IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO. 20 OF 2015

M/s. Tops Security Ltd.	**}**	**Appellant**
versus		
The Commissioner of Central Excise and Service Tax	**}**	**Respondent**

Mr. M. H. Patil with Mr. Sachin Chitnis i/b. Ms. Aparna Hirandagi for the appellant.

Mr. Pradeep S.Jetly i/b. Ms. Anamika Malhotra for the respondent.

CORAM :- S. C. DHARMADHIKARI & G. S. PATEL, JJ.

DATED :- FEBRUARY 29, 2016

P.C. :-

1) This appeal of the assessee challenges the order passed by the Tribunal on 9th May, 2014. That order reads as under:-

> " Heard both sides.
>
> 2. Applicant filed this application for restoration of the appeal, which was dismissed vide order dt. 31.12.2012 as applicant failed to comply with the conditions of the stay order. Applicant also filed miscellaneous application to include additional two grounds for waiver fo pre-deposit.
>
> 3. The Tribunal vide stay order dt. 15.10.2012 on undertaking given by the applicant that they will deposit the amount of tax along with interest within eight weeks granted time and waive the pre-deposit of penalties. On this condition till today applicant had not paid fully complied with the conditions of the stay order dt. 15.10.2012, which was passed on the undertaking given by the applicant. Therefore, we find no merit in

> the application. The ROA application is dismissed. Consequently miscellaneous application is also dismissed.
>
> (Dictated in Court)"

2) We find that the initial order of the Tribunal directs the appellant/assessee to make pre-deposit of the balance amount of service tax in the sum of Rs.3,77,25,883/- and report compliance.

3) The matters were placed in the month of December, 2012 for compliance, but finding that the initial order dated 15th October, 2012 to the above effect was not complied with that the Tribunal dismissed the appeal without any adjudication on merits. Thereafter, the restoration application was also dismissed.

4) The appellant/assessee pointed out to the Tribunal that it is true that it could not comply with the initial direction and deposit the sum of Rs.3,77,25,883/- in the set time frame, but that was deposited in three installments by three separate challans, one dated 27th February, 2013 and two challans dated 15th March, 2013.

5) Though the compliance was not reported within the time frame stipulated by the Tribunal and it was belated, the Tribunal, according to Mr. Patil learned counsel appearing for the

assessee, could not have dismissed the appeal of the assessee without adjudication on merits. It may, at best, could have modified the initial order and imposed some costs for the delay, but dismissal of the appeal without adjudication on merits is impermissible in law. In any event, for the financial hardship that was pleaded, the extension should have been granted or rather post facto while passing the order on the restoration application, namely, the impugned order dated 9th may, 2015.

6) Mr. Jetly appearing for the Revenue, on the other hand, would submit that the present appeal does not raise any substantial question of law and deserves to be dismissed, for, this Court possesses no power to re-appraise and re-appreciate the factual materials.

7) After giving our anxious consideration to the arguments of both sides, we find that the course adopted by the Tribunal of dismissal of the appeal without adjudication on merits raises substantial questions of law in the teeth of the language of section 35-C of the Central Excise Act, 1944, particularly sub-section (1) thereof. Hence, we admit the appeal on the following substantial questions of law:-

> "(a) Whether the Tribunal has erred in dismissing the appeals for non-compliance of pre-deposit ordered by it, without considering the request for extension of time to deposit the amounts ordered by the Tribunal, in a case

> where major portion of the service tax due was already deposited, from time to time?
>
> (b) Whether the Tribunal has erred in dismissing the appeals for non-compliance with the provisions of section 35F of the Central Excise Act, 1944 read with section 83 of the finance Act, in a case where they had deposited major portion of the tax dues, from time to time?"

8) With the consent of both sides, we dispose of this appeal finally by this order.

9) We find that the appellant/assessee has complied with the conditional stay order belatedly. The facts and circumstances of the present case do not warrant a dismissal of the statutory appeal preferred by the assessee without adjudication on merits. A belated compliance with the order passed by the Tribunal should not have visited the assessee, in the peculiar facts, with such drastic consequences of deprivation of an opportunity to address on the merits of the appeal.

10) As a result of the above discussion, we direct that the appellant assessee shall pay costs quantified at Rs.25,000/- on or before 15th March, 2016 and on reporting compliance, the impugned order shall stand quashed and set aside. The appeal shall then be restored to the file of the Tribunal for hearing on merits and in accordance with law.

(G.S.PATEL, J.) **(S.C.DHARMADHIKARI, J.)**