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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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\+ **W.P.(C) 927/2015 & CM 1622/2015**

RAJDHANI FLORA & INFRASTRUCTURE DEVELOPERS PVT. LTD. ..... Petitioner

Through: Mr. Puneet Aggarwal, Mr. Deepak Anand and Mr. Deepak Thakur, Advocates.

versus

UNION OF INDIA & ANR. ..... Respondent

Through: Mr. Dev. P. Bhardwaj, Advocate for R-1 Mr. Satish Kumar, Senior Standing counsel for R-2.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE VIBHU BAKHRU

<u>O R D E R</u>

% **10.05.2016**

1. The Petitioner is a private limited company engaged in the business of construction of road and horticulture activities. The Petitioner has in this writ petition challenged the impugned adjudication order dated 21st April 2014 passed by the Commissioner of Service Tax confirming the demand of service tax.

2. Against the impugned order dated 21st April 2014, the appeal lies to the Custom Excise & Service Tax Appellate Tribunal ('CESTAT') under Section 86 of the Finance Act, 1994 read with Section 35 F of the Central Excise Act, 1944 ('CE Act').

3. The Petitioner did file an appeal before the CESTAT under Diary No. 557752014. In the meanwhile, the Petitioner filed the present writ petition and this Court issued the notice by order dated 30th January 2015. When the said appeal came up for hearing before the CESTAT on 21st August 2015, the Petitioner informed the CESTAT of the pendency of the present petition. The Petitioner requested the CESTAT that the appeal be kept pending till the final outcome of the present petition. That prayer was declined by the CESTAT by order dated 21st August 2015 holding that since the Petitioner has already approached this Court, the appeal was not maintainable since the Petitioner cannot avail two parallel remedies against the impugned order simultaneously.

4. The central plea of the Petitioner is that the mandatory minimum pre-deposit of 7.5% of the demand in terms of the amendment in Section 35-F of CE Act in affordable for the Petitioner. The specific prayers afford to make such pre-deposit, this Court should interfere and allow the following prayers of the Petitioner:

(a) Declare Section 35 F of the CE Act as ultra vires.

(b) Declare Section 35 F to be only directory.

(c) Set aside the impugned order dated 21st April 2014.

(d) Set aside the show cause notices dated 13th April 2012 and 19th October 2012 which led to the aforementioned adjudication order dated 21st April 2014 and

(e) lastly to direct the Respondent to adjudicate "the matter of the petitioner after considering the law and all the documents, including balance sheets submitted by the petitioner".

5. As far as prayer (a) is concerned, this Court has in its order dated 20th October 2015 in CUSAA No. 19 of 2015 (***Anjani Technoplast Ltd. v. The Commissioner of Customs***) and order dated 25th April 2016 in W.P.(C) No. 3380 of 2016 (***Suvidha Signs Studios Pvt. Ltd. v. Union of India***) concurred with the view expressed by the High Court of Allahabad in ***Ganesh Yadav v. Union of India 2015 (320) ELT 711 (All)*** and declined to entertain the challenge to the constitutional validity of Section 35 F of the CE Act on any ground whatsoever.

6. As regards the plea that the Petitioner cannot afford the pre-deposit that might be ordered by the CESTAT, the Court finds the plea to be premature since there has been no occasion for the CESTAT to yet pass any order of pre-deposit. As already noticed, the CESTAT declined to hear the Petitioner's appeal only because the Petitioner has instituted parallel proceedings in this Court by way of the present petition challenging, *inter alia*, the adjudication order dated 21st April 2014.

7. In the considered view of the Court, the Petitioner cannot be allowed to bypass the statutory remedy available to it. The right course is for the Petitioner to revive/seek restoration of its appeal before the CESTAT accompanied by an application for condonation of delay in filing such restoration application seeking recall of the CESTAT's order dated 21st August 2015. The question of the Court in the present petition interfering

with the show cause notices which led to passing of the above adjudication order also does not arise.

8. The question whether the amended Section 35 F of the CE Act will apply to the Petitioner's appeal will be decided by the CESTAT in accordance with law. It will be open to the Petitioner, if it files the restoration application in the CESTAT not later than ten days from today along with an application for condonation of delay, to urge that the Petitioner was bonafide pursuing the present petition and that this factor should be taken into account while considering the prayer for condonation of delay in filing the restoration application.

9. The writ petition and application are disposed of in the above terms.

S.MURALIDHAR, J

VIBHU BAKHRU, J

MAY 10, 2016
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