IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 05.04.2018

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE Tmt.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A. No.559 of 2018
and
C.M.P. No.5057 of 2018

M/s.Teaserve
Represented by its Managing Director
No.35, Church Road
Coonoor
Nilgiris - 643 101 .. Appellant

Vs.

The Commissioner of Central Excise,
Service Tax and Customs,
Coimbatore ..Respondent

Civil Miscellaneous Appeal filed under Section 35G of Central Excise Act, 1944, against the Final Order No.40196/2017 dated 09.02.2017 passed by CESTAT, Chennai.

For Appellant : Ms.D.Naveena

For Respondent : Mr.Rajinish Pathiyil
Central Govt Senior Standing Counsel (CC & CE)

JUDGMENT
(Delivered by S.MANIKUMAR, J.)

Instant civil miscellaneous appeal is filed against the Final Order of CESTAT, Chennai dated 09.02.2017 made in Final Order No.40196/2017, on the following substantial questions of law:

> "1. Whether in the facts and circumstances of the case, an order of the Commissioner (Appeals) dismissing an appeal for non-compliance of pre-deposit order is an appealable order in terms of Section 86 of the Finance Act, 1994?

2. Whether in the facts and circumstances of the case, the Hon'ble CESTAT was justified in dismissing the appeal as not maintainable, without considering the correctness and legality of the order of the Commissioner (Appeals) dismissing the appeal for non-compliance of pre-deposit order?”

2. Short facts leading to the appeal are that Teaserve, is the world's first electronic tea auction centre started by the parent organization INDCOSERVE. It is submitted that INDCOSERVE is an organization, which is functioning under the administrative control of Department of Industries and Commerce, Government of Tamil Nadu. It was established to coordinate the activities of all the Industrial Cooperative tea factories. The need for cooperative tea factories was realised because, initially the small tea growers in the Nilgiris district of South India had to supply their green leaves only to private tea factories. These small growers faced several problems such as low rates for their leaves, heavy rejections of leaves in peak season and manipulation in weighing the leaves. This scenario prompted the Government of Tamil Nadu to form tea factories under cooperative sector with the first Industrial Cooperative Tea factory established in 1962.

3. Tamil Nadu Small Tea Growers Industrial Cooperative Tea Factories Federation Limited (INDCOSERVE) was established in the year 1965. Acceding to the representation made by the small tea growers of the Nilgiris District, the Government, accorded permission for setting up of an Electronic Tea Auction Centre. Accordingly, the new tea auction centre under Cooperative sector in the name of "Tea Manufacturers' Service Industrial Cooperative Society Limited" (TEASERVE), was registered on August 28, 2002 and set up at Coonoor in the Nilgiris District. TEASERVE commenced its Electronic Auction proceedings with effect from October 1, 2003. Only the registered buyers could participate in the electronic auction proceedings. TEASERVE was initiated mainly to avoid exploitation of small growers by the middleman. TEASERVE facilitates online tea auction system where the bidders are actual operators of the market.

4. While things stood thus, the appellant was issued with a show cause notice dated 19.09.2006 alleging that the activity undertaken by the appellant falls within the meaning of "promotion or marketing or sale of goods produced or provided by or belonging to the client" and hence, taxable under clause 19 (1) of Section 65 of the Finance Act, 1994. The said notice demanded a sum of Rs.5,77,826/- as service tax and Rs.7,143/- as Education Cess for the period from October 2003 to December 2005. The notice also proposed to impose penalties under Sections 76, 77 and 78 of the Finance Act, 1994.

5. Appellant filed its reply vide letter dated 16.10.2006, contending inter alia, that the demand was hit by limitation and that the appellant was eligible for exemption under Notification No.13/2003-ST dated 20.06.2003 and Notification No.8/2004-ST dated 09.07.2004. The appellant also submitted that they have paid service tax to the tune of Rs.2,51,205/- to M/s.CMC Ltd, who provide the set up for the electronic auction and the same is available as Cenvat credit and hence, ought to be deducted from the final demand. Based on the submissions of the appellant, the adjudicating authority passed an order dated 30.11.2007 restricting the demand to Rs.4,38,391/- and imposed penalties under Sections 76, 77 and 78.

6. Aggrieved by the impugned order of the adjudicating authority, appellant preferred an appeal under Section 85 of the Finance Act, 1994 before the Commissioner (Appeals) along with an application of stay. On 29.07.2008, the Commissioner (Appeals) passed an interim order, directing the appellant to deposit the entire amount of tax and 50% of the penalties imposed within a period of 30 days from the date of receipt of order. Being aggrieved by the impugned order, the appellant filed an application for modification of stay dated 25.08.2008 and that the appellant was unable to pay pre-deposit due to financial constraints. It was further pointed out before the Commissioner (Appeals) that the administration and staff were all officers of the Government of Tamil Nadu, who were working on deputation since the institution did not have funds to pay salary to regular staff. Vide order dated 25.09.2008, the first appellate authority has dismissed the application as well as the appeal preferred by the appellant on the ground of non-compliance of pre-deposit.

7. Aggrieved by the arbitrary action of the first appellate authority, the appellant preferred an appeal under Section 86 of the Finance Act, 1994 along with an application for grant of stay. CESTAT, at the time of hearing the stay application, directed the appellant to deposit a sum of Rs.1,00,000/- and report compliance by 27.04.2009 vide its order in Stay Order No.126/09 dated 11.03.2009.

8. Material on record discloses that the appeal preferred by the appellant was taken up for final disposal by CESTAT on 09.02.2017. On the said date, due to ill health of the appellant's counsel, who has his office in Coimbatore, he was incapable of appearing on the day of hearing and hence, the appellant was unable to advance their arguments before the CESTAT, and hence CESTAT passed an ex-parte order in Final Order No.40196/2017 dated 09.02.2017, wherein the appeal preferred by the appellant was dismissed as not maintainable on the ground that the first appellate authority had not considered the matter

on merits, as hereunder:

"FINAL ORDER No.40196/2017

None Present for the appellant.

2. Ld. Commissioner (Appeals) has recorded that appeal was not maintainable for non-compliance to the stay order. Once the merit of the case has not been gone into by the Commissioner (Appeals), there is no case that appellant has been aggrieved by his order. Accordingly, appeal is dismissed as not maintainable."

9. Being arrived by the above order, instant civil miscellaneous appeal is filed on the substantial questions of law stated supra.

10. Supporting the prayer sought for, Ms.D.Naveena, learned counsel for the appellant contended that the CESTAT, ought to have followed the mandate laid down by this court in Venus Rubbers vs. Addl. Commissioner of Central Excise, Coimbatore reported in 2014 (310) E.L.T. 685 (Mad.), wherein it was categorically held that where the learned Commissioner (Appeals) had dismissed the appeal for failure of pre-deposit, the Tribunal is required to consider the correctness of the order passed by the Appellate Commissioner and remand the matter to the Appellate Commissioner for de novo consideration after passing an appropriate order as to pre-deposit.

11. She further submitted that the Tribunal, ought to have seen that the pre-deposit order 29.07.2018 of the learned Commissioner (Appeals) has been passed without considering the relevant parameters necessary for passing an interim order viz. (a) prima facie case, (b) balance of convenience and (c) irreparable loss. It is her further submission that the learned Commissioner (Appeals) ought to have seen that the appellant is a non-profit institution and hence, it is not in a financial position to pay the pre-deposit. Further, he ought to have seen that, since the appellant is under the administration of the Tamil Nadu Government, no prejudice will be caused to the revenue if pre-deposit is waived. It is further relevant to point out that the Tribunal, while disposing the stay application filed by the appellant, considered these relevant factors and directed pre-deposit of Rs.1,00,000/- vide its Stay Order No.126/09 dated 11.03.2009.

12. It is her further submission that the Tribunal ought to have seen that once the appellant has complied with the pre-deposit order passed by it, it is all the more necessary that the matter be remanded back for consideration on merits. Further, in terms of section 35C of the Central Excise Act,

1944, the Hon'ble Tribunal, does not have the authority to dismiss an appeal, as not maintainable when the order assailed before the Tribunal it is an appealable order. The Tribunal ought to have seen that when the Commissioner (Appeals) passes a final order after taking into account the action taken by the parties on the interim order, such an order is not a mere confirmation of the interim order but a final order deciding the status of the appeal itself and such an order is passed under Section 85 of the Finance Act, 1994. The Tribunal ought to have seen that the impugned order being an order passed under Section 85 of the Finance Act, 1994 by the Commissioner (Appeals), the appeal there against would squarely lie to the Tribunal in terms of the provisions of Section 86 of the Finance Act, 1994.

13. Attention of this court was also invited to the judgment of this court in Venus Rubbers vs. Addl. Commissioner of Central Excise, Coimbatore reported in 2014 (310) E.L.T. 685 (Mad.), wherein, a Hon'ble Division Bench of this court at paragraph No.12, held as hereunder:

> “We find that in para 30 (g) of the abovesaid decision, the Tribunal has clearly held that in an appeal against the final order of the Appellate Commissioner (dismissing the appeal for failure to pre-deposit passed by the Commissioner (Appeals) in the given facts and circumstances of the case is erroneous, the Tribunal is required to set aside the order of the Appellate Authority and remand the matter to the Appellate Commissioner for de nova consideration after passing an appropriate order as to pre-deposit. We find that this exercise has not been done by the Tribunal in the present case and it has summarily upheld that the rejection of the appeal for failure or pre-deposit is impeccable and, therefore, we have no hesitation to hold that the Tribunal should have considered the pre-deposit issue perforce and to that extent the order has been rightly put to test by the appellant before this Court. Learned Standing Counsel for the Department, when pointed out about the error in the order, also fairly submits that the Tribunal should have considered the issue of pre-deposit on merits instead of confirming the order of the Commissioner (Appeals) as impeccable without setting out how it is above standards. In the light of the discussion as made above, the second substantial question of law is answered in favour of the assessee.”

14. On 13.03.2018, we have passed the following order:

> "Instant Civil Miscellaneous Appeal is filed, against the Final Order No.40196 of 2017, dated 9/2/2017, on the file of the CESTAT, Madras, on the

following substantial questions of law:-

1. Whether in the facts and circumstances of the case, an order of the Commissioner (Appeals) dismissing an appeal for non-compliance of pre-deposit order is an appealable order in terms of Section 86 of the Finance Act, 1994?

2. Whether in the facts and circumstances of the case, the Hon'ble CESTAT was justified in dismissing the appeal as not maintainable, without considering the correctness and legality of the order of the Commissioner (Appeals) dismissing the appeal for non-compliance of pre-deposit order?”

2. Placing reliance on the decision in Venus Rubbers Vs. Additional Commissioner of Central Excise, Coimbatore {2014 (310) ELT 685 (Mad)}, Ms.D.Naveena, learned counsel for the appellant submitted that issue is covered by the abovesaid decision.

3. In Venus Leather's case, a Division Bench of this Court has framed the following questions of law:-

“1. Whether the Tribunal was right in dismissing the appeal filed by the assessee holding that the Commissioner (Appeals) has no power to review the order of pre-deposit?

2. Whether the Tribunal was justified in dismissing the appeal filed holding that the Appellate Commissioner's order dismissing the appeal for non-compliance of the order in terms of Section 35 F without considering the merits of the assessee's case on the issue of pre-deposit is right?”

4. After considering the few decisions, at paragraph No.12, this Court has held as follows:-

“We find that in para 30 (g) of the abovesaid decision, the Tribunal has clearly held that in an appeal against the final order of the Appellate Commissioner (dismissing the appeal for failure to pre-deposit passed by the Commissioner (Appeals) in the given facts and circumstances of the case is erroneous, the Tribunal is required to set aside the order of the Appellate Authority and remand the matter to the Appellate Commissioner for de nova consideration after passing an appropriate order as to pre-deposit. We find that this exercise has not been done by the Tribunal in the present case and it has summarily upheld that the rejection of the appeal for failure or pre-deposit is impeccable and, therefore, we have no hesitation to hold that the Tribunal should have considered the pre-deposit issue perforce and to that extent the order has been rightly put to test by the appellant before this

Court. Learned Standing Counsel for the Department, when pointed out about the error in the order, also fairly submits that the Tribunal should have considered the issue of pre-deposit on merits instead of confirming the order of the Commissioner (Appeals) as impeccable without setting out how it is above standards. In the light of the discussion as made above, the second substantial question of law is answered in favour of the assessee."

5. Mr.Rajinish Pathil, Senior Central Government Standing Counsel, seeks time to get instructions.

6. Post on 19/3/2018, in the motion list."

15. Added further, on the basis of instructions in C.No.I/10/12/2018-LG dated 27.03.2018, Mr.Rajnish Pathiyil, learned Senior Central Govt. Standing Counsel, submitted that the department have instructed him to state that the matter can be remitted back to the Tribunal. For brevity, instructions dated 27.03.2018 is reproduced hereunder:

C.No.I/10/12/2018-LG Dated : 27.03.2018

TOP PRIORITY

To
Rajnish Pathiyil
Senior Central Govt. Standing Counsel

Sub: Observation of the Commissioner in case of M/s.Teaserve vs. The Commissioner of Central Excise, Salem - Regarding

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Sir/Madam,

Please refer to your letter Ref: No.RP/GST & CE/0007/2018/002 dated 20.03.2018 the case CMA No.559 of 2018 M/s.Teaserve vs. The Commissioner of Central Excise, Salem.

Observation of the Commissioner is hereby communicated for favour of necessary action while defending the case posted on 28.03.2018.

"We may suggest that the court may direct the Hon'ble Tribunal to decide on merit instead of sending it back to the Commissioner (Appeals) as pre-deposit issue was sorted and the matter will attain the finality quicker, if it is decided by the Hon'ble High Court to direct Tribunal to decide in 3 months & so."

Yours faithfully,

S.Thiruchangu
Superintendent (Legal Cell, Cbe)

16. In the light of the decisions of this court and the submissions, Final Order of the CESTAT, Madras dated 09.02.2017 made in Final Order No.40196 of 2017, impugned in the civil miscellaneous appeal is set aside. Matter is remitted to the Tribunal for consideration on merits.

The civil miscellaneous appeal is allowed on the above terms. No cost. Consequently, the connected civil miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To

1.The Commissioner of Central Excise
Service tax and Customs Coimbatore

2.The Customs Excise and Service Tax
Appellate Tribunal
No.26 Sashtri Bhavan Annexe Building Haddows Road
Chennai-6

+1 cc to Mr.S.Durairaj advocate sr 25991
+1 cc to M/s.Rajnish Pathiyil Advocate sr 25489

aa04/05/2018