

CWP No.2169 of 2018

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**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

CWP No.2169 of 2018

Date of decision:10.10.2018

M/s G.D.Goenka World Institute ... Petitioner

Vs.

Union of India and others ... Respondent

CWP No.11347 of 2018

Sanjay Aggarwal ... Petitioner

Vs.

Commissioner of Central Excise Commissionerate,
Ludhiana and another ... Respondents

CWP No.2191 of 2018

M/s IL& FS Rail Limited ... Petitioner

Vs.

Union of India and others ... Respondents

CWP No.4529 of 2018

M/s Auto Dynamic Corporation ... Petitioner

Vs.

Union of India and others ... Respondent

CWP No.4530 of 2018

M/s Oceanic Consultants Private Limited ... Petitioner

Vs.

Union of India and others ... Respondent

CWP No.2169 of 2018

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CWP No.4623 of 2018

M/s G.D.Goenka World Institute (Unit of GDG Education Trust)
... Petitioner

Vs.

Union of India and others ... Respondents

CWP No.4635 of 2018

Tarun Monga ... Petitioner

Vs.

Union of India and others ... Respondents

CWP No.5929 of 2018

M/s Swift Fundamental Research and
Education Society ... Petitioner

Vs.

Union of India and others ... Respondents

**CORAM: HON'BLE MR. JUSTICE MAHESH GROVER
HON'BLE MR. JUSTICE AMIT RAWAL**

Present:- Mr. Amar Pratap Singh, Advocate and
Mr. Rohit Gupta, Advocate
for the petitioner in CWP Nos. 2191, 9529, 4530,
4623 and, 4635 of 2018.

Mr. Veer Singh, Advocate
for the petitioner in CWP No.5929 of 2018.

Mr. Tajender K. Joshi, Advocate
for the respondents (in all the cases).

Mahesh Grover J. (Oral)

By this order we will dispose of 08 writ petitions bearing CWP
Nos.2169, 11347, 2191, 4529, 4530, 4623, 4635 and 5929 of 2018.

The petitioner has questioned vires of Section 35F of The
Central Excise Act, 1944 (hereinafter known as “the Act”) as being

un-constitutional.

Further prayer has been made for issuance of certiorari to quash the impugned order dated 11.01.2018 (Annexure P-1) passed by the Customs Excise and Service Tax Appellate Tribunal ((hereinafter known as “the Tribunal”).

The petitioner is a trust engaged in promoting educational activities and faced a demand after an elaborative investigation into the evasion of service tax. An order was passed forming service tax demand under the proviso to Section 73(1) of the Act under the category '*commercial training and coaching services*' which was confirmed and an assessment framed defining the principal demand with interest and penalty under Sections 76, 77 and 78 of the Finance Act, 1994.

Aggrieved against this order, the petitioner filed an appeal along with stay application before respondent No.3. An order was then passed on 11.01.2018 by respondent no.3 refusing to entertain the said application of the petitioner and while doing so, the Tribunal relied on its earlier precedent in the case of **Dunar Foods Limited Vs. CCE Ludhiana**, decided on 20.06.2017/04.12.2017.

The petitioner is aggrieved of this order and since it is brief in content, we deem it appropriate to set it down here below:-

“This matter is listed before us on the ground that the appellant has not complied with the condition of Section 35F of Central Excise Act, 1944 wherein with effect from 6.8.2014, the appellant is required to make mandatory pre-deposit of 7.5%/10% of the amount in dispute. In view of the decision of this Tribunal in the case of Dunar Foods vide Stay Order

*No.60566-60571/2017 dated 04.12.2017, we direct to make mandatory pre-deposit as per Section 35F of Central Excise Act, 1944 within four weeks and report compliance on 21.02.2018. The Order to be given Dasti.
(dictated and pronounced in the Court) ”*

Grievance of the petitioner is that the Tribunal has failed to exercise its inherent jurisdiction to evaluate the hardship of the petitioner and inability to deposit the demanded amount.

In brief, argument is that every Tribunal would have the inherent power to waive off the pre-condition of deposit in exceptional cases, even if the statute prohibits so expressly. Great emphasis has been laid on this aspect and our attention has been invited to the comparative language of Section 62(5) of Punjab Value Added Tax Act, 2005 (hereinafter known as “2005 Act”) and Section 35F of the Act as amended. Both the provisions are extracted herein below:-

Punjab Vat Act, 2005	Central Excise Act, 1944
62.(1) An appeal against every original order passed under this Act or the rules made thereunder shall lie, - (a) if the order is made by a Excise and Taxation Officer or by an officer-Incharge of the information collection centre or check post or any other officer below the rank of Deputy Excise and Taxation Commissioner, to the Deputy Excise and Taxation Commissioner; or	Section 35F. Deposit of certain percentage of duty demanded or penalty imposed before filling appeal. - The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal, -(i) under sub-section (1) of section 35, unless the appellant has deposited seven and a half per cent. of the duty in case where duty or duty and penalty are in dispute, or penalty where such

(b) if the order is made by the Deputy Excise and Taxation Commissioner, to the Commissioner; or (c) if the order is made by the Commissioner or any officer exercising the powers of the Commissioner, to the Tribunal. (2) An order passed in appeal by a Deputy Excise and Taxation Commissioner or by the Commissioner or any officer on whom the powers of the Commissioner are conferred, shall be further appeal-able to the Tribunal. (3) Every order of the Tribunal and subject only to such order, the order of the Commissioner or any officer exercising the powers of the Commissioner or the order of the Deputy Excise and Taxation Commissioner or of the designated officer, if it was not challenged in appeal or revision, shall be final. (4) No appeal shall be entertained, unless it is filed within a period of thirty days from the date of communication of the order appealed against. (5) No appeal shall be entertained, unless such appeal is accompanied by satisfactory proof of the prior minimum payment of twenty-five per cent of the total amount of tax, penalty and interest, if any.	penalty is in dispute in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the Commissioner of Central Excise; (ii) against the decision or order referred to in clause (a) of subsection (1) of section 35B, unless the appellant has deposited seven and a half per cent., of the duty in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the Commissioner of Central Excise; (iii) against the decision or order referred to in clause (b) of subsection (1) of section 35B, unless the appellant has deposited ten per cent. of the duty in case where duty or duty and penalty are in dispute, or in penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against: Provided that the amount required to be deposited under this section shall not exceed rupees ten crores

(7) In deciding an appeal, the appellate authority, after affording an opportunity of being heard to the parties, shall make an order - (a) affirming or amending or canceling the assessment or the order under appeal; or (b) may pass such order, as it deems to be just and proper. (8) The appellate authority shall pass a speaking order while deciding an appeal and send copies of the order to the appellant and the officer whose order was a subject matter of appeal.	Provided further that the provisions of this section shall not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014. Explanation -For the purposes of this section "duty demanded" shall include, - (i) amount determined under section 11D; (ii) amount of erroneous Cenvat credit taken; (iii) amount payable under rule 6 of the Cenvat Credit Rules, 2001 or the Cenvat Credit Rules, 2002 or the Cenvat Credit Rules, 2004.
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With regard to aforesaid, learned counsel for the petitioner while placing reliance upon the Division Bench judgment of this Court rendered in **CWP No.26920 of 2013 titled as Punjab State Power Corporation Vs. State of Punjab and others, decided on 23.12.2015** contends that the Tribunal has gone wrong.

We would like to refer to the judgment rendered in **Punjab State Power Corporation's case (supra)** which while interpreting the provisions of Section 62 (5) of 2005 Act, observed as follows:-

33. It is, thus, concluded that even when no express power has been conferred on the first appellate authority to pass an order of interim injunction/protection, in our opinion, by necessary

implication and intendment in view of various pronouncements and legal proposition expounded above and in the interest of justice, it would essentially be held that the power to grant interim injunction/protection is embedded in Section 62(5) of the PVAT Act. Instead of rushing to the High Court under Article 226 of the Constitution of India, the grievance can be remedied at the stage of first appellate authority.”

Similarly, reliance was placed on another judgment rendered by Division Bench of this Court in Maruti Suzuki India Limited Vs. Union of India bearing CWP No.12922 of 2014 where this Court while placing reliance upon Punjab State Power Corporation's case observed as follows:-

“23. The other argument of the Ld. Counsel for the respondent that the decision of Hon’ble the Supreme Court in Narayan Chandra Ghosh’s case (supra) having not been considered in PSPCL case, hence that judgment in PCPL case is per incuriam also does not appear to be well founded. In Narayan Chandra Ghosh’s case (supra) the vires of the provisions regarding pre-deposit was not in issue. Also the argument that in an appropriate case, on strong prima facie case being shown, the Appellate Forum may reduce or waive the pre-deposit amount was neither raised nor considered. Hence, that case cannot be relied on for the proposition that was canvassed and decided in the PSPCL case.”

Learned counsel for the respondents on the other hand justifies the order passed by the Tribunal in view of the mandatory content of the statute. He further contends that in the absence of any express provision, the

Tribunal under no circumstances can grant any relaxation in the matter of pre-deposit.

The matter being confined to a very narrow conflict as noticed above is further narrowed down, if we see the observations of Allahabad High Court. The issue was that whether after the amendment of Section 35F of Act brought into force w.e.f. 6.8.2014, would the proceedings already pending qua demands raised prior to the amendment be governed by the amended provisions or the un-amended ones. While dealing with this controversy, the Court observed in Writ-C No.33950 of 2015 titled as M/s Ganesh Yadav Vs. Union of India and others, as follows:-

“Thus, the principle of law which emerges is that the right of appeal is a vested right and the right to enter a superior Court or Tribunal accrues to a litigant as on and from the date on which the lis commences although it may actually be exercised when the adverse judgment is pronounced. Such a right is governed by the law which prevails on the date of institution of the suit or proceeding and not by the law that prevails at the date of the decision or on the date of the filing of an appeal. Moreover, the vested right of an appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.

Justice G.P.Singh in his treatise on Statutory Interpretation has succinctly elucidated the principles to be applied in determining whether a statute is retrospective or not, in the following words:

"(ii) Statutes dealing with substantive rights.- It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the Legislature to affect existing rights, it is "deemed to be prospective only 'nova constitutio futuris formam imponere debet non praeteritis [2 c. Int. 392]". In the words of LORD BLANESBURG, "provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment." "Every statute, it has been said", observed LOPES, L.J., "which takes away or impairs vested rights acquired under existing laws, or creates a new obligation or imposes a new duty, or attaches a new disability in respect of transactions already past, must be presumed to be intended not to have a retrospective effect". As a logical corollary of the general rule, that retrospective operation is not taken to be intended unless that intention is manifested by express words or necessary implication, there is a subordinate rule to the effect that a statute or a section in it is not to be construed so as to have larger

retrospective operation than its language renders necessary. In other words close attention must be paid to the language of the statutory provision for determining the scope of the retrospectivity intended by Parliament."

(emphasis supplied)

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 35F](#) of the Act."

The language of the statute itself is un-ambiguous. It states "that the Tribunal or the Commissioner (Appeals) as the case may be shall not entertain appeal unless the appellant has deposited 7 ½% of the duty in case where duty or penalty is in dispute or where sub-penalty is in dispute. The proviso lays down that provisions of this Section shall not apply to the stay applications or appeals pending before any Appellate Authority prior to the commencement of the Finance (No.2) Act 2014.

It is thus clear that distinction was provided to the proceedings

initiated prior to the Finance Act, 2014 which was protected. Prior to the amendment, the provision as it existed is as below:-

Section 129-E of the Act

Prior to the amendment

"[Section 129E](#) prior to the amendment 129-E. Deposit, pending appeal, of (duty and interest) demanded or penalty levied. - Where in any appeal under this Chapter, the decision or order appealed against relates to any (duty and interest) demanded in respect of goods which are not under the control of the customs authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the proper officer the (duty and interest) demanded or the penalty levied:

Provided that where in any particular case, the (Commissioner (Appeals)), or the Appellate Tribunal is of opinion that the deposit of (duty and interest) demanded or penalty levied would cause undue hardship to such person, the [Commissioner (Appeals)] or, as the case may be, the Appellate Tribunal may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue;

Provided further that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty and interest demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible

to do so decide such application within thirty days from the date of its filing."

Amended

"129-E. Deposit of certain percentage of duty demanded or penalty imposed before filing appeal - The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal -

(i) under sub-section (1) of section 128, unless the appellant has deposited seven and a half per cent of the duty demanded or penalty imposed or both, in pursuance of a decision or an order passed by an officer of customs lower in rank than the Commissioner of Customs;

(ii) against the decision or order referred to in clause (a) of sub-section (1) of section 129-A, unless the appellant has deposited seven and a half per cent of the duty demanded or penalty imposed or both, in pursuance of the decision or order appealed against;

(iii) against the decision or order referred to in clause (b) of sub-section (1) of section 129-A, unless the appellant has deposited 10 per cent of the duty demanded or penalty imposed or both, in pursuance of the decision or order appealed against;

Provided that the amount required to be deposited under this section shall not exceed rupees ten crores:

Provided further that the provisions of this section shall not apply to the stay applications and appeals pending before any

any appellate authority prior to the commencement of the Finance (No.2) Act, 2014."

While dealing with the almost identical issues, the Bombay High Court upheld the validity of the clause requiring pre-deposit to the entertaining of the appeal in **Haresh Nagindas Vora Vs. Union of India and another** 2017 SCC OnLine Bom 3013. Paragraphs 11 and 12 of the judgment are extracted herein below:-

"11. The intention of the Parliament in amending [Section 129E](#) by the amending Act in question needs to be noted. Prior to the amendment, in view of the powers and discretion conferred with the appellate authority to waive/dispense with the pre-deposit, substantial time was expended on the adjudication of such applications and in deciding issues, as to whether, the contention of the applicant in the stay application, of an undue hardship is being caused, could be accepted to grant an appropriate waiver. Resultantly, orders on the stay application generated further litigation before the higher forums taking a toll on the valuable time of the tribunal delaying the adjudication of the appeals. This undoubtedly caused a serious prejudice to the parties before the Tribunal. Thus the aim of the amended provision is also to curtail litigation which had assumed high proportions, leaving no time to the appellate authorities to devote the same to important issues. Considering these hard realities and to have a expeditious disposal of the statutory appeals which undoubtedly is a necessary requirement of effective trade, commerce and business, the Parliament in its

wisdom amended the provisions of [Section 129E](#) of providing deposit of 7.5% and 10% respectively as sub-clauses (i), (ii) and (iii) respectively provide. If such is the aim and insight behind the provision, it certainly cannot be held to be unreasonable, onerous, unfair or discriminatory for two fold reasons. Firstly, the object of a public policy sought to be achieved by the amendment, namely speedy disposal of the appeals before the appellate authorities is a laudable object and cannot be overlooked, so as to label the provision as unreasonable and onerous and violative of [Article 14](#) of the Constitution. Secondly that the amount which is required to be deposited is not unreasonable from what the earlier (pre amended) regime provided.

12. The contention of the petitioner that the provision is rendered discriminatory as it creates two different classes when it mandates pre-deposit of duty demanded or penalty imposed or both, and more particularly when penalty cannot be considered to be a revenue as it is not a tax requiring it to be safeguarded, also cannot be accepted. It may be pointed out that even the pre-amended provision stipulated for a deposit in case of appeals from orders levying penalty. This submission of the petitioners also cannot be accepted considering the decision of the Supreme Court in "Vijay Prakash D.Mehta and Jawahar D.Mehta Vs. Collector of Customs (Preventive), Bombay", AIR 1988 SC 2010 which lays down that right to appeal is a statutory right and not an absolute right, which can be

circumscribed by the conditions in the grant. In "Nand Lal Vs. State of Haryana" AIR 1980 SCC 574 the Supreme Court referring to the earlier decision in [Anant Mills Co. Ltd vs State Of Gujarat & Ors.](#)(1975) 2 SCC 175 held as under:-

"It is well settled by several decisions of this Court 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 (vide the latest decision in Anant Mills Ltd. v. State of Gujarat, 1975 MhLJ Online (S.C.) 1:(1975) 2 SCC 175:AIR 1975 SC 1234)"

Thus by virtue of [Section 129E](#) the right to appeal as conferred under the said provision is a conditional right, the legislature in its wisdom has imposed a condition of deposit of a percentage of duty demanded or penalty levied or both. The fiscal legislation as in question can very well stipulate as a requirement of law of a mandatory pre-deposit as a condition precedent for an appeal to be entertained by the appellate authority. In view of the above settled position in law, [Section 129E](#) of the Act cannot be held to be unconstitutional on the ground as assailed by the petitioner."

There is thus a little doubt that the Tribunal which is a creation of statute is bound by the procedure of a statute. In this particular case, when the provisions of Section 35F of the Act gives no flexibility waiving off the pre-condition of a deposit, there would be little room to hold the

order of the Tribunal as erroneous. The judgments relied upon by the learned counsel for the petitioner do not in any way enhance his case for the reason that in the Punjab State Power Corporation's case (supra) while dealing with Section 62(5) of 2005 Act, Court was examining the particular language of the statute which requires the furnishing of satisfactory proof of prior minimum payment of 25% of the total amount of additional demand, penalty and interest which to our minds itself offers sufficient room for the Tribunal to apply its mind on this aspect and conclude whether there has been compliance or not. There may possibly be an element of dispute qua the demand and the calculation of 25% and may form the basis of a plea of waiver by pleading sufficient deposit by the assessee. Similarly, in the case of Maruti Suzuki India Limited (supra), the Court dealt with the provisions of Section 45-AA of the Employees State Insurance Act, 1948 (hereinafter known as "1948 Act") which are extracted herein below:-

45AA. Appellate authority.—If an employer is not satisfied with the order referred to in section 45A, he may prefer an appeal to an appellate authority as may be provided by regulation, within sixty days of the date of such order after depositing twenty-five per cent. of the contribution so ordered or the contribution as per his own calculation, whichever is higher, with the Corporation:

Provided that if the employer finally succeeds in the appeal, the Corporation shall refund such deposit to the employer together with such interest as may be specified in the regulation."

The aforesaid also reflects the satisfaction to be recorded by the

Appellate Authority regarding the deposit and is sufficiency but in Section 35F of the Act, no window has been provided to the assessee. That apart, we notice that the Tribunal has placed reliance on Dunar Foods Limited's case (supra) which is a decision rendered by the Tribunal itself, wherein it initially invited a dissent from one of the members, whereafter, the matter was referred to a third member who concurred with the majority view to hold that the Tribunal would have no discretion in the matter of pre-deposit. The said order has never been challenged and consequently we cannot find fault with the Tribunal, which has placed reliance upon its own order to decline the prayer of the petitioner but be that as it may we are of the opinion that decision of the Punjab State Power Corporation (supra) and Maruti Suzuki India Limited (supra) would be of no avail to the petitioner, in view of the distinctive nature of the controversy in those cases.

To our minds, there would be no escape from pre-deposit as the Tribunal lacks the power to entertain the appeal without it. If we have to lend any other interpretation, it would defeat the legislative intent which is so clearly visible from the provisions of Section 35-F of the Act and in fact, there would have been no necessity of amendment and Section 129(E) in its un-amended form need not have been tinkered with. In conclusion, the said vires have already been upheld (and in fact, learned counsel for the petitioner also candidly concedes to it) the only question which was left for us to determine is of an inherent discretion with the Tribunal to entertain an appeal without pre-deposit which we have for the aforesaid reasons held to be a course not available to it.

At this stage, learned counsel for the petitioner makes a prayer that the petitioner may be granted some time to deposit the amount so that

the appeal can be heard on merits. On 08.02.2018, this Court had passed the interim order to the following terms:-

“Notice of motion.

Service is waived, Mr. Tajender K. Joshi, learned counsel having accepted notice on behalf of the respondents. Let a complete set of paper book be supplied to him during the course of the day.

Adjourned to 19.04.2018.

Till further orders, the appeal shall not be dismissed on the ground of failure to comply with a condition of pre-deposit.”

Since we have now decided the question, it would be just and appropriate if four weeks time is granted to make deposit in which eventuality the Tribunal shall decide the appeal on merits.

In view of above, all the aforesaid writ petitions stand dismissed.

(Mahesh Grover)

Judge

(Amit Rawal)

Judge

10.10.2018

savita

Whether Speaking/Reasoned

Yes/No

Whether Reportable

Yes/No