CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Service Tax Appeal No. 51216 of 2019

(Arising out of Order-in-Appeal No. 217(SRM)ST/JDR/2018 dated 27.02.20018 passed by the Commissioner (Appeals), Central Excise & CGST, Jodhpur).

Aravali Equip Private Limited **...Appellant**
C-81, Amba Mata Scheme
Udaipur-313004

VERSUS

Commissioner of Central Goods and Service Tax, Central Excise, **...Respondent**
142-B, Sector- 11, Hiran Magri
Udaipur

APPEARANCE:

Shri Shri S.C. Kamra, Advocate for the Appellant
Ms. Jaya Kumari, Authorized Representative of the Department

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing/Decision: October 28, 2024

FINAL ORDER NO. 59399/2024

JUSTICE DILIP GUPTA:

The order dated 27.02.2018 passed by the Commissioner (Appeals) dismissing the appeal filed by Aravali Equip Private Limited[1] for the reason that despite the order dated 31.01.2014 requiring the appellant to deposit the entire confirmed demand within four weeks, the appellant did not ensure compliance of the said order.

2. It transpires from the records that an order dated 31.03.2013 was passed by the Assistant Commissioner confirming the demand

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1. the appellant

of service tax with penalty and interest. It is against this order that the appellant filed an appeal before the Commissioner (Appeals) under the unamended provisions of section 35 F of the Central Excise Act, 1944[2].

3. Section 35 F of the Central Excise Act, as it stood prior to 06.08.2014, is reproduced below:

> "**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 interests of revenue**:
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> 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 filling.

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2. the Central Excise Act

> Explanation.- For the purposes of this section "duty demanded" shall include,-
> (i) amount determined under section 11D;
> (ii) amount of erroneous CENVAT credit taken;
> (iii) amount payable under rule 57CC of Central Excise Rules, 1944;
> (iv) amount payable under rule 6 of CENVAT Credit Rules, 2001 or CENVAT Credit Rules, 2002 or CENVAT Credit Rules, 2004;
> (v) interest payable under the provisions of this Act or the rules made thereunder.
>
> **(emphasis supplied)**

4. It transpires from the aforesaid provisions of section 35F of the Central Excise Act that a person desirous of appealing against an order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied but power is vested with the appellate authority to dispense with such deposit subject to such conditions as the appellate authority may deem fit to impose so as to safeguard the interests of revenue.

5. The appellant filed a stay application under section 35F of the Central Excise Act. The Commissioner (Appeals), by order dated 31.01.2014, directed the appellant to deposit the entire confirmed demand within four weeks of the receipt of the order failing which the appeal would be liable for rejection for non-compliance of the provisions of section 35F of Central Excise Act . The relevant portion of the order is reproduced below :

> 4. I have gone through the case records as well as written submissions made at the time of personal hearing. The issue involved in this appeal is whether the appellants were liable to pay service tax on the services rendered to M/s RSMM which were alleged to be chargeable to Service Tax under Cargo Handling Service. The appellants have contested that the activity is of internal handling of material and not

> covered under cargo handling services, moreover services provided to self cannot be taxed. The adjudicating authority has confirmed the demand of Service Tax on the ground that loading of different type of ore stacked located around LGO Crushing Plant into the truck/trippers; transportation of loaded truck/ tippers to an average lead of 0.5 kms away and unloading into hopper of LGO crushing plant were covered under Cargo Handling Service and were chargeable to Service Tax w.e.f. 16.08.2002. I find that prima facie there is no force in the contention of the appellants. Further the examination of facts and submission made by the appellants to support of his version is a time consuming exercise and cannot be examined at this stage of stay application. The financial hardship though has been pleaded but is not supported by any documentary evidence. **Therefore, the appellants are directed to deposit the entire confirmed demand within four weeks of the receipt of this order and submit the evidence of the deposit to the concerned Range Superintendent under intimation to this office failing which the appeal would be liable for rejection for non-compliance of provisions of Section 35F of Central Excise Act, 1944** read with Section 83 of The Finance Act, 1994. On deposit of the said amount, recovery of interest and penalties will remain stayed until disposal of the appeal."
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> **(emphasis supplied)**

6. The appellant did not ensure compliance of the aforesaid order requiring the appellant to deposit the entire demand within four weeks. The Commissioner (Appeals), therefore, dismissed the appeal by order dated 27.02.2018 and the relevant portion of the order is reproduced below:

> "7. I have carefully gone through the case record and written submission made in the appeal memo. **I find that the then commissioner (Appeals) vide**

> **stay order No.68(OPD)ST/JPR- 11/2014 dated 12.02.2014, directed the appellant to deposit the Service Tax of Rs. 3,37,669/-- within four weeks of the receipt of the order** and submit the evidence of the deposit the said amount to the concerned Range Superintendent under intimation to this office. Failing which their appeal will be liable for rejection for non-compliance of provisions of Section 35 F of Central Excise Act, 1944 as made applicable in service tax matter under Section 83 of the Finance Act, 1994. **However, they have not deposited any amount in compliance of the said Stay order. These facts have been confirmed by the appellant during the personal hearing held on 09.01.2018. Further neither they have filed any appeal against the Stay order nor filed any modification application**.
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> 8. In view of above, I hold that since the appellant has not complied with the stay order, the appeal deserves to be rejected on the grounds for non-compliance of stay order without going into the merits of the case. **Therefore, I reject the appeal for non-compliance of Provisions of Section 35 of Central Excise Act, 1944**."
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> **(emphasis supplied)**

7. It is against this order that the present appeal has been filed.

8. Shri S.C. Kamra, learned counsel for the appellant submitted that the appellant had filed an application dated 10.03.2014 for modification of the order dated 31.01.2014, but the said application was not decided and, in fact, the Commissioner (Appeals) made a wrong statement in the order that no application for modification was filed. Learned counsel, therefore, submitted that the order passed by the Commissioner (Appeals) should be set aside and the matter should be remanded to the Commissioner (Appeals) to first decide the modification application.

9. Ms. Jaya Kumari, learned authorised representative appearing for the department, however, supported the impugned order and stated that the modification application was never filed by the appellant and the statement made in the order that modification application was not filed is correct.

10. The submissions advanced by the learned counsel for the appellant and the learned authorised representative appearing for the department have been considered.

11. It is not in dispute that the appellant was required to deposit the entire confirmed demand within four weeks by the order dated 31.01.2014. It is also not in dispute that the appellant did not deposit the said amount within the stipulated period four weeks. In paragraph 15 of the memo of appeal filed before the Tribunal, the appellant has merely stated that an application for modification of stay order dated 31.01.2014 was filed. It does not mention the date on which it was filed nor does it give the diary number of the application, which would have been given if the application was filed. If the appellant had actually filed the modification application, there is no reason as to why the appellant would not move applications before the Commissioner (Appeals) for deciding the stay application at the earliest and would not have kept quiet for a long period of about four years.

12. It is, therefore, not possible to accept the contention by the appellant that any application had been filed for the modification of the interim order dated 31.01.2014. The statement contained in the impugned order of the Commissioner (Appeals) that no modification application had been filed is correct.

13. In any view of the matter, mere filing of the modification application does not mean that the order earlier passed on 31.01.2014 ceases to have any effect. If the order was not modified by the Commissioner (Appeals), it was incumbent upon the appellant to make the deposit as was required by order dated 31.01.2014.

14. The appellant had not complied with the terms of the order dated 31.012.2014. The appellant, therefore, cannot complain that the Commissioner (Appeals) committed any illegality in dismissing the appeal.

15. There is, therefore, no merit in this appeal. It is, accordingly, dismissed.

(Order dictated and pronounced in the open court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

Diksha, Jyoti