

**CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
PRINCIPAL BENCH, COURT NO. 1**

SERVICE TAX APPEAL NO. 51354 OF 2018

[Arising out of Order-in-Appeal No. 223 (SRM)ST/JDR/2018 dated 27.02.2018 passed by the Commissioner (Appeals) Central Excise & Central Goods & Service Tax, Jodhpur]

M/S C S DOSHI

Appellant

66, Saheli Nagar, Udaipur (Raj,) 312001

Vs.

**THE COMMISSIONER OF CENTRAL GOODS
AND SERVICE TAX, UDAIPUR**

Respondent

142-B, Hiran Magri,
Sector-11, Udaipur
(Raj)

Appearance:

Present for the Appellant : Ms. Kainaath, Advocate

Present for the Respondent: Shri S K Meena, Authorised Representative

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT

HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 51182 /2023

Date of Hearing/Decision : 29/08/2023

JUSTICE DILIP GUPTA:

The order dated 27.02.2018 passed by the Commissioner (Appeals) dismissing the appeal for the reason that the appellant had not made the statutory pre-deposit as contemplated under section 35F of the Central Excise Act, 1944¹ has been assailed in this appeal.

1 Central Excise Act

2. Ms. Kainaat, learned counsel for the appellant has submitted that the appellant has very good case on merits and, therefore, the Commissioner (Appeals) should have examined the same instead of dismissing the appeal for the reason that statutory amount of pre-deposit was not made by the appellant. Learned counsel for the appellant also submitted that an opportunity should have been provided by the Commissioner (Appeals) to make the pre-deposit.

3. Shri S K Meena, learned authorized representative appearing for the Department has, however, supported the impugned order and submitted that Commissioner (Appeals) was justified in dismissing the appeal.

4. The submissions advanced by the learned counsel for the appellant and the learned authorized representative of the department have been considered.

5. A perusal of the order passed by the Commissioner (Appeals) indicates that the appellant in the written submissions had confirmed that it had not made the mandatory pre-deposit. This shows that the appellant was aware that it was required to make the pre-deposit, but instead of depositing the amount the appellant pursued the appeal. The Commissioner (Appeals) was, therefore, justified in not granting time to the appellant to make the pre-deposit.

6. Section 35F of the Central Excise Act, as amended on August 06, 2014, deals with deposit of certain percentage of duty demanded or penalty imposed before filing an appeal is reproduced below:

Section 35F. Deposit of certain percentage of duty demanded or penalty imposed before filing appeal.

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The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal, -

- (i) under sub-section (1) of section 35, unless the appellant has deposited seven and a half per cent. of the duty, in case where duty or duty and penalty are in dispute or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the Commissioner of Central Excise;
- (ii) against the decision or order referred to in clause (a) of sub-section (1) of section 35B, unless the appellant has deposited seven and a half per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against;
- (iii) against the decision or order referred to in clause (b) of sub-section (1) of section 35B, unless the appellant has deposited ten per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such case where duty or duty and penalty are in dispute, in pursuance of the decision or order appealed against:

Provided that the amount required to be deposited under this section shall not exceed rupees ten crores:

7. It would be seen from a bare perusal of section 35F of the Central Excise that after August 06, 2014 neither the Tribunal nor the Commissioner (Appeals) have the power to waive the requirement of pre-deposit, unlike the situation which existed prior to the amendment made in section 35F on August 06, 2014 when the Tribunal, if it was of the opinion that the deposit of duty and interest demanded or penalty levied would cause undue hardship, could dispense the said deposit on such conditions as it deemed fit to impose so as to safeguard the interest of the Revenue.

8. Section 83 of the Finance Act makes applicable the provisions of section 35F of the Central Excise Act to service tax as they apply in relation to duty of excise.

9. The Supreme Court in **Narayan Chandra Ghosh vs. UCO Bank and Others²**, examined the provisions contained in section 18 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 relating to pre deposit in order to avail the remedy of appeal. The provisions are similar to the provisions of section 129E of the Customs Act. The Supreme Court emphasised that when a Statute confers a right to appeal, conditions can be imposed for exercising of such a right and unless the condition precedent for filing appeal is fulfilled, the appeal cannot be entertained. The Supreme Court, therefore, held that deposit under the second proviso to section 18(1) of the Act, being a condition precedent for preferring an appeal, the Appellate Tribunal erred in law in entertaining the appeal. The Supreme Court also held that the Appellate Tribunal could not have granted waiver of pre-deposit beyond the provisions of the Act. The relevant portion of the judgment of the Supreme Court is reproduced below:

"7. Section 18(1) of the Act confers a statutory right on a person aggrieved by any order made by the by the Debts Recovery Tribunal under Section 17 of the Act to prefer an appeal to the Appellate Tribunal. However, the right conferred under Section 18(1) is subject to the condition laid down in the second proviso thereto. The second proviso postulates that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent of the amount of

2. (2011) 4 SCC 548

debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less. However, under the third proviso to the sub section, the Appellate Tribunal has the power to reduce the amount, for the reasons to be recorded in writing, to not less than twenty-five per cent of the debt, referred to in the second proviso. **Thus, there is an absolute bar to entertainment of an appeal under Section 18 of the Act unless the condition precedent, as stipulated, is fulfilled. Unless the borrower makes, with the Appellate Tribunal, a pre- deposit of fifty per cent of the debt due from him or determined, an appeal under the said provision cannot be entertained by the Appellate Tribunal. The language of the said proviso is clear and admits of no ambiguity.**

8. It is well-settled that when a Statute confers a right of appeal, while granting the right, the Legislature can impose conditions for the exercise of such right, so long as the conditions are not so onerous as to amount to unreasonable restrictions, rendering the right almost illusory. Bearing in mind the object of the Act, the conditions hedged in the said proviso cannot be said to be onerous. **Thus, we hold that the requirement of pre-deposit under sub-section (1) of Section 18 of the Act is mandatory and there is no reason whatsoever for not giving full effect to the provisions contained in Section 18 of the Act. In that view of the matter, no court, much less the Appellate Tribunal, a creature of the Act itself, can refuse to give full effect to the provisions of the Statute. We have no hesitation in holding that deposit under the second proviso to Section 18(1) of the Act being a condition precedent for preferring an appeal under the said Section, the Appellate Tribunal had erred in law in entertaining the appeal without directing the appellant to comply with the said mandatory requirement.**

9. The argument of learned counsel for the appellant that as the amount of debt due had not been determined by the Debts Recovery Tribunal, appeal could be entertained by the Appellate Tribunal without insisting on pre-deposit, is equally fallacious. Under the second proviso to sub- section (1) of Section 18 of the Act the amount of fifty per cent, which is required to be deposited by the borrower, is computed either with reference to the debt due from him as claimed by the secured creditors or as determined by the Debts Recovery Tribunal, whichever is less. Obviously, where the amount of debt is yet to be determined by the Debts Recovery Tribunal, the borrower, while preferring appeal, would be liable to deposit fifty per cent of the debt due from him as claimed by the secured creditors. Therefore, the condition of pre-deposit being mandatory, a complete waiver of deposit by the appellant with the Appellate Tribunal, was beyond the provisions of the Act, as is evident from the second and third provisos to the said Section. At best, the Appellate Tribunal could have, after recording the reasons, reduced the amount of deposit of fifty per cent to an amount not less than twenty-five per cent of the debt referred to in the second proviso. We are convinced that the order of the Appellate Tribunal,

entertaining appellant's appeal without insisting on predeposit was clearly unsustainable and, therefore, the decision of the High Court in setting aside the same cannot be flawed."

(emphasis supplied)

10. The principles laid down in the aforesaid decision of the Supreme Court in **Narayan Chandra Ghosh** were reiterated by the Supreme Court in **Kotak Mahindra Bank Pvt. Limited vs. Ambuj A. Kasiwal & Ors**³.

11. In **Chandra Sekhar Jha vs. Union of India and Another**⁴, the Supreme Court noted that the Tribunal had rejected the appeal filed under section 129A of the Customs Act for the reason that the appellant had not complied with the requirement of pre-deposit under section 129E of the Customs Act. Though the contention of the appellant that the provisions of section 129E of the Customs Act as it stood prior to 06.08.2014 should be applied, was rejected by the Supreme Court for the reason that the order was passed by the Commissioner on 23.11.2015 and the appeal was filed in 2017, but the Supreme Court also observed:-

"8. It is in sharp departure from the previous regime that the new provisions has been enacted. Under the new regime, on the one hand, the amount to be deposited to maintain the appeal has been reduced from 100% to 7.5% but the discretion which was made available to the appellate body to scale down the pre-deposit has been taken away.

11. We would think that the legislative intention would clearly be to not to allow the appellant to avail the benefit of the discretionary power available under the proviso to the substituted provisions under section 129E. When the

3. Civil Appeal No. 539 of 2021 decided on 16.02.2021

4. Civil Appeal No. 1566 of 2022 decided on February 28, 2022

appellant is not being called upon to pay the full amount but is only asked to pay the amount which is fixed under the substituted provisions, we do not find any merit in the contention of the appellant. "

12. In this connection, it will also be appropriate to refer to a decision of the Delhi High Court in **Dish TV India Limited vs. Union of India & Ors.**⁵, wherein the requirement of pre-deposit under section 129E of the Customs Act, came up for consideration. The High Court held that when the Statute itself provided waiver of pre-deposit to the extent of 90% or 92.5% of the duty amount and made it mandatory to deposit 7.5% or 10% of duty amount, the Courts cannot waive this requirement of deposit. The observations of the Delhi High Court are as follows:

"7. Previously, prior to amendments of the statute, applications for waiver of the pre-deposit were being preferred. Several litigations have travelled up to the Hon'ble Supreme Court upon such applications for waiver of pre-deposit.

10. In view of the aforesaid statutory provisions of the Act, it appears that the statute has now effected waiver of pre-deposit to the extent of 90% or 92.5% of the duty amount and has made it mandatory to deposit 7.5% or 10% of the duty amount, as the case may be. It ought to be kept in mind that the relief is granted by the law itself. Courts cannot be more charitable than the law. When the provisions of the law are explicitly clear or where the provisions of law are absolutely unambiguous, such type of pre-deposits cannot be waived by the courts.

13. In view of the amendment in the Act, especially Section 129E thereof, there is no question whatsoever of the waiver of predeposit. As stated hereinabove, the statute itself has waived 90% or 92.5% of the duty amount, as the case may be, assessed by the authorities under the Customs Act, 1962. **The petitioner- assessee has to deposit only 7.5% or 10% (as the case may be) of the duty assessed. Thus, there is no question of further waiver of the amount which is required to be deposited under Section 129E of the Customs Act, 1962."**

(emphasis supplied)

5. W.P. (C) 4960 of 2020 decided on 06.08.2020

13. A Division Bench of Delhi High Court in **M/s Vish Wind Infrastructure LLP v/s Additional Director General (Adjudication), New Delhi**⁶ examined the provisions of section 35F of the Central Excise Act, 1944 which are pari materia to section 129E of the Customs Act and held that every appeal filed before the Tribunal after the amendment made in section 35F of the Excise Act and section 129E of the Customs Act on 06.08.2014 would be maintainable only if the mandatory pre-deposit was made. In coming to this conclusion, the Division Bench relied upon the judgment of the Delhi High Court in **Anjani Technoplast Ltd. v/s Commissioner of Customs**⁷ and also observed that in view of the peremptory words 'shall not', there is an absolute bar on the Tribunal to entertain any appeal unless the requirement of pre-deposit is satisfied. The Division Bench further observed as follows:-

"28. Equally, it is trite that no court can issue a direction to any authority, to act in violation of the law. A reading of section 35F of the Central Excise Act reveals, by the usage of the peremptory words "shall not" therein, that there is an absolute bar on the CESTAT entertaining any appeal, under Section 35 of the said Act, unless the appellant has deposited 7.5 % of the duty confirmed against it by the authority below.

29. The two provisos in section 35F relax the rigour of this command only in two respects, the first being that the amount to be deposited would not exceed 10 crores, and the second being that the requirement of pre-deposit would not apply to stay applications or appeals pending before any authority before the commencement of the Finance (No.2) Act, 2014, i.e. before 6th August, 2014.

30. Allowing the CESTAT to entertain an appeal, preferred by an assessee after 6th August, 2014, would,

6. **Writ Petition (C)2178/2019 decided on August 28,2019**
 7. **2015(326) ELT 472 (Del.)**

therefore, amount to allowing the CESTAT to act in violation, not only of the main body of section 35F but also of the second proviso thereto, and would reduce the command of the legislature to a dead letter. 31.

31. That no court can direct an authority to act in violation of the law is settled in innumerable authorities, including, inter alia, **Vice-Chancellor, University of Allahabad v. Dr. Anand Prakash Mishra**⁸, **A.B.Bhaskara Rao v. C.B.I**⁹, **Manish Goel v. Rohini Goel**¹⁰, and **State of Bihar v. Arvind Kumar**¹¹.

33. In view of the aforesaid facts, reasons and judicial pronouncements, the prayer of the petitioner for being permitted to prosecute its appeal before the CESTAT without complying with the condition of mandatory pre-deposit, cannot be granted. There is, therefore no substance in these writ petitions which are, consequently, dismissed”.

14. The same view was taken by the Division Bench of the Delhi High Court in **Diamond Entertainment Techno. P. Ltd. v/s Commissioner of CGST, Dehradun**¹².

15. The Madhya Pradesh High Court in **Ankit Mehta v/s Commissioner, CGST Indore**¹³ also dismissed the Writ Petition that had been filed against the order of the Tribunal dismissing the appeal for the reason that the required pre-deposit was not made. The contention that was advanced before the Tribunal and before the Madhya Pradesh High Court was that the appellant was not in a position to make the pre-deposit due to financial constraints. After examining the provisions of section 129E of the Customs Act, the Madhya Pradesh High Court observed as follows:-

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- 8. (1997) 10 SCC 264
 - 9. (2011) 10 SCC 259
 - 10. (2010) 4 SCC 393
 - 11. (2012) 12 SCC 395
 - 12. 2019 (368) E.L.T. 579 (Del.)
 - 13. W.P. No. 4557/2019

"The aforesaid statutory provision of law makes it very clear that it is mandatory for an appellant to deposit seven and a half percent of the duty demanded or penalty imposed or both. The petitioner has not deposited a single rupee and in those circumstances, keeping in view the provisions of section 129E, the appeal itself has been dismissed.

This Court after careful consideration of the aforesaid judgments is of the opinion that section 129E does not empower the Tribunal or the Commissioner (Appeals) to waive the pre-deposit or to reduce the pre-deposit , this Court is also not inclined, keeping in view the aforesaid statutory provisions of law to waive or reduce the pre-deposit and, therefore, no case for interference is made out in the matter. Accordingly, the Writ Petition is dismissed".

16. In view of the aforesaid decisions of the Supreme Court, the Delhi High Court and the Madhya Pradesh High Court, the Commissioner (Appeals) was justified in dismissing the appeal for the reason that the appellant had not made the pre-deposit.

17. Thus, for all the reasons stated above, the appeal is dismissed.

(Order dictated and pronounced in the open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

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