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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/335 /2009 - EX[DB] WITH E/S/349/2009-EX

Date 30/03/2009

Assistant Registrar
C.E.S.T.A.T., New Delhi

To :
M/S ARUN ENTERPRISES,
B-48, SITE-IV, INDUSTRIAL AREA, SAHIBABAD,
GHAZIABAD.
M/S ARUN ENTERPRISES,

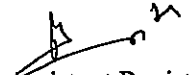
Appellant

Vs

Respondent

C.C.E. GHAZIABAD

I am directed to transmit herewith a certified copy of Final order No. 252/09& S.O.NO.280/2009- EX[DB] dated 19-3-09
passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944


Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent

C.C.E. GHAZIABAD

C.G. O. COMPLEX-II, KAMLA NEHRU NAGAR, GHAZIABAD 201302

2. Adv. / Consult

MR.BIPIN GARG

B-1/1289,A-VASANT KUNJ, NEW DELHI

3 S.D.R

~~4 J.C.D.R.~~

5 Bar association, CESTAT, New Delhi

6 M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017

7 M/s Centax Publications (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New - 3

8 Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)

9 Raghuraman's 44-B, Regal Flat, Shipra Suncity, Indirapuram - 201010, Ghaziabad, DT, U.P.

10 Nidheshak publications, I.P.Estate, new Delhi

11 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026

12 Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar, Chennai

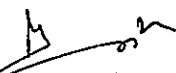
13 Taxindiaonline.com Pvt.Ltd, B-XI/8183, Vasant Kunj, New Delhi - 110070

14 Easy Service Tax Online Dot Com Pvt.Ltd.407A.Iscon Mall.Above Star India Bazar,Satellite Road,Ahmedabad-15

15 Office Copy

16 Guard file

17. SR.P.S.TO, PRESIDENT.


Assistant Registrar
(Excise Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R. K. Puram, New Delhi

COURT-I

Date of hearing/decision: 19.03.2009

Excise Appeal No. 335 of 2009

[Arising out of Order-in-Appeal No.304-CE-GZB/2008 dated 23.12.2008 passed by the Commissioner (Appeals), Central Excise, Ghaziabad].

For approval and signature:

Hon'ble Mr. Justice R.M.S. Khandeparkar, President
Hon'ble Mr. Rakesh Kumar, Member (Technical)

1	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982.	Yes
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3	Whether Their Lordships wish to see the fair copy of the Order?	No
4	Whether Order is to be circulated to the Departmental authorities?	No

M/s Arun Enterprises

Appellant

Vs.

CCE, Ghaziabad

Respondent

Appearance:

Appeared for the Appellant – Mr. Bipin Garg, Advocate
Appeared for the Respondent – Mr. K.K. Goel, DR.

Coram: Hon'ble Mr. Justice R.M.S. Khandeparkar, President
Hon'ble Mr. Rakesh Kumar, Member (Technical)

FINAL Oral Order No. 252/09-Ex

Per Justice R.M.S. Khandeparkar:

The present appeal arises from the order dated 23.12.2008 passed in Appeal No. 304/2008 by Commissioner (Appeals), Ghaziabad.

2. Few facts relevant for the decision in the matter are that the appellant sought to challenge the original order dated 31.03.2008 passed by the Additional Commissioner, Central Excise, Ghaziabad in the matter whereby the Additional Commissioner had confirmed the demand for Rs.22,06,738/- under section 11A(1) of the Central Excise Act, 1944 against the appellant and also confirmed the demand for interest on the said amount at the applicable rates under the provisions of Section 11AB of the said Act and further imposed penalty of Rs. 22,06,738/- in exercise of power under Rule 25 of the Central Excise Rules, 2002 read with Section 11AC of the said Act. The said order was sought to be challenged on the various grounds including the ground that the demand in question was time barred as the differential amount of cartage shown in the balance sheet was to the knowledge of the Department and hence there was no case for allegation of suppression of the said fact. Alongwith the appeal the appellant also preferred an application for exemption from the requirement of payment of the amount claimed under the original order. The Commissioner (Appeals) by order dated 28.11.2008 directed that an amount of Rs. 12,58,753/- being the balance amount due in terms of the impugned order be deposited as pre-deposit in terms of Section 35F of the said Act, while staying the certain remaining demands. The appellant did not comply with the direction to deposit the amount of Rs.12,58,743/- and has sought to challenge the said order on the ground that the lower appellate authority failed to consider the aspect regarding the bar of limitation while ordering the deposit of the said amount.

3. Learned Advocate appearing for the appellant taking us through the record submitted that the show cause notice read with audit report ex-facie discloses that at least in November, 2006 the Department was fully aware of the fact regarding the allegation of suppression of differential amount of the freight charges and alleged mis-declaration in this regard, however, the show cause notice was issued only in

December, 2007. This aspect has been totally overlooked while issuing the order directing to pre-deposit of Rs. 12 lakhs. Learned Advocate also drew our attention to the decision of the Apex Court in the matter of Nizam Sugar Factory vs. Collector of Central Excise, A.P. reported in 2006 (197) ELT 465 (S.C.).

4. Learned DR on the other hand, placing reliance in the decision of the Apex Court in Benara Valves Ltd., vs. Commissioner of Central Excise reported in 2008 (12) STR 104 (S.C.) submitted that the mandate of Section 35F of the said Act clearly requires the appellant to satisfy that the direction to deposit the duty demanded or penalty levied would cause undue hardship and failure in that regard would not entitle the appellant to claim any benefit on the ground that the amount was deposited prior to hearing the appeal. According to learned DR, the appellant neither pleaded any undue hardship nor even the hardship as such on account of duty or penalty, nor the record discloses possibility of any such hardship to the appellant in case such direction for deposit is issued to the appellant and considering the same no fault can be found in the impugned order.

5. It cannot be disputed that Section 35F clearly mandates the appellant to deposit the duty demanded in order to enable him to ensure hearing from the appellate authority against the order passed by the lower authority. In case he wants to seek exemption from compliance of his obligation to deposit the duty, appellant has to satisfy the appellate authority that direction to deposit such amount would cause undue hardship to the appellant. First proviso to Section 35F of the said Act clearly mandates that the appellate Tribunal should be of the opinion that compliance for the deposit of duty demanded or penalty levied would cause undue hardship to the appellant. On such opinion being formed by the appellate authority, it can pass an appropriate order either directing the appellant to comply with the requirement of pre-deposit or any order as it may deem fit in the facts and the circumstances of the case before such authority.

6. An order granting such exemption or any concession in the matter of deposit of the amount demanded has to be a speaking order. The Apex Court in *Benara Valves Ltd.*, (supra) had clearly held that Section 35F of the said Act speaks of "undue hardship" and "safeguard the interest of revenue" and, '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". Further, reiterating the view taken by the Apex Court in *S. Vasudeva vs. State of Karnataka and Ors.* (AIR 1994 SC 923)) it was held that the expression "Undue hardship" is normally related to economic hardship and "Undue" means something is not merited by the conduct of the claimant, or is very much disproportionate to it. It has been further observed that undue hardship can be said to have been caused when the hardship is not warranted by the circumstances.

7. The impugned order by the lower appellate authority as well as the interim order by the lower appellate authority in the matter in hand, undoubtedly nowhere discloses this aspect of undue hardship having been taking into consideration by the lower appellate authority. It is, however, contended on behalf of the respondent that the said plea of hardship was never raised before the lower appellate authority. The contention is based solely on the ground that though the application before the lower appellate authority uses the expression undue hardship there is no supporting facts pleaded or established. It cannot be disputed that application on the face of it nowhere states the facts relating to undue hardship. However, it is also seen that party has relied on memo of appeal and other materials placed before the appellate authority. It is well settled law that rules of pleading in terms of code of civil procedure are not strictly applicable to the Tribunal or quasi-judicial authorities. Being so merely because the party has not specifically stated in the application various facts which can discloses undue hardship that itself can not be ground to hold that

no case of undue hardship is made out, more particularly when the party is able to make out such case from the records before concern authorities in the course of the hearing of the matter. But mere failure to narrate the facts in the application for stay in detail that itself cannot be a justification to ignore the mandate of provision of law comprised under Section 35F of the Act.

8. The Apex Court in Benara Valves Ltd., case has clearly ruled that "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 manner 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". The Apex Court therefore, has clearly ruled that while considering the prima-facie case the point in relation to the liability of the appellant to deposit an amount should not be totally ignored and should not be dealt with in routine manner unmindful of consequences which may flow from the order passed in relation thereto. In other words, when a specific point is raised by the appellant that the bar of limitation is ex-facie apparent inasmuch as that it is revealed from the audit report on the face of it in comparison of the show cause notice to the appellant, it was not sufficient for the lower appellate authority to reject the contention by merely observing that "the issuance for inclusion of such income in transaction value and time bar are vital and important which require more time for detailed examination on record". Since the contention of the appellant was that in view of bar of limitation the appellants were not liable to deposit any amount demanded by the Department and the contention was sought to be supported by referring to the records before the authority while contending that the

same is clearly revealed ex-facie from the show cause notice and audit report, it was necessary for the authority to deal with the said point while deciding the matter under the provisions of Section 35F of the Act. Neither the interim order nor the impugned order passed by the lower authority discloses application of mind to this aspect, and therefore the appellants are justified in contending that the impugned order is bad in law. The matter, therefore, needs to be remanded to the lower appellate authority to deal with the same in accordance with the provisions of law as early as possible within a specified time limit. It is also necessary to bear in mind that the Apex Court ruling in Benara Valves Ltd. where Apex Court has held that the order of stay or exemption from the payment should not be passed without considering the aspect regarding "safeguard the interest of revenue". Both the aspect regarding hardship to the party as well as safeguard of the interest of revenue are to be considered while passing such order. However, in the peculiar facts and circumstances of the case in hand, we do not find it appropriate to direct the lower appellate authority merely to decide the stay application and it would be appropriate to direct to dispose the entire appeal on merits within specified time.

9. In the circumstances, we set aside the impugned order as well as the interim order and direct the Commissioner (Appeals) to dispose the appeal within thirty days from the first appearance of the party after hearing the party. The party to appear before the Commissioner (Appeals) on 30.4.2009 for further proceedings in the matter. Registry is directed to intimate the order to the Commissioner (Appeals) expeditiously.

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R. K. Puram, New Delhi

COURT-I

Date of hearing/decision: 19.03.2009

Excise Stay No. 349 of 2009

M/s Arun Enterprises

Appellant

Vs.

CCE, Ghaziabad

Respondent

Appearance:

Appeared for the Appellant – Mr. Bipin Garg, Advocate

Appeared for the Respondent – Mr. K.K. Goel, DR.

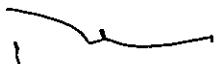
Coram: Hon'ble Mr. Justice R.M.S. Khandeparkar, President
Hon'ble Mr. Rakesh Kumar, Member (Technical)

STAY Oral Order No. 280/09-EX

Per Justice R.M.S. Khandeparkar:

In view of the disposal of the appeal, stay application stands
disposed of.


(Justice R.M.S. Khandeparkar)
President


(Rakesh Kumar)
Member (Technical)

/Pant/