Shree Krishna Engineering Industries and Another Vs CCE, Commissioner and Others

Court: Calcutta High Court

Date of Decision: June 28, 2000

Acts Referred: Central Excises and Salt Act, 1944 â€" Section 11A, 35F
Customs Act, 1962 â€" Section 129E

Citation: (2000) 72 ECC 270 : (2000) 122 ELT 682 : (2000) 2 ILR (Cal) 426

Hon'ble Judges: Amitava Lala, J

Bench: Single Bench

Judgement

Amitava Lala, J.
The Court: By making this Writ Petition, the Petitioners, virtually, asked for dispensation of requirements of pre-deposit

along with prayers for not giving effect or further effect and/or taking any steps or further steps in connection with the Order dated 5th April, 2000

by the Respondent No. 2 and order dated 1st Feb., 1999 passed by Respondent No. 1 and further and other order or orders in connection

thereto.

2. Since the subject matter in issue is merged with the order of the CEGAT [Customs, Excise and Gold (Control) Appellate Tribunal] Eastern

Branch, Calcutta there is no question that it can be opened for the Court"s interference without going to the ultimate findings particularly when the

subject matter of challenge is the order of Tribunal dated 5th April, 2000.

3. The relevant part of such order of Tribunal for consideration of this Court is as follows:

After hearing both the sides we find that the issue of classification of the steel products manufactured by the appellants is quite arguable from both

the sides and no opinion can be expressed at this point without appreciating the submissions made by both the sides in detail. As regards the

limitation also it is seen that the appellants have had not taken any steps in intimating the department about their manufacturing activities. They are

only relating (sic) upon the classification lists filed by the other assessees in support of their arguments that they were under a bona fide belief that

the steel seats so manufactured by them were entitled to benefit of exemption notification. The grounds raised by the appellants as regards the

limitation also can be gone into only at the time of final hearing of the appeal inasmuch as the appellants have not made out a prima facie case on

this aspect in their favour. The appellants reliance on para 16 of Kerala High Court judgment also does not come to their rescue inasmuch as the

issue before their lordships was classification of a particular product wherein it was observed, after taking into note the view expressed by the

Board of Revenue that principles of taxability cannot vary [from] person to person. Merely because exemption was granted to the other assessees

the appellants do not automatically become entitled to the exemption. The issue has to be examined on the basis of merits. As regards the financial

position we fully agree with the submissions made by the Ld. Advocate for the Revenue that two different profit and loss accounts reflecting

different figures for the year ending 31.3.1998 have been placed on record by the appellants, apart from the fact that the same are either not signed

by anybody or are signed by the partner only. No corresponding receipts as against the TDS deducted in the respective years have been shown in

the balance sheets. Accordingly, we are fully convinced that the financial position of the appellants as reflected in the balance sheet does not reflect

their correct financial position. However, keeping in view the arguable nature of the appeal and the other facts and circumstances we direct the

appellants to deposit an amount of Rs. 20 lakhs (Rupees twenty lakhs) within a period of six weeks from the date of receipt of the order. Subject

to above deposit the balance amount of duty and penalty shall stand waived and its recovery stayed during the pendency of the appeal. It is made

clear that failure to deposit the above amount would result in automatic dismissal of the appeal without any further notice to the appellants. Matter

to come up for ascertaining compliance on 1.6.2000.

4. It appears from the penultimate paragraph of the judgment and order passed by the Tribunal that three aspects are coming out from there.

Firstly, the question of discrimination; secondly, the question of limitation and thirdly, the question of reasonableness in respect of imposition of tax

and other liabilities in connection thereto.

5. According to the petitioners the aforesaid three grounds are good grounds of appeal and unless and until the same are to be heard by the

Appellate Authority without imposition of the pre-deposit, it will cause great hardship to the petitioner. Therefore, the pre-deposit should be

dispensed with by the Writ Court by applying test of balance of convenience and reasonableness.

6. Scope and ambit of Section 35F of the Central Excise Act, 1944 speaks for the pre-deposit similarly with Section 129E of the Customs Act,

1962 which is as follows:

Deposit, pending appeal, of duty demanded or penalty levied: Where in any appeal under this Chapter the decision or order appealed against

related 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:

Providing 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.

7. Therefore, the Tribunal has discretionary authority to dispense with pre-deposit.

8. In the instant case, the prayer in the application is made for dispensing with the condition of pre-deposit of duty amount of Rs. 1,63,40,820.24

and penalty amount of Rs. 16 lakhs and staying recovery thereof during the pendency of the appeal. The pre-deposit is directed to be made by the

petitioner for a sum of Rs. 20 lakhs within a period of six weeks from the date of receipt of the order. Subject to above deposit the balance

amount of duty of penalty was directed to be waived and its recovery being stayed during the pendency of the appeal. It was made clear that

failure to deposit the amount would result in automatic dismissal of the appeal without further notice.

9. The certified copy of the order was forwarded on 25th April, 2000 and this Writ Petition is made within the period of six weeks from the order

by which such time was granted for pre-deposit of the amount as aforesaid.

10. According to the petitioners, one M/s. Special Engineering Services Ltd. manufacture dutiable goods classifiable under Chapters 84, 86 and

87 etc. of Central Excise Tariff 1985. For these items statutory records are maintained and the petitioners have claimed Central Excise Duty at the

appropriate rates. But, in addition to above, they use the aforesaid company to procure orders along with drawings for supply of accessories i.e.

front seat cushion and frame, spring case squab Front, spring case squab rear from Hindustan Motors and supply similar type of goods.

11. In their factory they make out copies of these drawings and prepare purchase orders and place the same to the job workers i.e. (i) Kumar

Agencies (ii) Shrikrishna Engineering Industries, the petitioner No. 1 herein. The said Petitioner No. 1 concerned is carrying on business at their

rental premises. The machineries installed in their factory have been given to them on loan by M/s. Special Engineering Services Ltd. as above.

They use to supply raw materials to the Petitioner No. 1 in case of the change of design in some tools and dyes made available to the job worker.

No interest is charged on loan for machineries, tool and dyes. On completion of manufacture of these goods, the said job worker i.e. the Petitioner

No. 1 herein use to raise on the aforesaid company job charges bill/challan and on the basis of such challan they issue their challans and materials

are being supplied to the premises of the Hindustan Motors Ltd. The said company in their classification list sought for the full exemption of duty on

these products in the form of notifications--Notifications No. 61/86 dated 10th February, 1986, 171/86 and 172/86 both dated 1st March, 1986

which are duly approved by the Assistant Collector, Central Excise, Calcutta ""1 Division"". The aforesaid statement is made on the basis of

Annexure ''E'' to the petition wherein the statement of the Petitioner company who is giving job work to the Petitioner No. 1 is recorded.

According to the Petitioner, in a similarly placed situation exemption was granted in respect of the other companies and therefore, they are entitled

for the same. On account of discrimination, Learned Counsel appearing on behalf of the petitioner cited two decisions. One is reported in Bajoria

Rubber Industries Ltd. Vs. Collector of C. Ex., . (Collector of Customs and Central Excise Vs. Calicut Refrigeration Company, .

12. By showing the first judgment petitioners wanted to establish that the judicial discipline speaks that the Tax Authority in Bengal is bound by the

decision of the Appellate Authority in Bombay. Otherwise, this would lead to discrimination in between the parties at Bombay and Bengal.

13. On the basis of the last part of Paragraph 16 of the Second Judgment he contended that consistency in the interpretation of a tariff entry is very

desirable and principles of taxability cannot vary from person to person or from office to office.

14. So far, the second point in respect of the limitation is concerned he contended that intent to evade duty must be proved by invoking proviso to

Section 11A(1) of Central Excise and Salt Act, 1944 to extend the period of limitation. The observation of the Tribunal as regards the limitation is

that it is seen that the petitioners have not taken any step in intimating the department about their manufacturing activities. According to the

petitioners they are under the bona fide belief that the goods manufactured by them were completely exempted and that was also the view of the

department that the firm did not comply with any Central Excise formality or pay any duty. In these facts and circumstances of the instant case, no

motive whatsoever could be attributed to the firm. The petitioners said that the Tribunal, though took note of the submissions, failed to consider the

same while recording its reasonings.

15. According to the petitioners, the Tribunal failed to consider the well-settled legal position that in order to invoke the longer period of limitation,

mere inaction or failure on the part of the manufacturer is not sufficient and something positive on his part is required. In the instant case, there was

no deliberate action on the part of the firm. Admittedly, the same Central Excise Division under the same Commissionerate had granted the

exemption under the said notifications in respect of identical goods manufactured by others about which fact the firm was aware. The firm bona

fide proceeded on the basis that its goods were fully exempted from duty and as such did not comply with any Central Excise formality in the

genuine and bona fide belief that it was not liable. The Commissioner erred in confirming the purported demand on the assumption that the proviso

to Section 11A(1) was applicable.

16. The Petitioner, further, contended that had the firm paid any duty, it would have obtained complete reimbursement thereof from its customers.

In this respect, the petitioner relied upon the judgment reported in 1995 (6) RLT 333(SC) Cosmic Dye Chemical v. Collector of Central Excise,

Bombay in its paragraphs 5 and 6. According to the Supreme Court, the main limb of Section 11A provides limitation of six months. In case,

where the duty is not limited or paid or short limited or short paid or erroneously refunded, it can be recovered by the appropriate officer within six

months from the relevant date. The expression ""relevant date"" is defined in the Section itself. But the said period of six months gets extended to five

years where such non-levy and levy etc. is ""by reason of fraud, collusion or any wilful mis-statement or suppression of facts or contravention of any

of the provisions of the Act or of the rules with intent to evade payment of duty...."" Now, so far as fraud or collusion is concerned, it is evident that

the requisite intent, i.e. intent to evade duty is built into these two words. So far as, mis-statement or suppression of facts are concerned, they are

clearly qualified by the word ""wilful"" preceding the words ""mis-statement or suppression of facts"" which means ""with intent"" to evade duty. The

next set of words ''contravention of any of the provisions of the Act or Rules"" are again qualified by the immediately following words ""With intent to

evade payment of duty"". It is, therefore, not correct to say that there can be a suppression or mis-statement of fact, which is wilful and yet

constitutes a permissible ground for the purpose if the proviso to Section 11A. Mis-statement or suppression of facts must be wilful. Therefore,

mere recording of statement in the penultimate paragraph that the petitioners have not taken any steps in intimating the department about their

manufacturing activities does not qualify the proviso of Section 11A to the extent of wilful evasion of tax as such it can be ignored at the initial stage

on account of pre-deposit. On the contrary, whenever the Tribunal in deciding the issue of limitation held that such question can be gone into only

at the time of final hearing of the appeal on the question of making pre-deposit should not have been ignored.

17. In respect of the third point i.e., in respect of the merit of the case is concerned the petitioner contended that the Tribunal erred in holding that

the financial position of the petitioners as reflected in the balance-sheet does not reflect correct financial position because of the reason that the

factory''s balance sheet and company''s balance-sheet cannot be the same.

18. To that extent the petitioner cited three judgments reported in 1995 (80) ELT 12 (SC) 1993 (64) E.L.T. 387 (All) (Kamal Bidi Factory v.

CEGAT) Triton Valves Limited Vs. CEGAT, to establish that hardship of the Company should be considered on the basis of the appropriate

parameter of the case. In the first case, the Supreme Court held that since the petitioner is a sick unit there cannot be any embarge on hearing the

appeal without the deposit being made. So far as the second matter is concerned that financial capacity of the assessee has to be ascertained and

the Appellate Authority cannot act arbitrarily. In the third judgment it was considered on the basis of the Paragraphs 18 and 19 of same judgment

that the impact of having to secure a deposit of larger number of amount is a factor of relevance in considering the question of hardship. The

Tribunal has to avert the adverse impact of the requirement of the pre-deposit on the operation of the Petitioner No. 1 concerned.

19. The question of dispensation of pre-deposit in case of preferring appeal either in the Central Excise Act or in the Customs Act cannot proceed

on the basis of any fixed principle but depending upon the facts and circumstances of each case. Therefore, in the instant case, apart from the

description as aforesaid, certain points are to be jotted down hereunder to come to an appropriate conclusion. It is also significant to know what

are the circumstances on which the other Courts dispensed with the pre-deposits.

20. Although no one cited a judgment reported in Smithkline Beecham Consumer Healthcare Ltd. Vs. CCE (A), . which was delivered by this

Court in respect of dispensation of pre-deposit on the basis of the prima facie case and what would be the materials to be considered for such

reason but for the sake of Justice I want to draw certain inferences from such judgments. From the referred judgments therein certain principles

can be formulated hereunder in respect of dispensation of pre-deposit.

(a) Prima facie case not necessarily means that one must have a gilt-edged case which is bound to succeed. Prima facie case always has been held

by the Court to be a case which is arguable and fit for trial and consideration.

(b) Prima facie case in merit which is most likely to exonerate him from payment and still Tribunal insists on pre-deposit of the amount it would

amount to undue hardship.

(c) Prima facie case is the conduct of the parties which has to be taken into consideration while it is to be decided whether the deposits has to be

dispensed with or not.

On the other hand, case of the authority would be:

(a) Loss of revenue;

(b) Intention of the party.

Therefore, these are the balancing factors for the parties for coming to an appropriate conclusion by the authority for the purpose of dispensation

of the pre-deposits.

21. In the instant case, it has been substantially established by the petitioner herein being appellant before the Tribunal that out of two job workers

one has been given exemption by the same Central Excuse Division whereas the petitioner has not been granted exemption. Therefore, there is a

clear case of discrimination. In case of consideration of discrimination, a Single Bench of this Court, as referred to already held in a decision that

the principles of judicial discipline speaks that the Tax Authority of the State follow the decision of the Appellate Authority of other State. Similar

submission also made by the petitioner being appellant therein which the authority concerned wanted to distinguish by saying that the special

matters therein were in respect of paddings for front and rear seats being only parts of the sheets and not complete sheets which is different from

the present case and such logic was accepted by the Tribunal. I fail to understand while a company known as M/s. Special Engineering Services

Ltd. entrusted similar type of works to the petitioner concerned as well as one Kumar Agencies as per Annexure "A" being pages 42 and 43 of

the petition but said Kumar Agencies was exempted but the petitioner concerned was not. Moreover, whether there is a material difference in

respect of the classification as held by the Tribunal in its paragraph 7 is available or not that has to be gone into by the Tribunal at the time of

hearing of the Appeal. But the same is definitely a good ground to exonerate him from the payment and even thereafter it was necessitated for pre-

deposit.

22. So far as other part i.e. in respect of 11A of the Central Excise Act for the purpose of limitation is concerned the same has been categorically

decided by the Supreme Court that unless there is wilful act on the part of Petitioner No. 1 appellant therein is available, the same cannot be

applicable in the case of the petitioners. Failure on the part of the authority u/s 11A of the Act has definitely given a right to the petitioners in

respect of limitation. Therefore, without any prima facie basis that the petitioners are avoiding wilfully or evading duty how the Tribunal can take

step in respect of the application u/s 11A is unknown to this Court. Application of Section 11A of the Central Excise Act has not any independent

approach in this case but hidden in the cause of exemption. Therefore, the same cannot be said to be wilful suppression, if any, under the said

Section of the Act. Thirdly, there is an explanation as to the factory''s balance sheet as well as company''s balance sheet which may or may not be

acceptable by the Tribunal but the same cannot be treated as an intentional mistake on the part of the petitioners when there is every possibility of

exonerating themselves from the payment. In other words, the Tribunal has to enter into the question of exemption and an exemption alone first on

the basis of the facts as well as law and if it is found that there is a clear case of exemption, It is not the business of the Central Excise Authority to

enter into the question of maintaining the balance sheet properly because the same is the subject matter of other authority in accordance with other

law applicable therein.

23. Therefore, the Tribunal, for the purpose of dispensation of pre-deposit will come to a conclusion as to whether there is a strong prima facie

case even to the extent of exonerating the petitioners being appellant therein or not and if it is so, there is no other alternative but to show

appropriate sympathy to such type of appellant in the question of dispensation of pre-deposit. Therefore, this Court is fully agreeable with the

petitioner that the petitioner should be exempted from pre-deposit of any amount. Accordingly, I held in favour of the petitioners. However, for the

sake of revenue, the appeal will be heard and disposed of within a period of two weeks from the date of communication of this order mandatorily

if necessary by giving day to day hearing. In view of above, the question of pre-deposit and the default clause of dismissal of the appeal in case of

failure to deposit that amount under pre-deposit are set aside by this Court. The concerned Tribunal may proceed accordingly as per the directions

given hereinabove.

24. Thus, we Writ Petitions stand disposed of. No order as passed as to costs.

25. Xeroxed certified copy of this judgment will be supplied to the parties within seven days from the date of putting requisition.

26. All parties are to act on a signed copy minute of the operative part of this judgment on the usual undertaking and subject to satisfaction of the

officer of the Court in respect as above.