

Case :- CENTRAL EXCISE APPEAL No. - 30 of 2013

Petitioner :- M/S Musk Tobacco (India) Pvt. Ltd.

Respondent :- The Commissioner, Central Excise & Service Tax

Petitioner Counsel :- B.P. Singh Dhakray, Shakti Singh Dhakray, Sushil Kumar Srivastava

Respondent Counsel :- S.P. Kesarwani, Sr. S.C.

Hon'ble Sunil Ambwani, J.

Hon'ble Bharat Bhushan, J.

1. We have heard Sri B.P.Singh Dhakray, Senior counsel assisted by Sri Shakti Singh Dhakray, and Sushil Kumar Srivastava, for the appellant. Sri S.P. Kesarwani, learned Standing Counsel appears for the Central Excise Department.

2. In this appeal under Section 35 G of the Central Excise Act, 1944, the appellant is aggrieved by an order dated 10.1.2013 passed by the Custom Excise and Service Tax Appellate Tribunal (CESAT), by which it has decided the application under Section 35 F of the Central Excise Act, 1944 in the pending appeals and has directed the appellant to deposit Rs 1 Crore as against the recovery of Central Excise duty of Rs. 7,74,09,518 and equal amount of penalty.

3. The order has been challenged on the ground that the appellant's factory started its production in June 2007. There was no evidence to support the show cause notice and the order imposing excise duty. There was no foundation on the materials seized to form an opinion of prima facie suppression of production and clandestine removal from January 2007.

4. Sri B.P.Singh Dhakray, learned counsel for the appellant submits that the photocopy of the registers, recovered from Sri Raghu, an employee of the Firm, made the basis for imposition of Excise duty, could not be relied upon inasmuch as the photocopy is not admissible in evidence. He has relied on the decisions in **U. Sree Vs U. Srinivas, reported in Manu/SC/1086/2012** decided by Hon'ble Supreme Court on 11.12.2012. He has also relied on the decision of **Commissioner of Customs Vs Sayed Ali and another reported in Manu/SC/0125/2011** of the Supreme Court dated 18.2.2011, to submit that the seizure was not made by the competent authority as the authority seizing was not the authority notified under the Act. The notification was made after the judgement in Sayed Ali's case on 6.7.2011.

5. It is submitted that in the present case, there was no evidence whatsoever regarding the suppression of production and clandestine removal, photocopy of which original was not shown to the appellant and

hence it could not be taken into consideration for imposition of ~~excise duty~~ www.taxguru.in
The cross examination of witnesses was not allowed.

6. Sri Dhakray, submits that the company does not have financial means to pay even Rs. 1 Crore. He has filed balance sheets of last three years to show that the company does not have any reserves and surplus. The factory is lying closed for last three years.

7. Sri. S.P. Kesarwani, learned Standing Counsel on the other hand submits that there is prima facie finding of suppression of production and clandestine removal based on search and seizure of the factory premises, plant machinery, power supply and other evidence of manufacturer. It was found that the appellant was clandestinely removing the finished goods to different destinations through road/railways transport.

8. The search at the godown resulted in recovery of 'Captain' brand cigarettes allegedly without invoice of appellant's company and the goods were seized. Search at the Baba Roadlines on 26.9.2007 were also conducted with recovery of 4000 packets of 'Perfect' brand belonging to M/s R.K.Cigarettes. The person incharge of the transport company admitted that the seized goods were received by him from the appellant company. In respect of this recovery, a show cause notice was given and after adjudication the appeal is pending.

9. In **Raghunath International Ltd Vs Union of India reported in 2012 (280) ELT 321 (Alld.)**, this Court had occasion to consider the judgement in Sayed Ali (Supra) case and after interpreting the words "or" and "and" it was held that the Addl. Director having been specified as Central Excise Commissioner was fully entitled to issue show cause notice. There is no provision in the law that it had to be issued after obtaining permission from the adjudicating authority.

10. In this appeal, we are required to examine whether the appellant had made out a strong prima facie case and will have any financial hardship in depositing the duty. In **Benara Values Ltd Vs Commissioner of Central Excise (2006) 13 SCC 347** considered in **Ketan V. Parekh Vs Special Director, Directorate of Enforcement reported in 2012(275) ELT 3 (SC)**, it was held in paragraph no. 27 as under:

"Two significant expressions used in the provisions are "undue hardship to such person" and "safeguard the interests of the Revenue". Therefore, while dealing with the application twin requirements of considerations i.e. consideration of undue hardship aspect and imposition of conditions to safeguard the interests of the Revenue have to be kept in view.

As noted above there are two important expressions in Section 35-F. One is undue hardship. This is a matter within the special knowledge of the applicant for waiver and

has to be established by him. A mere assertion about undue hardship would not be sufficient. It was noted by this Court in *S. Vasudeva v. State of Karnataka* that under Indian conditions expression "undue hardship" is normally related to economic hardship. "Undue" which means something which is not merited by the conduct of the claimant, or is very much disproportionate to it. Undue hardship is caused when the hardship is not warranted by the circumstances.

For a hardship to be "undue" it must be shown that the particular burden to observe or perform the requirement is out of proportion to the nature of the requirement itself, and the benefit which the applicant would derive from compliance with it.

The word "undue" adds something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant.

The other aspect relates to imposition of condition to safeguard the interests of the Revenue. This is an aspect which the Tribunal has to bring into focus. It is for the Tribunal to impose such conditions as are deemed proper to safeguard the interests of the Revenue. Therefore, the Tribunal while dealing with the application has to consider materials to be placed by the assessee relating to undue hardship and also to stipulate conditions as required to safeguard the interests of the Revenue"

11. The CESAT has recorded finding that there is prima facie finding of suppression of production and clandestine removal. The balance sheets thus will not reflect the true and correct financial position of the company. The Tribunal was lenient enough in directing the appellant to deposit only Rs. 1 crore and waiving the remaining amount of Excise duty and penalty, which together with would amount to about Rs. 16 crores. We, therefore, do not find any substantial question of law for consideration and interference in this appeal.

12. The Central Excise Appeal is accordingly dismissed in-limine. Having regard to the facts and circumstances of the case, the appellant company is allowed sixty days time from today to deposit the amount.

Order Date :- 12.3.2013

RavindraKSingh