

2012 (25) S.T.R. 119 (A.P.)

IN THE HIGH COURT OF JUDICATURE FOR ANDHRA PRADESH AT HYDERABAD

V.V.S. Rao and Ramesh Ranganathan, JJ.

LANCO INFRATECH LTD.

Versus

CESTAT, BANGALORE

Writ Petition No. 4262 of 2011, decided on 28-2-2011

CASES CITED

Commissioner v. Sri Chaitanya Educational Committee — 2011 (22) S.T.R. 135
(A.P.) — *Referred*

Mehsana Dist. Co-Op. Milk P.U. Ltd. v. Union of India — 2003 (154) E.L.T. 347
(S.C.) — *Referred*

Nagarjuna Construction Co. Ltd. v. Government of India — 2010 (19) S.T.R. 321
(A.P.) — *Referred*

DEPARTMENTAL CLARIFICATION CITED

C.B.E. & C. Circular No. 98/1/2008-S.T., dated 4-1-2008

REPRESENTED BY : Shri Joseph Prabhakar, Counsel, for the Petitioner.

Shri A.R. Reddy, Sr. Counsel, for the Respondent.

[Order per : V.V.S. Rao, J.] - The petitioner is a company registered under the Indian Companies Act, 1956, in Andhra Pradesh. They obtained service tax registration for providing commercial or industrial construction services like erection, commissioning and installation services and construction of residential complex services. They also availed the benefit under the Works Contracts Composition Scheme under Circular No. 98/1/2008-S.T., dated 4-1-2008 with effect from 1-6-2007 in respect of contracts entered into prior to 1-6-2007. The second respondent issued show cause notice dated 23-10-2008 proposing service tax, interest and penalty during the period from June, 2007 to March, 2008 on the ground that the petitioner was not eligible to avail the benefit under the Composition Scheme, and they had to pay service tax at the full rate of 12.36%. By order dated 28-1-2009, the second respondent confirmed the demand of service tax of ` 7,78,34,714/-, and interest and penalty of ` 7,80,00,000/-. Being aggrieved, the petitioner went in appeal under Section 35B of the Central Excise Act, 1944 (the Act). The petitioner also moved an interlocutory application seeking waiver of pre-deposit and stay of recovery of service tax and penalty. By the impugned order dated 29-11-2010 [2011 (23) S.T.R. 351 (Tribunal)] the learned CESTAT, while granting the benefit of abatement from the taxable value of works contract service under Notification No. 01/2006-S.T. for the purpose of the interlocutory petition, permitted waiver of pre-deposit and stay of recovery on condition of the petitioner depositing ` 2.66 crores.

2. In the writ petition filed against the order of the learned CESTAT, Mr. Joseph Prabhakar, the Counsel for the petitioner, would submit that the impugned order was passed without considering the *prima facie* case and, therefore, it is vitiated by improper exercise of power vested in the Tribunal under Section 35F of the Act. He would rely on *Mehsana Dist. Co.-Op Milk P.U. Ltd. v. Union of India* - 2003 (154) E.L.T. 347 (S.C.). Nextly he would urge that

“undue hardship”, which is the requirement for waiver of pre-deposit, also includes financial hardship and, having regard to the well known fact that the amounts deposited by the petitioner for availing the remedy of appeal, even after the appeal is allowed, would be returned after several years, if the waiver of pre-deposit is not granted, the petitioner would suffer undue hardship. Learned Counsel would contend that the non-speaking order passed by the learned Tribunal suffers from error and the ratio in *Nagarjuna Construction Company Ltd v. Government of India* - 2010 (19) S.T.R. 321 (AP) = 2010 (28) STT 369 = 2010 (35) VST 266 (AP) was not considered in the proper perspective.

3. The Senior Counsel for Central Excise and Customs, Mr. A.R. Reddy submits that an order of waiver of pre-deposit, a mandatory condition precedent for availing the appellate remedy, is not a matter of course. While passing any order, the Tribunal is required to safeguard the interest of the Revenue. The impugned order was passed keeping in view the Scheme of Section 35F of the Act and, therefore, no interference is called for.

4. The issue before the Tribunal, at the interlocutory stage, was whether the petitioner had demonstrated a *prima facie* case and undue hardship. In so far as abatement, to the taxable value, to the extent of 67% in terms of Notification No. 01/2006-S.T. is concerned a clear finding was recorded by the learned Tribunal in favour of the petitioner. In regard to the question whether the service tax provider was entitled to opt for composition in terms of Rule 3(3) of the Works Contracts (Composition Scheme for Payment of Service Tax) Rules, 2007 is concerned the issue, according to the Tribunal, was the subject matter of *Nagarjuna Construction Company* and operated against the petitioner. Therefore, in so far as the question whether the petitioner could avail the benefit of the Composite Scheme in relation to the contracts entered into prior to 1-6-2007 is concerned, it was certainly against the petitioner. The Tribunal, taking into consideration of the matter with reference to abatement from taxable value, gave relief to the extent of benefit of abatement of taxable value of the works and directed pre-deposit of only ` 2,66,00,000/- as a condition for grant of an order of waiver, and stay of recovery. The question is whether the order suffers from any grave error apparent on the face of record warranting exercise of certiorari jurisdiction of this Court. In *CCE, Guntur v. M/s. Sri Chaitanya Educational Committee, Poranki, Vijayawada* - CEA No. 301 of 2010, dated 19-1-2011 [2011 (22) S.T.R. 135 (A.P.)], on an analysis of the relevant case law, this Bench enumerated the following principles to be kept in mind while considering the applications for stay or waiver of pre-deposit under Section 35F of the Act.

- (1) The applications 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;
- (2) Three aspects to be focused while dealing with the applications for dispensing of pre-deposit are: (a) *prima facie* case, (b) balance of convenience, and (c) irreparable loss;
- (3) Interim orders ought not to be granted merely because a *prima facie* case has been shown;
- (4) The balance of convenience must be clearly in favour of making of an interim order and there should not be the slightest indication of a likelihood of prejudice to the interest of public revenue;
- (5) While dealing with the applications twin requirements of consideration

i.e., consideration of undue hardship, and imposition of conditions to safeguard the interests of revenue have to be kept in view;

- (6) When the Tribunal decides to grant full or partial stay, it has to impose such conditions as may be necessary to safeguard the interests of the revenue. This is an imperative requirement; and
- (7) An appellate Tribunal, being a creature of the statute, cannot ignore the statutory guidance while exercising general powers or expressly conferred incidental powers.

5. Tested in the background of the above principles, the impugned order does not suffer from any error much less grave error apparent on the face of the record. We are not, therefore, inclined to interfere with the well considered order of the learned CESTAT. We, however, request that in case the petitioner complies with the impugned order dated 29-11-2010, in Appeal No. ST/440/2010 and ST/269/2010 passed by the learned CESTAT [2011 (23) S.T.R. 351 (Tribunal)], within three weeks from today, the appeal itself be disposed of by the CESTAT within a period of three months thereafter.

6. The writ petition is, accordingly, dismissed. There shall be no order as to costs.
