IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.6.2016

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

Writ Petition No.22067 of 2016 and WMP.No.18859 of 2016

Only Success Learning Technologies Private Limited, rep. by Sendhil Annamalai, Director, Chennai.-34 ...Petitioner

Vs

The Additional Commissioner of Service Tax, Service Tax II Commissionerate, Anna Nagar, Chennai-40. ...Respondent

PETITION under Article 226 of The Constitution of India praying for the issuance of a Writ of Certiorari to call for the records on the file of the respondent in proceedings C.No.IV/9/444/2012-STC-Adj. in Order-in-Original No.137/2015-16-ST-II dated 23.3.2016 and quash the same.

For Petitioner : Mr.Joseph Prabhakar

For Respondent : Mr.A.P.Srinivas, SPC (Senior Panel Counsel)

ORDER

Mr.A.P.Srinivas, learned Senior Panel Counsel takes notice for the respondent. Heard both.

2. The petitioner has filed this writ petition challenging an Order-in-Original passed by the respondent dated 23.3.2016, in and by which, the respondent confirmed the demand to the extent of Rs.44,20,799/- being the service tax payable for the assessment years 2007-08 and 2011-12 in terms of the provisions of Section 73(1) of the Finance Act, 1994, apart from demanding interest and imposing penalty.

3. In the affidavit filed in support of the writ petition, the petitioner raised several grounds, touching upon the merits of the order passed by the respondent.

4. However, this Court posed a preliminary question to the learned counsel for the petitioner that as against the impugned order, the petitioner has not exhausted the appeal remedy, which has been provided under the provisions of the Finance Act.

5. In response to such a query, the learned counsel for the petitioner submits that the petitioner does not seek to canvass the merits of the case, but would pray for a direction to the petitioner to approach the Tribunal with a further direction to the Tribunal to take up the petitioner's stay application. In other words, the submission of the learned counsel for the petitioner is that the petitioner should be permitted to go before the Tribunal with a direction to the Tribunal to take up the stay application, thereby bypassing the pre-deposit condition, which has been made mandatory with effect from 6.8.2014.

6. The learned counsel for the petitioner strongly placed reliance on the decision of the Hon'ble Division Bench of this Court in the case of Arafaath Travels Pvt. Ltd. Vs. CESTAT [reported in 2016-TIOL-133-HC-MAD-ST] and by referring to paragraph 4.8 therein, it is submitted that unless the lis in question has commenced prior to the introduction of the Finance Act, 1994 (with effect from August 2014), the petitioner's right to appeal, as per the erstwhile provision of law, could not be affected by the provisions introduced by the amendment of 2014.

7. The learned counsel for the petitioner fairly submitted that there is yet another judgement of the Hon'ble Division Bench of this Court in the case of M/s.Dream Castle & another Vs. Union of India & Others [2016-TIOL-1009-HC-MAD-ST] and this decision was rendered without noticing the decision in the case of Arafaath Travels Pvt. Ltd. (cited supra) and the petitioner seeks to take advantage of the observations contained in paragraph 4.8 of the judgment in the case of Arafaath Travels Pvt. Ltd. (cited supra).

8. The learned counsel for the petitioner again fairly submitted that the decision of the Hon'ble Division Bench of this Court in the case of M/s.Dream Castle & another (cited supra) is against the petitioner's contentions wherein it has been held that the amended provisions would apply to all appeals presented after the amended date and such is also the view taken by another Hon'ble Division Bench of the Delhi High Court in the case of M/s.Pioneer Corporation Vs. Union of India [reported in 2016-TIOL-1116-HC-DEL-CX].

9. Thus, after carefully considering the submissions made by the learned counsel for the petitioner, it is clear that the petitioner seeks a direction to the Tribunal, as directed by a learned Single Judge of this Court in the case of Fifth Avenue

Sourcing (P) Ltd. Vs. Commissioner of S.T., Chennai [reported in 2015 (40) S.T.R. 71] wherein this Court directed the petitioner therein to file an appeal before the Tribunal along with a stay application without making a pre-deposit of 7.5% of the tax amount confirmed against the petitioner. However, such a direction cannot be issued for the simple reason that the said decision of the learned Single Judge of this Court has been reversed in the decision of the Hon'ble Division Bench of this Court in the case of M/s.Dream Castle & another (cited supra).

10. However, now the petitioner seeks to take advantage of the observations made by another Hon'ble Division Bench of this Court in the case of Arafaath Travels Pvt. Ltd. (cited supra) and states that when one Hon'ble Division Bench made such an observation, this Court should direct the petitioner to approach the Tribunal with a direction to the Tribunal to take up the stay application.

11. The arguments advanced by the learned counsel for the petitioner do not merit acceptance for the reason that in the case of Arafaath Travels Pvt. Ltd. (cited supra), the Hon'ble Division Bench of this Court took note of the amendment, which was made applicable to appeals filed after 6.8.2014 and that the appeals and the stay applications filed prior to the said date were to be governed by the erstwhile provisions. However, the Hon'ble Division Bench did not frame a separate question as regards the validity of the provisions, which were introduced with effect from 6.8.2014.

12. While testing the correctness of a pre-deposit order passed by the Tribunal, these observations have been made. However, the fact remains that in the decision in the case of M/s.Dream Castle and another (cited supra), the prayer sought for is to declare that Section 35F of the Central Excise Act read with Section 83 of the Finance Act would apply only to show cause proceedings initiated on or after 6.8.2014. The Hon'ble Division Bench, after elaborately considering all the contentions raised, including the decision of the Kerala High Court in the case of Muthoot Finance Ltd. Vs. Union of India [2015-TIOL-632-HC-Kerala], dismissed the writ petition and upheld the validity of the amendment. In the case of Arafaath Travels Pvt. Ltd. (cited supra), the Hon'ble Division Bench of this Court also took note of the judgment of a learned Single Judge of the Kerala High Court in the case of Muthoot Finance Ltd. (cited supra). This was noticed in the decision in the case of M/s.Dream Castle and another (cited supra) and the Hon'ble Division Bench of this Court has given elaborate reasons as to how such a view is incorrect.

13. At this stage, it would be useful to refer to a few paragraphs in the decision in the case of M/s.Dream Castle and another (cited supra), which are as follows :

> "38. The interim order passed by the Andhra Pradesh High Court in K.Rama Mohanarao & Co. was followed by a learned Judge of the Kerala High Court in two cases, namely (i) Muthoot Finance Ltd. Vs. Union of India [2015 TIOL 632 HC Kerala] and (ii) Secretary to Government, Department of Agriculture Vs. Union of India [2015 TIOL 895 HC Kerala]. In an interim order passed by a Division Bench of the High Court of Punjab & Haryana in Super Threading (India) Pvt. Ltd. v. Union of India [2015 (323) ELT 119 (P&H)], the decision of the single Judge of the Kerala High Court in Muthoot Finance Ltd. was followed.
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> 39. However, a Division Bench of the Allahabad High Court struck a different note in Ganesh Yadav Vs. Union of India [2015 (39) STR 177 (All.)]. In the said case, the Allahabad High Court was dealing with a writ petition challenging the very vires of the amendment. After pointing out in paragraph 4 of its decision that as a first principle of law, the right of appeal is a statutory right and that it is always open to the legislature which confers a remedy of appeal to regulate the same subject to compliance of certain conditions, the Bench took note of the decisions of the Supreme Court to the effect that the right of appeal is neither an absolute right nor an ingredient to natural justice. Since it is only a statutory right, it can always be circumscribed by the condition in the grant. Therefore, the Court upheld the constitutional validity of the Finance Act 2 of 2014.
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> 40. Thereafter, the Allahabad High Court took up for consideration the next question which is exactly identical to the question that is raised in the present case. After taking note of the decision of the Privy Council in Colonial Sugar Refining Co. Ltd., the decision of the Supreme Court in

Hoosein Kasam Dada and the decisions of the Supreme Court in Jose Da Costa Vs. Bascora Sadasiva Sinai Narconim [(1976) 2 SCC 917] and Ramesh Singh Vs. Cinta Devi [AIR 1996 SC 1560], the Allahabad High Court held in paragraphs 19 and 20 as follows:

'19. Parliament while substituting the provisions of Section 35F of the Central Excise Act, 1944 by Finance Act (No.2) of 2014, has laid down that the Tribunal or the Commissioner (Appeals) "shall not entertain any appeal" unless the appellant has deposited the duty or, as the case may be, a penalty to the stipulated extent. These words in Section 35F of the Act would indicate that on and after the enforcement of the provision of Section 35F of the Act, as amended, an appellant has to deposit the duty and penalty as stipulated and unless the appellant were to do so, the Tribunal shall not entertain any appeal. This provision would, therefore, indicate that it would apply to all appeals which would be filed on and from the date of the enforcement of Section 35 of the Act.

20. The intendment of Section 35F of the Act is further clarified by the second proviso which stipulates that the provisions of the section shall not apply to stay applications and appeals which were pending before any appellate authority prior to the commencement of Finance (No.2) Act, 2014. The second proviso is a clear indicator that Parliament has exempted the requirement of complying with the pre-deposit as mandated by Section 35F(1) of the Act as amended only in the case of those stay applications and appeals which were pending before any appellate authority prior to the commencement of Finance (No.2) Act, 2014. Consequently, both by virtue of the opening words of Section 35F(1) of the Act as well as by the second proviso to the provision, it is clear that appeals which are filed on and after the enforcement of the amended provision on 6 August 2014 shall be governed by the requirement of pre-deposit as stipulated therein. The only category to which the provision will not apply that

would be those where the appeals or, as the case may be, stay applications were pending before the appellate authority prior to the commencement of Finance (No.2) Act, 2014.'

....

53. Despite all the conflicts, sometimes latent, sometimes patent and sometimes incorrigible, there has been uniformity of opinion at least on one thing, namely that the right of appeal is neither an absolute right, nor an ingredient of natural justice, and that it is only a statutory right which can be circumscribed by the conditions in the grant. A useful reference can be made in this regard to the decisions in Seth Nand Lal Vs. State of Haryana [1980 (Supp.) SCC 574] and Vijay Prakash D.Mehta Vs. Collector of Customs [(1988) 4 SCC 402].

54. Therefore, it is well settled that the right of appeal is a creature of statute and the legislature is well within its competence to impose conditions for the exercise of such a right subject only to the restriction that the conditions so imposed are not so onerous as to amount to unreasonable restrictions rendering the right almost illusory.

55. Therefore, the question of prime importance that arises is, as to whether a switch-over from a regime where the deposit of the entire duty was mandatory subject however to the discretion granted to the Appellate Authority to waive the whole or any part it, to a regime where a fixed percentage of 7.5% of the demand is made mandatory, can be said to be more onerous or less onerous. This question appears to have been answered in Shyam Kishore Vs. Municipal Corporation of Delhi [(1993) 1 SCC 22], by a three Member Bench of the Supreme Court, though not directly, but indirectly. In paragraph 38 of the decision, the Supreme Court stated as follows:

"The decisions of the Bombay and Calcutta High Courts earlier referred to (Elora - AIR 1980 Bom. 162 and Chatter Singh - AIR 1984 Cal. 283) have upheld the validity of a provision banning the entertainment of an appeal altogether where the taxes are not paid. However, the Supreme Court decisions in Anant Mills [1975 (2) SCC 175], Vijay Prakash Mehta [1988 (4) SCC 402] and A.S.Bava [AIR 1968 SC 13] had occasion to consider only the vires of a milder provision which permitted the Appellate Authority to waive or relax the condition of deposit. As explained in Seth Nand Lal Vs. State of Haryana, these decisions settle the principle "that the right of appeal is a creature of a statute and there is no reason why the legislature while granting the right cannot 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"

56. Let us now conceive of different types of pre-deposit conditions that are capable of being imposed for entertaining a statutory appeal. In a graded scale they will be as follows:

(i) A condition which makes it mandatory for the assessee to deposit the whole of the disputed tax or penalty or both can be said to be the most onerous;

(ii) A condition that makes it mandatory for the assessee to deposit the entire amount of disputed tax, penalty or both with a discretion to the Appellate Authority to grant waiver of the whole or part of the amount can be said to be less onerous than the first; and

(iii) A condition that the assessee should deposit at least the admitted amount of tax, could be said to be less onerous.

57. That leaves us only with one more type of condition namely the condition to make a pre-deposit of a fixed percentage of the tax demanded or penalty levied or both. The answer to the question raised in this writ petition lies squarely in our answer to the question as to whether the condition of this nature requiring the assessee to make a pre-deposit of 7.5% could be placed in between the categories narrated in (i) and (ii) or in between categories narrated in (ii) and (iii) above. If this condition falls in between categories (i) and (ii), it is more onerous than the existing condition

and hence, cannot take retrospective effect. If this condition falls in between categories (ii) and (iii), it is less onerous than the existing condition and hence, the question whether it is retrospective or not will not even be raised by those who are benefited by it."

14. In the light of the above, I am of the view that the legal position enunciated in the decision in the case of M/s.Dream Castle & another (cited supra) is the correct interpretation given to the provision.

15. That apart, the Hon'ble Division Bench of the Delhi High Court also considered the same issue in the case of M/s.Pioneer Corporation (cited supra) and held as follows :

"10. Under Section 35F of the CE Act as it stood prior to 6th August 2014, a discretion was available to the CESTAT to consider the financial hardship and accordingly determine the pre-deposit amount. That discretion has been consciously sought to be curtailed and thus an amendment was made to Section 35F of the CE Act requiring making of a pre-deposit of 7.5% in all cases subject to an upper cap of Rs.10 crores. A direction, therefore to the CESTAT that it should waive the pre-deposit would be contrary to the express legislative intent expressed in the amended Section 35F with effect from 6th August 2014.

11. While the jurisdiction of the High Court under Article 226 of The Constitution to grant relief notwithstanding the amended Section 35F cannot possibly be taken away, the Court is of the view that the said power should be used in rare and deserving cases where a clear justification is made out for such interference. Having heard the submissions of Mr.Datta and having perused the adjudication order, the Court is not persuaded to exercise its powers under Article 226 to direct that there should be a complete waiver of the pre-deposit as far as the petitioner's appeal before the CESTAT is concerned."

16. In the light of the above, this Court is of the view that the relief sought for to direct the petitioner to approach the Tribunal and file a stay application with a further direction to the Tribunal to hear the same thereby waiving the condition of pre-deposit of 7.5%, cannot be acceded to.

17. Accordingly, the writ petition is dismissed as not maintainable. However, it is open to the petitioner to move the Tribunal and file an appeal, if so advised. No costs. Consequently, the above WMP is also dismissed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

RS

To

The Additional Commissioner of Service Tax, Service Tax II Commissionerate, Anna Nagar, Chennai-40.

+ 1 cc t Mr.A.P. Srinivas, Advocate Sr.36459
+ 1 cc to Mr.Joseph Prabakar, Advocate Sr.36124

WP.No.22067 of 2016 &
WMP.No.18859 of 2016

VGI(CO)
Eu 26.7.16