

Karamchand Thapar and Bros (Coal Sales) Ltd. and Another Vs Union of India (UOI) and Others

Court: Calcutta High Court

Date of Decision: June 30, 2008

Acts Referred: Central Excises and Salt Act, 1944 â€” Section 35L

Citation: (2008) 3 CHN 998

Hon'ble Judges: Soumitra Pal, J

Bench: Single Bench

Advocate: N.K. Podder, for the Appellant; I.P. Mukherjee, for the Respondent

Final Decision: Allowed

Judgement

Soumitra Pal, J.

Affidavit of service filed in Court today be kept on records.

2. In the writ petition the petitioner has challenged the order dated 11th June, 2008 passed on the Stay Petition No. SP 314/07 arising out of

Service Tax Appeal No. 30/07 on the ground that the order of the learned Customs, Excise and Service Tax Appellate Tribunal, Kolkata

(hereinafter referred to as "the Tribunal") is perverse as it did not consider the judgment and order dated 12th June, 2006 passed by the Mumbai

Bench of the Tribunal in the case of the appellant itself wherein full waiver of pre-deposit of service tax and penalty were granted. Moreover, the

Tribunal did not consider the case of Naresh Kumar & Co. v. Commissioner of Service Tax, Kolkata in M.A. 426 of 2006, and S.P. No. 616 of

2006 where in a similar matter it had directed stay of pre-deposit of tax and penalty interest imposed on the appellant therein. Submission has been

made that the averments made in the application for stay particularly in paragraph-5 were not considered and order impugned has been passed

mechanically without going into the fact whether a prima facie and arguable case have been made out.

3. Instead of considering the order dated 18th December, 2007 in W.P. No. 1359 of 2007, Karamchand Thapar v. Union of India wherein it has

been held that the rate of taxation is similar so far as business auxiliary service and clearing and forwarding agent are concerned, the Tribunal had

referred to an order dated 29th May, 2008 passed in Naresh Kumar & Co. v. Commissionerate of Service Tax in Appeal No. STAP 31 of 2007

which the appellant had no chance to deal with.

4. Learned Advocate appearing on behalf of the respondents submits that the order is just and proper as it is evident that whether prima facie case

exists or not was considered and since huge revenue is involved directions were issued for pre-deposit.

5. The relevant portion of the impugned order is as follows:

6. Prima facie it appears that a detailed examination of scope of service in each contract is necessary to decide liability and to classify the service

provided. Appeal of the appellant being related to Classification of service and any party to a litigation involving classification if aggrieved by the

order of the Tribunal can appeal against the same before the Hon'ble Supreme Court u/s 83 of the Act read with the provisions contained in

Section 35L of Central Excise Act, 1944 and the appellant having fairly worked out its liability if liable under the class "clearing and forwarding

agent" may not exceed Rs. 3,71,55,048/- and having regard to the interim order dated 18.12.2007 in W.P. No. 1359/07 on the question of

maintainability of the Writ Petition being open as well as the order passed by the Mumbai Bench of the Tribunal in the case of the same Appellant,

it would be proper to direct the Appellant to make pre-deposit of an amount of Rs. 3,71,55,048/- (Rupees Three Crore Seventy One Lakh Fifty

Five Thousand and Forty Eight only) during pendency of Appeal, within 4 (four) weeks from the date of receipt of this order and report

compliance by 30th of July, 2008. We direct accordingly. If such direction is carried out, realisation of balance demand shall be stayed till disposal

of Appeal.

6. It appears that the Tribunal neither considered the statements made in the stay application nor dealt with the orders passed by the Mumbai

Bench of the Tribunal in case of the appellant itself. Though reference has been made to the order passed by the learned single Judge it has not

been spelt out whether a prima facie and arguable case have been made out or not. Rather it has referred to an order dated 29th May, 2008

passed in Naresh Kumar & Co. v. Commr. of Service Tax in Appeal Case No. STAP 31/07 (paragraph 5.3 of the impugned order) which the

petitioner had no occasion to deal with since hearing was concluded on 27th March, 2008. Natural justice not only means right to be heard and be

represented but also to provide an opportunity to deal with the judgement or order relied on by the Tribunal or Authority. Absence of opportunity

to deal with the order, as it has happened in the instant case, makes the order vulnerable.

7. Therefore, the impugned order dated 11th June, 2008 passed by the Tribunal cannot be sustained and is, thus, set aside and quashed. The

Tribunal is directed to hear the matter afresh after giving an opportunity of hearing to the parties in the light of the observations made in this order

without granting adjournments.

8. The Writ Petition is, thus, allowed.

9. No order as to costs.

10. All parties concerned are to act on a signed copy of the minutes of the operative portion of this order on the usual undertakings.