UNDUE HARDSHIP

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Which is the deadliest scare in any indirect tax case? Is it the duty demanded or penalty imposed or the interest charged? For us, it would be the only the menace of "Pre deposits". Today, most of the revenue cases are based on astronomical guesstimates. Though they are blindly confirmed left, right and center by the quasi-judicial fraternity, ultimately such cases fall like nine pins, at the higher appellate forums. But before reaching the end of the tunnel to see the judicial light, one has to travel on a thorny terrain filled with perilous impediments, of which, the "Pre-deposit" requirement is the most menacing obstacle!

While pursuing any indirect tax appeal, be it Central Excise or Customs or Service Tax, "pre-deposit" of duties and penalties are a mandatory requirement before the Commissioner (Appeals) or before the CESTAT. As per Section 35 F of the Central Excise Act, any person desirous of appealing against a decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied. Similar provisions are made available for the Customs as well the Service Tax. This pre-deposit requirement is made discretionary by the proviso to the respective Sections, whereby, either the Commissioner (Appeals) or the CESTAT is empowered to dispense with such pre-deposit, if the same is to cause an undue hardship to the appellants, subject to such conditions to safeguard the interest of revenue. Now what is an "undue hardship" all about?

Over years, this pre-deposit, the discretion bestowed to waive the same and the term "undue hardship" had been the bone of contention in plethora of cases and always there existed a divided opinion. In a celebrated decision in the case of **BONGAIGAON REFINERY & PETROCHEM LTD Vs CCE (A), CALCUTTA** as reported in **1994 (69) ELT 193 (Cal),** the Hon'ble High Court of Calcutta held that,

> *"As already seen the phrase "undue hardship" would cover a case where the appellant has a strong prima facie case. The phrase also in my view covers a situation where there is an arguable case in the appeal. In the former case the Appellate Authority should dispense with the pre-deposit altogether on the basis of the authorities referred to earlier. In the latter case the authority would have to safeguard the interest of the revenue."*

This view was further reinforced in another decision of the Calcutta High Court in the case of **RUBY RUBBER INDUSTRIES Vs COMMISSIONER OF C. EX.,CALCUTTA-II** as reported in **1998(104) ELT 330 (Cal),** wherein the High Court held that, while forming the requisite opinion as to whether such deposit would cause undue hardship to the appellant, whether the appellant has got a *prima facie* case is a relevant factor to be taken into consideration for deciding the question of undue hardship. While defining the term *"Prima facie case"* the High Court also held that,

> *"It will also not be out of place to mention here that it is now well settled, through judicial precedence that the 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 Courts to be a case which is arguable and fit for trial and consideration."*

On the contrary, in a recent case of **COMMISSIONER OF CUSTOMS, BANGALORE Vs UNITED TELECOM LTD** as reported in **2006 (198) ELT 12 (Kar)** the Hon'ble High Court of Karnataka held that,

> **"***The concept of undue hardship in the context of taxing statutes and occurring in a provision like the pre-deposit provision under Section 129E can only be linked to the financial hardship that the assessee faces if the assessee has to comply with the pre-deposit requirement and cannot be anything else. Unless an assessee pleads the financial hardship for the compliance of pre-deposit and the assessee in fact is unable to pay the pre-deposit amount in reality also, there is no undue hardship as contemplated in the proviso to Section 129E."*

These above conflicting judgements leave on to really wonder as to what is an "undue hardship" all about? Does it include the appellant having a *"prima facie case"* as it held in the Calcutta High Court *supra,* or is it only a *"financial hardship"* as held by the Karnataka High Court, *supra?*

In a recent decision, the Hon'ble Apex Court in the case of **M/s BENARA VALVES LTD Vs COMMISSIONER OF CENTRAL EXCISE** as reported in ……. has tried to resolve this conflict. In this landmark decision the Hon'ble Supreme Court has held that:

- Principles relating to grant of stay pending disposal of the matters before the concerned forums have been considered in several cases. It is to be noted that in such matters though discretion is available, the same has to be exercised judicially.
- It is true that on merely establishing a prima facie case, interim order of protection should not be passed. But if on a cursory glance it appears that the demand raised has no leg to stand, it would be undesirable to require the assessee to pay full or substantive part of the demand.
- Where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizens' faith in the impartiality of public administration, interim relief can be given.
- Two significant expressions used in the provisions are "**undue hardship to such person**" and "**safeguard the interests of 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 interest of Revenue have to be kept in view.
- It was noted by this Court in S. Vasudeva v. State of Karnataka and Ors. (AIR 1994 SC 923) that under Indian conditions expression "Undue hardship" is normally related to economic hardship.
- 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 interest of revenue. It is for the Tribunal to impose such conditions as are deemed proper to safeguard the interest of revenue.

Thus the Apex Court has laid that the "undue hardship" primarily relates to economic hardship and also includes situations leading to public mischief, grave irreparable private injury or shaking of a citizens' faith in the impartiality of public administration.

This leaves us to the basic question as to whether there shall be a requirement of a pre-deposit at all, at the first place, that too, for the appeals lying before the Commissioner (Appeals)? It is an unwritten fact that, as per the present trend, only CESTAT is the first gateway to justice and the quasi-judiciary including Commissioner (Appeals) is nothing but a joystick of the revenue game. In such a situation, asking for a pre-deposit before Commissioner (Appeals) for an appeal preferred against an order passed by the Revenue Brigadiers without any reasoning or application of mind would itself constitute an "undue hardship".

Coming to the appeals before the CESTAT, as on date, the pendency of the appeals lying at CESTAT is mind boggling. The ratio between the fresh receipts of appeals as to the disposal is like the winning chances of the next World cup between Australia and Kenya. That too, after the Service Tax, the influx beats Ganges in full floods. Today, bulk of the time of the CESTAT is spent only in disposing the pre-deposit waiver petitions and the number of cases finally disposed off, is literally in single digits. With more and more pre-deposit waiver petitions pouring in, the precious time of the CESTAT will only be wasted in disposing off such petitions. Moreover, this pre-deposit is also not a recognizable revenue for the Government but only an advance deposit lying in the banks. In most of the cases including the landmark ITC case, where the department lost miserably and had to refund a huge pre-deposit along with interest, the Government only loses money in holding such amounts. Instead of wasting time on hearing such requirements if the CESTAT is allowed to concentrate on the final disposal of the cases, there shall be speedy disposal of many cases, wherefrom, the Government can see a real revenue!

Instead of requiring the appellant to pre-deposit the entire duty and penalty imposed by the quasi-judiciary and which are mostly confirmed on astronomical guesstimates and are bound to collapse ultimately, will it not be a sane and decent proposal to prescribe certain percentage, say 10 to 25%, of the duty demanded as a pre-deposit requirement under the relevant Sections. Alternatively, as in the cases of exports, the appellant may also be required to execute a Bond with Bank guarantee or surety, as the case maybe, towards the duty and penal liabilities. We sincerely feel that, this would definitely encourage the appellants to fight their case without much fuss and would also enable the CESTAT to concentrate on the final disposal of cases, which is the actual disposal.

Before parting...

Normally any case in CESTAT gets concluded only after a period of 4 to 5 years. Maybe even more! In cases where there is a huge pre-deposit a prudent businessman would not hold that pre-deposit as receivables from the Government but would absorb in his expenditure. Though the pre-deposits are not duty and hence the provisions of Section 11 B are not applicable to such pre-deposits, the

principle of unjust enrichment is based on equity. Will not the department contend that, as the appellant has absorbed the pre-deposit in his expenditure and hence indirectly passed the burden to the customer through the price of the goods, such pre-deposits shall be hit by the principles of "unjust enrichment" and deny them back?

IN THE SUPREME COURT OF INDIA

Appeal (civil) 5166 of 2006

M/s BENARA VALVES LTD

Vs

COMMISSIONER OF CENTRAL EXCISE

ARIJIT PASAYAT & LOKESHWAR SINGH PANTA JJ.,

Dated: November 23, 2006

JUDGEMENT

Per: ARIJIT PASAYAT, J :

Leave granted.

Challenge in these appeals is to the order passed by the Allahabad High Court dismissing the writ petitions filed by the appellants who had filed the writ petitions questioning correctness of the order passed by the Customs Excise and Service Tax Appellate Tribunal, New Delhi (in short the 'Tribunal') dealing with the applications filed for staying recovery of duty and penalty imposed pending disposal of the appeals before the Tribunal. Allegations against the appellants were to the effect that they were removing excisable goods clandestinely without payment of duty and without raising Central Excise invoices/bills under the guise of estimates/rough estimates to their front trading firms which they called 'houses' and consequently to the ultimate customer. Searches were conducted at the premises of manufacturing units and other connected concerns, through whom the goods were allegedly sold. During the search, incriminating documents were allegedly recovered from various premises and statements of the concerned persons have also been recorded.

After issuing notice under Central Excise Act, 1944 (in short the 'Act'), Central Excise Rules, 1944 (in short the 'Rules') and Central Excise Rules, 2001 (in short the '2001 Rules') the Commissioner of Central Excise, Kanpur demanded Rs.2,05,31,762/- from M/s Benara Automotives Pvt. Ltd. (in short 'BAPL') and penalty of equal amount was imposed under Section l1 AC of the Act. Additionally, penalties were imposed on six other persons. The Commissioner also confirmed the demand of Rs.24, 24,813/- in respect of M/s Benara Valves Ltd. (in short 'BVL') and imposed penalty of equal amount. Additionally, Rs.1,00,000/- each was imposed on several other persons. Appeals were preferred before the Tribunal challenging the determination. Prayer for stay of realisation of demands raised till disposal of the appeals in terms of Section 35 F of the Act was made. The Tribunal directed as follows:

"Therefore, considering the facts and circumstances of all these cases, we direct the applicant to pre-deposit the following amounts within eight weeks under Section 35F of the Central Excise Act:

(1) M/s. BAPL and M/s. BVL are directed to pre-deposit twenty-five percent of the duty demanded from them:

(2) The other applicants are directed to pre-deposit twenty-five percent of the penalties imposed on them".

Questioning correctness of the order passed by the Tribunal, writ petitions were filed. By the impugned orders, the High Court directed extension of time to comply with the Tribunal's order. However, the prayer for dispensation of deposit was rejected.

Learned counsel for the appellants submitted that demands raised will not stand the test of appeal as correct legal and factual position were not kept in view while adjudicating the issues. Mr. B. Dutta, learned Additional Solicitor General for the respondents submitted that demands have been raised after detection of large scale manipulations and evasions and no relief should be extended to such dishonest manufacturers. According to him, neither any prima facie case has been established, nor any case of irreparable loss or balance of convenience has been made out.

Principles relating to grant of stay pending disposal of the matters before the concerned forums have been considered in several cases. It is to be noted that in such matters though discretion is available, the same has to be exercised judicially.

The applicable principles have been set out succinctly in Silliguri Municipality and Ors. v. Amalendu Das and Ors. (AIR 1984 SC 653) = (2002-TIOL-516-SC-MISC) and M/s Samarias Trading Co. Pvt. Ltd. v. S. Samuel and Ors. (AIR 1985 SC 61) = (2002-TIOL-515-SC-MISC) and Assistant Collector of Central Excise v. Dunlop India Ltd. (AIR 1985 SC 330) = (2002-TIOL-156-SC-CX).

It is true that on merely establishing a prima facie case, interim order of protection should not be passed. But if on a cursory glance it appears that the demand raised has no leg to stand, it would be undesirable to require the assessee to pay full or substantive part of the demand. Petitions for stay should not be disposed of in a routine matter unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand. There can be no rule of universal application in such matters and the order has to be passed keeping in view the factual scenario involved. Merely because this Court has indicated the principles that does not give a license to the forum/authority to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest. Where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizens' faith in the impartiality of public administration, interim relief can be given.

It has become an unfortunate trend to casually dispose of stay applications by referring to decisions in Siliguri Municipality and Dunlop India cases (supra) without analysing factual scenario involved in a particular case.

Section 35-F of the Act reads as follows:

"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 interest 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 filing."

Two significant expressions used in the provisions are "undue hardship to such person" and "safeguard the interests of 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 interest of 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 and Ors. (AIR 1994 SC 923) 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 have 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 interest of 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 interest of 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 condition as required to safeguard the interest of revenue.

In the instant case Tribunal has rightly observed that the rival stands have to be examined in detail with reference to material on record. The only other question that needs to be examined is whether any reduction of the amounts to be deposited as directed by the Tribunal is called for.

It appears that pursuant to the direction given by this Court on 18.8.2006, the appellants have paid Rs.4 lakhs and Rs.30 lakhs within the time stipulated. Considering the nature of the dispute and the difficulties highlighted by the appellants seeking dispensation of deposit, we direct that the appeals shall now be heard without requiring further deposit, if the appeals are free from other defects in accordance with law. However, for the balance of the amount demanded, with a view to safeguard interest of the Revenue, the appellants shall furnish such security as may be stipulated by the Tribunal.

The appeals are accordingly disposed of. No costs.