IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.09.2018

CORAM:

THE HONOURABLE MR. JUSTICE K.RAVICHANDRABAABU

W.P.No.15423 of 2018

Mr.R.Arvind ...Petitioner

Vs

1.The Deputy Commissioner of Service Tax
Division III, Commissionerate II, Newry Tower
Second Floor, Plot No.2054, I Block, 12th Main Road,
Anna Nagar, Chennai - 600 040.

2.The Commissioner of GST & Central Excise (Appeals),
26/1, Mahatma Gandhi Marg
Nungambakkam, Chennai - 600 034.

...Respondents

PRAYER:-

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for the records on the file of the second respondent comprising of Order in Appeal No.34 and 35/2018 (CTA-I) dated 17.01.2018 and quash the same with consequential direction to the second respondent to hear and dispose off the Appeal in A.No.06/2017(STA-II) dated 09.02.2017 preferred by the petitioner herein according opportunity of personal hearing.

For Petitioner : Mr.Akhil Suresh
For Respondents: Mrs.Aparna Nandakumar,
Senior Panel Counsel

O R D E R

The petitioner is aggrieved against the order of the second respondent dated 17.01.2018 in dismissing the appeal on the reason that the required pre-deposit was made belatedly after a period of 7 months from the date of filing of the appeal. In other words, the second respondent dismissed the appeal for non-compliance of pre-deposit as per Section 35F of the Central Excise Act, 1944.

2. The petitioner is an Assessee and registered with the Service Tax Commissionerate for rendering service tax under the category of renting of immovable property. Pursuant to the issuance of show cause notice, an order in original dated 25.11.2016 was passed against the petitioner, wherein and whereby, the Adjudicating Authority confirmed the service tax

demand and interest apart from imposing penalty.

3. Challenging the said order, the petitioner preferred an appeal before the Commissioner of Central Excise (Appeals) on 09.02.2017. However, the petitioner did not make the pre-deposit along with the appeal and on the other hand, they made such deposit on 27.09.2017, with a delay of 7 months from the date of filing of the appeal. The First Appellate Authority, therefore, rejected the appeal on the sole reason that the pre-deposit was made belatedly and that in the absence of any provision to entertain the appeal with a delay of more that 7 months, the appeal cannot be entertained. Thus the First Appellate Authority Viz., the second respondent herein, dismissed the appeal for non-compliance of pre-deposit as per Section 35F of the Central Excise Act, 1944.

4. The learned counsel for the petitioner submitted that when, admittedly, the appeal was presented in time, the belated payment of pre-deposit cannot be the reason to reject the appeal. In support of his contention, the learned counsel relied on the recent decision of a Division Bench of this Court made in W.A.Nos.342 to 347 of 2017 dated 07.06.2017.

5. On the other hand, the respondents filed a counter affidavit and relied on a Full Bench decision of this Court reported in [1996 (I) CTC 95] in the case of State of Tamil Nadu Vs E.P.Nawab Marakkadai.

6. Heard both sides.

7. There is no dispute to the fact that the petitioner has presented the appeal before the second respondent within time. It is also not in dispute that the appeal was not accompanied with the pre-deposit and on the other hand, such deposit was made only after a period of 7 months from the date of presentation of the appeal. The issue, thus, arises for consideration in this writ petition as to whether the appeal presented within time can be rejected on the ground that pre-deposit was made belatedly, has already been considered by the Division Bench of this Court in W.A.Nos.342 to 347 of 2017 dated 07.06.2017, wherein the Division Bench after taking note of various decisions, including the Full Bench decision relied on by the respondents herein viz., [1996 (I) CTC 95], has observed at Paragraph No.24.4 to 32 as follows:

> 24.4.Therefore, a plain reading of the expression, 'presenting' which obtains, in proviso to Section 128 (1), as against 'entertain' which obtains, in Section 129 E, would have us, come to the conclusion that as long such appeal is presented, i.e., lodged, within the prescribed period of limitation including the condonable period, it cannot be dismissed solely on the ground that the

mandatory pre-deposit of duty or penalty or both, was not made, before the expiry of the period of limitation, prescribed under Section 128 (1) read with the first proviso of the 1962 Act.

25.Mr.Chopda, during the course of his arguments, has articulated a concern on behalf of the Revenue, which is, if such an interpretation is given, then, it is likely that the aggrieved party would abuse the process of law.

25.1.While we share the concern of Mr.Chopda, it must be said that our conclusions have to be based on the language used in the Act and not based on the likelihood of abuse of the provisions by the litigants.

25.2.Having said so, in our view, the Authorities below could follow the procedure, which has been adverted to, in the Circular dated 14.10.2014, as indicated in our interim order dated 07.04.2017.

26.The Circular sensu stricto applies only vis-a-vis appeals filed with the Tribunal. Therefore, according to the procedure prescribed in the said Circular, the appellants are required to be given, at least three opportunities for processing necessary evidence of having made the prescribed mandatory pre-deposit.

26.1.The Circular, further states that if after three opportunities, the necessary evidence is not filed, then, the appeal should be numbered and placed, for a decision before the concerned Presiding Officer.

27.In our view, the same procedure could be applied even vis-a-vis appeals preferred before the second respondent i.e., “The Commissioner of Customs (Appeals-I)”.

27.1.To our minds if this procedure is adopted it would to a great extent address the concerns of the Revenue.

27.2.Furthermore, as correctly submitted by Mr.Sam, Clause (i) of Section 129 E applies to appeals preferred to the second respondent i.e., The Commissioner of Customs (Appeals-I). While Clause (ii) and (iii) of Section 129 E apply to appeals preferred to the Tribunal, albeit, in different circumstances. The different circumstances is pivoted on the Authority from whose order appeal is preferred to the Tribunal.

28.Before we conclude, we must also deal with the submission of Mr.Chopda that the judgment of the Full Bench in the matter of: State of Tamil Nadu Vs. E.P.Nawab Marakkadai, 1996 (100) STC 1, would come in the way of the appellants.

28.1.In this behalf, Mr.Chopda has laid emphasis on the observations made by the Court in paragraph no.11 of the said judgment. For the sake of convenience, the said observations are extracted hereafter:

"11.Learned counsel for the respondent laid emphasis on the following words in the said judgment:

"........... We are of opinion that by the word 'entertain' here is meant the first occasion on which the court takes up the matter for consideration. It may be at the admission stage or if by the rules of that Tribunal the appeals are automatically admitted, it will be the time of hearing of the appeal."

But the very next sentence in the said judgment cuts at the very root of the respondent's contention. It is as follows:

"............But on the first occasion when the court takes up the matter for consideration, satisfactory proof must be presented that the tax was paid within the period of limitation available for the appeal.""

29.In our view, the said observations of the Full Bench have to be read in the context of the provision, which the Court was called upon to interpret in the said case.

29.1.In that case the Court was called upon to interpret the provisions of Section 31 (1) of the Tamil Nadu General Sales Tax Act, 1959 (in short, the TNGST Act). For the sake of convenience, the same, as set out in the judgment, is extracted herein below:

"6.Sub-section (1) of section 31 of the Act is as follows:

"31.Appeal to the Appellate Assistant Commissioner.- (1) Any person objecting to an order passed by the appropriate authority under section 4 - A, section 12, section 12 - A, section 14, section 15, sub-sections (1) and (2) of section 16, section 18, sub-section (2) of section 22, section 23 or section 27 [other than an order passed by an Assistant Commissioner (Assessment)] may, within a period of thirty days from the date on which the order was served on him in the manner prescribed, appeal against such order to the Appellate Assistant Commissioner (having jurisdiction):

Provided that the Appellate Assistant Commissioner may, within a further period of thirty days admit an appeal presented after the expiration of the first mentioned period of thirty days if he is satisfied that the appellant had sufficient cause for not presenting the appeal within the first mentioned period:

Provided further that in the case of an order under section 12, section 12-A, section 14, section 15 or sub-sections (1) and 92) of section 16, no appeal shall be entertained under this sub-section unless it is accompanied by satisfactory proof of the payment of the tax admitted by the appellant to be due or of such instalments thereof as might have become payable, as the case may be.""

30.A perusal of the Section would show that the second proviso, on which, reliance was placed by Mr.Chopda is framed in a manner, which is perceptibly different from the language which obtains in Section 129 E of the 1962 Act.

30.1.The word 'entertain' is followed by the expression "unless it is accompanied by satisfactory proof of payment of tax admitted". In other words, the second proviso to Section 31(1) of the TNGST Act, prohibited the concerned Authority from entertaining an appeal, unless it was accompanied by satisfactory proof of payment of admitted tax.

30.2.The reason being that there could be no rationale in the appellant not paying the admitted tax, as against the disputed tax. The prescription in Section 129 E of the 1962 Act pertains quite naturally to prescribed mandatory pre-deposit of disputed tax/ penalty or both.

31.There is a marked difference, according to us, in the language of the two Sections. Therefore, in our opinion, the said judgment would have no applicability to the facts of the instant case.

31.1.In our opinion, the judgment which is closer to the facts obtaining in the present case, is the judgment of the Supreme Court rendered in M/s.Ranjit Impex Vs. Appellate Deputy Commissioner and Another, (2013) 10 Supreme Court Cases 655. For the sake of convenience, the observations made by the Supreme Court in paragraph nos.2 to 4 and

6 being apposite, are set out hereafter:

"2.The factual narration would exposit that the appellant herein preferred an appeal before the Deputy commissioner I, Commercial Taxes and at the time of presentation, a sum of Rs.8,52,472 was required to be deposited as per the calculation made under Section 51 of the Tamil Nadu Value Added Tax Act, 2006 (for brevity "the Act") but as it was not done, the memorandum of appeal was returned to him. The learned Single Judge disposed of the writ petition directing the assessee to comply with all the requirements as intimated by the appellate authority in the return memo dated 3-1-2011 and on such compliance, the appellate authority was directed to register the appeal and dispose of the same in accordance with the law.

3.In the writ appeal, it was contended that the appellate authority could not have returned the memorandum of appeal on the ground that Section 51 uses the term "entertain" and second, the amount that was due to the appellant from the Department was to be adjusted for the purpose of deposit as envisaged under Section 51 of the Act. The Division Bench came to hold that the proof of deposit of tax has to be produced at the time when the appeal is taken for consideration but not at the time of presentation of the appeal. As far as issue of adjustment is concerned, it is objected that the amount had properly been adjusted.

4.As far as the first issue is concerned, it is needless to say that the conclusion arrived by the Division Bench is absolutely justified, for a condition to entertain an appeal does not mean that the memorandum of appeal shall be retuned because of such non-compliance pertaining to pre-deposit. The only consequence is that the appeal shall not be entertained which means the appeal shall not be considered on merits and eventually has to be dismissed on that ground.

6.Having heard the learned counsel for the assessee and the learned counsel for the Revenue, we are inclined to direct that the appellant shall deposit the amount as required by the Deputy Commissioner I, Commercial Taxes vide order dated 6-1-2011 by 30-9-2013 whereafter the appeal shall be heard and disposed of on merits. As far as the adjustment/refund is concerned, it is open to the appellant to initiate any independent proceeding. The conclusion of the Division Bench with regard to the factum that there has been proper adjustment by the Department in respect of the claim made by the assessee is set aside. However, we may proceed to clarify that we have not expressed any opinion with regard to the claim of the assessee."

32.Having regard to the aforesaid, we are inclined to hold that the second respondent could not have dismissed the appeals, on the ground that the prescribed mandatory pre-deposit was made, beyond the condonable period.

8. Since the Division Bench has also taken into consideration of the Full Bench decision relied on by the respondents and has come to the above conclusion that the Appellate Authority could not have dismissed the appeal on the ground that the prescribed mandatory appeal was made beyond the condonable period, this Court, bound by the above decision of the Division Bench, cannot take a different view.

9. Even otherwise, it is also to be noted at this juncture, that the above said decision of the Division Bench has been accepted by the Revenue and acted upon. Even though the said decision was made by considering the relevant provision under the Customs Act, as it is not in dispute that the present provision viz., Section 35F of the Central Excise Act, 1944 is pari materia, I do not think that there will be any difficulty for this Court to apply the above decision of the Division Bench to the facts and circumstances of the present case and grant the relief to the petitioner.

10. Accordingly, the writ petition is allowed and the order passed by the second respondent is set aside. Consequently, this matter is remitted back to the second respondent to take up the appeal and pass orders on the same on merits and in accordance with law, along with the cross appeal already filed by the Revenue. The second respondent shall pass such order within a period of six weeks from the date of receipt of a copy of this order. No costs.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

To

1.The Deputy Commissioner of Service Tax
Division III, Commissionerate II, Newry Tower
Second Floor, Plot No.2054, I Block, 12th Main Road,
Annanagar,
Chennai - 600 040.

2.The Commissioner of GST & Central Excise (Appeals),
26/1, Mahatma Gandhi Marg
Nungambakkam, Chennai - 600 034.

+1cc to M/s.Aparna Nandakumar, Advocate SR.NO.62335
+1cc to Mr.Muthu Venkataraman, Advocate SR.NO.62463

SS(CO)
sm:26.9.2018

W.P.No.15423 of 2018