law as it involves interpretation of documents and earlier order passed by the authority for similar agreement. Therefore, in view of the various provisions which have been shown to us, the petitioner has strong prima facie case and in case the relief of exemption from payment of pre-deposit is not granted, undue hardship will result to the petitioner as according to the petitioner, the revenue could not show that particular burden created by the impugned order is in proportion to the liability of the petitioner.

5. Learned counsel for the revenue vehemently submitted that Hon''ble Supreme Court in the case of Benara Valves Ltd. and others Vrs. Commissioner of Central Excise and Another has clearly considered in what circumstances the courts may grant interim order with respect to the condition of pre-deposit and what is the meaning of undue hardship. Learned counsel for the revenue seriously questioned the merit in the case of challenge to the impugned order which was challenged before the appellate authority. According to learned counsel for the revenue, from any angle if the contract is examined, it squarely falls within the ambit of providing maintenance service to the company who gave the contract, may it be, in relation to the colony or garden. The order passed by the adjudicating authority is well reasoned order and cogent reasons have been given by the adjudicating authority who fastened the liability upon the writ petitioner. Therefore, there is no prima-facie case in favour of the writ petitioner, much less to resulting into any undue hardship to the petitioner.

6. We have considered the submissions of the learned counsel for the parties and perused the agreement in question and the reasons given by the Commissioner(Appeals), Central Excise Service Tax, Ranchi in its order dated 11.04.2012. We are of the considered opinion that the same authority, on earlier occasion, when it decided the application without giving opportunity of hearing to the writ petitioner, partly allowed the application of the petitioner and directed the petitioner to deposit 50% of the confirmed demand for maintaining the appeal and when this Court directed the same authority to give opportunity of hearing to the writ petitioner, it rejected the application of the writ petitioner for exemption from condition of pre-deposit.

7. Be that as it may, so far as prima-facie case is concerned, we are of the considered opinion that the issue as has been considered by the appellate authority i.e., Commissioner (Appeal) Central Excise Service Tax, Ranchi, itself shows that the issue of not only question of fact but question of law has been successfully raised by the writ petitioner before the appellate authority even at the time of arguing the application for exemption from condition of pre-deposit. It appears that the appellate authority virtually proceeded to examine the issue as though it was deciding the appeal itself and instead of finding out the prima-facie case, it has virtually recorded the findings on the issues. It is not a case of mere more details of the fact or even of law in the impugned order but it is a case where probably the authority, influenced by the detailed arguments of the parties, proceeded to record very many findings. However, we are making it clear that those observations shall be treated to be only prima-facie observations of the authority and not the findings on the issue finally.

8. After going through the contents of the agreement and definition of the cleaning activities as given in Clause 24(b) of Section 65 of the Finance Act, 1994, there may be prima-facie force in the submission of the learned counsel for the petitioner that the cleaning activities may not include the activities undertaken by the petitioner when it is for the residential complex or colony and the plea of the petitioner that the work awarded to the petitioner of the nature mentioned even in the order passed by the original authority may not fall in the category of "maintenance". There is also prima facie, force in the submission of the learned counsel for the revenue that there are overlapping works, hence, some of the works have been clearly mentioned in the agreement to be the work of maintenance. In view of those arguments of learned counsel for the parties, the matter is required to be considered by the fact finding authority carefully to find out the nature of the contract after taking into account the another contract obtained by the petitioner itself from the same company and after taking into account all the facts of the work to be done by the petitioner and to find out whether the contract is a contract for maintenance or it is a contract of service for cleaning activities. In view of the above reasons, we are of the considered opinion that there is prima-facie case in favour of the writ petitioner.

9. So far as the question of undue hardship is concerned, we are of the considered opinion that the Commissioner(Appeals), Central Excise, Ranchi itself was of the view in the order dated 19.12.2011 that the petitioner should deposit 50% of the confirmed demand, then in that situation, there was no justification for putting the petitioner in worse position than the earlier order which was passed ex-parte asking the petitioner to deposit 50% of the confirmed demand for maintaining the appeal. Therefore, the question of undue hardship has already been assessed by the authority itself when it passed the order dated 19.12.2011 and we are of the considered opinion that in that fact situation, the petitioner''s application for exemption from condition of pre-deposit deserves to be allowed in terms of the relief as granted by order dated 19.12.2011.

10. Learned counsel for the petitioner submitted that the order passed in W.P.(T) No. 2233 of 2012 in the case of The Tinplate Company of India Ltd. Vs. Union of India and others, this Court, after considering the fact of petitioner''s case of that writ petition itself, has granted relief to the writ petitioner of M/s. Tinplate Company to the effect that in view of the delay already caused in the litigation, the appellate authority may decide the appeal within three months from the date of receipt of the copy of the order and till then, requirement of condition of pre-deposit shall remain suspended. Learned counsel for the petitioner submitted that in view of the said judgment of this Court, similar relief may be granted to the present petitioner and the appellate authority may be directed to decide the appeal within stipulated period and till then, the condition of pre-deposit may be dispensed with.

11. We are of the considered opinion that a larger issue was involved in the case of Tinplate Company Ltd. and that was with respect to the right of the applicant before the appellate authority of hearing in the matter of seeking relief of dispensing with the condition of pre-deposit and that issue has already been decided by the Division Bench of this Court vide Judgment dated 12.10.2012 (in which one of us Justice Prakash Tatia, C.J. was member), therefore, that relief was granted to the writ petitioner in peculiar facts of the case following the judgment passed by different High Courts but such relief cannot be made a precedent so as to invite all such appellants who are before the appellate authority to seek similar relief of deciding their appeals within stipulated period and till then, the condition of pre-deposit may be dispensed with. If such orders are passed in routine manner and required to be followed in all cases, then virtually it will make section 35F of the Central Excise Act, 1944 redundant. We may also observe that the High Court normally will not direct sub-ordinate courts or tribunals or appellate authorities to decide the matter on priority basis simply because the party has approached the High Court so as to deny the early hearing to all others, who could not or who have not approached the High Court. It is better to leave the docket of the lower Court and appellate Court according to discretion of lower Court and appellate Court. In view of the above reasons, since the judgment in the case of Tinplate Company giving interim relief is not a precedent, we are of the considered view that in the facts of the case, the

petitioner is not entitled to same relief in view of the facts of this case. However, the writ petition of the petitioner is partly allowed. The impugned order dated 11.4.2012 passed by the Commissioner(Appeals), Central Excise and Service Tax, Ranchi is set aside. The application of the writ petitioner is allowed to the extent that the writ petitioner may now deposit 50% of the confirmed demand before the appellate authority within a period of one month from today. We are making it clear that none of the observations made above be treated to be any decision or finding or even observation on the merits of the case of any of the parties.