IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.02.2019

CORAM :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A. No. 1762 of 2018
and
C.M.P. No.13629 of 2018

M/s.Yes & Yes Hi-Tech Promoters
India Pvt. Limited,
No.14A, Sathy Road,
Soolai, Erode - 638 004.

...Appellant

-vs-

The Commissioner of Central Excise
and Service Tax,
No.1, Foulks Compund, Anaimedu,
Salem - 636 001.

...Respondent

This Civil Miscellaneous Appeal filed under Section 35G of the Central Excise Act, 1994 pleased to set aside the Miscellaneous Order No.40222-40223 of 2017 dated 29.05.2017 on the file of the Customs, Excise, Service Tax Appellate Tribunal, Chennai and allow the appeal.

For appellant : M/s.Kanthivisalakshi for Mr.S.Yeshwanth

For Respondent : Mr.Rajnish Pathiyil

JUDGMENT

[Judgement of the Court was delivered by T.S.Sivagnanam, J.]

This Civil Miscellaneous Appeal filed under Section 35G of the Central Excise Act, 1994 pleased to set aside the Miscellaneous Order No.40222-40223 of 2017 dated 29.05.2017 on the file of the Customs, Excise, Service Tax Appellate Tribunal, Chennai and allow the appeal.

2. The appeal has been filed raising the following substantial questions of law:

> "(i) Whether the Tribunal is right in dismissing the restoration application on the ground that it becomes functus officio once dismissed the appeal for non-compliance of pre-deposit order under Section 35F of the Central Excise Act, 1944 and Section 86 of the Finance Act?
>
> (ii) Whether the Tribunal is right when the Act or Rules in question do not prohibit restoration of an appeal, dismissed on the ground of non-deposit of pre-deposit the Tribunal certainly has power and jurisdiction to recall its order if the ends of justice requires such a course of action?
>
> (iii) Whether the Tribunal is right in discriminating the appellant when similar nature of cases are restored for hearing of the main appeal even pre-deposit made belatedly like the appellant?"

3. The appellant/assessee filed the appeal before the Tribunal challenging the order in original dated 29.01.2014 in and by which the demand of service tax made in the show cause notice dated 19.10.2012 demanding service tax to the tune of Rs.52,60,667/-. There is also a demand for interest and levy of penalty. Before the Tribunal, the appellant/assessee filed an application seeking for complete waiver of the pre-deposit. The Tribunal vide interim order dated 12.12.2014, directed the appellant to deposit the sum of Rs.6,00,000/- within six weeks and report compliance on 13.01.2015.

4. When the case was listed subsequently, the counsel who appeared for the assessee reported no instructions from his client are given about pre-deposit, the authorised representative of the Department submitted that there is no compliance report, consequently appeals stood dismissed for want of compliance under Section 35F of the Act. The assessee filed petition for restoration and as there was a delay, the assessee prayed for condonation of delay and restoration of this appeal and this application was dismissed by the Tribunal vide impugned order as Tribunal has no jurisdiction as it would become the funtus officio. The correctness of this order is questioned before us in this appeal.

5. We have heard M/s.Kanthivisalakshi for S.Yashwanth, learned counsel for the appellant and Mr.Rajnish Pathiyil, learned counsel for the respondent.

6. The substantial questions of law raised in this appeal has been considered by the Hon'ble Division Bench of this Court in the case of Classic Builders (Madras) Pvt. Ltd. Vs. CESTAT, Chennai [reported in 2016(42) S.T.R.668 (Mad)] and the substantial questions of law were answered in favour of the assessee. In the said decision various other decisions were also referred to. At this juncture, it is beneficial to quote the following paragraphs of the judgement:

> "7. The next issue is what is the interpretation to be given to the expression 'functus officio' with reference to the functioning of the Tribunal. While interpreting the tax law, the functioning of the State as a welfare state and the impact of tax law upon the life of the citizen have to be taken into account and it has to be balanced also.
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> 7.1. Tax laws have an impact on every citizen's life, who pays taxes or who does not even pay any direct taxes because indirect taxation affects the life of everyone.
>
> 7.2. The needs of governance in a police State are limited but those in a welfare State are far more and which is understandable.
>
> 7.3. That is an area which requires serious reflection by everyone concerned with the framing of the tax laws and their implementation. It has been said, even in the ancient texts while describing the taxing power of the king, the political sovereign, that a good king is he who draws in the form of taxes from the subjects only as much as a bee draws honey from a flower so that the sustenance of the flower is not endangered.
>
> 9.4. It is contended by the learned counsel for the appellant that restoration of appeal which was dismissed for non-compliance of the stay order by the Tribunal does amount to review and Tribunal has power and jurisdiction to recall its order, in the ends

of justice, as required in terms of Rules 20 and 41 of CESTAT (Procedure) Rules, 1982. The said Rules is reproduced hereunder:-

(i) Rule 20 - Action on appeal for appellant's default:

Where on the day fixed for the hearing of the appeal or on any other day to which such hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Tribunal may, in its discretion, either dismiss the appeal for default or hear and decide it on merits: Provided that where an appeal has been dismissed for default and the appellant appears afterwards and satisfies the Tribunal that there was sufficient cause for his non-appearance when the appeal was called on for hearing, the Tribunal shall make an order setting aside the dismissal and restore the appeal.

(ii) Rule 41 - Orders and directions in certain cases:

The Tribunal may make such orders or give such directions as may be necessary or expedient to give effect or in relation to its orders or to prevent abuse of its process or to secure the ends of justice.

9.5. Contending that the Tribunal has jurisdiction to recall its own order, to meet the ends of justice, the following decisions are relied upon by the learned counsel for the appellant :

(i) Hussein Haji Harun vs. Union of India (1995 (77) ELT 803 (Guj)).

It cannot be gainsaid that when the Act or the Rules in question do not specifically prohibit
restoration of an appeal dismissed on the ground of non-deposit of the amount, the Tribunal certainly has the power and jurisdiction to recall its earlier order, if the ends of justice require such a course of action. It is more so because while dismissing the appeal on the ground of non-deposit of the amount, the Tribunal did not determine any issue or dispute and so there was no question of reviewing the earlier decision in the present case. It is not possible to regard such order of dismissal as a final order.

(ii) Scan Computer Consultancy Vs. Union of India (2006 (204) E.L.T. 43 (Guj)) Needless to state that, by mere default in making deposit as directed, the appellant does not stand to gain anything and only delays his right to have his case adjudicated. Nor does such a delay in making pre-deposit cause any justice prejudice to the revenue, in absence of any stay operating in favour of the appellant. It cannot be lost sight of that right of appeal is statutorily granted and it is hedged in by the requirement to make pre-deposit as directed by the appellate authority, as being a condition for hearing of the appeal on merits. However, that condition cannot be used by the appellate authority for the purposes of denying an appellant the right of adjudication which is otherwise statutorily granted. In a given case, even if no pre-deposit is made, the appeal may not be heard, but having dismissed the appeal for non-compliance of pre-deposit does not permit the appellate authority to refuse to restore the appeal upon compliance being shown.

(iii) Commissioner of Customs & Central Excise, Goa vs. Pankaj Jaju (2014 (313) ELT 5 (Bom.)) As it has been held by the Apex Court in the case of J.K.Synthetics Ltd. (supra), under Rule 41, the CESTAT has wide powers to prevent abuse of its process and to secure the ends of justice. As such, though the application was filed under Rule 20, it will have to be held that jurisdiction exercised by the learned Tribunal was under Rule 41 of the said Rules. Apart from that, the similar view has been taken by the Division Bench of Gujarat High Court in the aforesaid three matters, stating therein that in the absence of any provision in the Act or Rules specifically prohibiting restoration of appeal dismissed on the ground of non-deposit of penalty, the learned Tribunal has a power and jurisdiction to recall its order, if ends of justice require such course of action.

(iv) Venus Electronics and Control Pvt. Ltd. vs. CC, Kandla (2006 (198) ELT 547 (Tri Mum)) While allowing the application filed for restoration of appeal following the judgment of the Apex Court in the case of Inventa Electronics Pvt. Ltd. as reported at 2004 (168) ELT A121 (SC), it was observed that since right to appeal is a statutory right and pre-deposit requirement under Section 129E are only in nature of procedural requirements therefore for delay in meeting the pre-deposit requirement, the primary right of appeal cannot be extinguished.

10. From the decisions relied upon by the learned counsel for the Assessee, it is clear that it is not for the Tribunal to state that the Tribunal has no jurisdiction to hear it, but it has no jurisdiction to refuse to hear it, once the procedural requirement of pre-deposit is complied with. The legal reasoning, in support of that, runs as follows:

(a) When the Act or the Rules in question do not specifically prohibit restoration of an appeal, dismissed on the ground of non-deposit of the amount, the Tribunal certainly has the power and jurisdiction to recall its earlier order, if the ends of justice require such a course of action.

(b) When Rule 20 provides for restoration of appeal in case when the appeal is dismissed for default, there is no reason as to why the power of restoration should not be exercised in case of non-compliance with the provision for pre-deposit.

(c) even if no pre-deposit is made, the appeal may not be heard, but the dismissal of the appeal for non-compliance of pre-deposit does not permit the appellate authority to refuse to restore the appeal upon compliance being shown.

(d) under Rule 41, the CESTAT has wide powers to prevent abuse of its process and to secure the ends of justice.

(e) since right to appeal is a statutory right and pre-deposit requirement under Section 129E of the said Act are only in nature of procedural requirements, but for delay in meeting the pre-deposit requirement, the primary right of appeal cannot be extinguished.

10.1. From the case law discussed, it is apparent that the Tribunal cannot deprive the

substantive right of the party to prefer the appeal on the mere ground that there is violation of procedure.
Therefore, the order of the Tribunal, dismissing the restoration application and the order dismissing the appeal itself are liable to be set aside."

7. It is submitted by M/s.Kanthivisalakshi for Mr.S.Yashwanth, learned counsel for the appellant that the pre-deposit ordered by the Tribunal has been subsequently complied with by the appellant on 11.03.2016 though belatedly. By applying the decision in the case of Classic Builders (Madras) Pvt. Ltd. Vs. CESTAT, Chennai [reported in 2016(42) S.T.R.668(Mad)] the substantial questions of law have to be answered in favour of the appellant/assessee.

8. For the aforementioned reasons, this appeal is allowed and the order passed by the Tribunal is set aside and the appeal is restored to the file of the Tribunal and to be heard and decided on merits. Accordingly, the substantial questions of law raised in this appeal are answered in favour of the assessee. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

mrm/ssb
To

The Commissioner of Central Excise
and Service Tax,
No.1, Foulks Compund, Anaimedu,
Salem - 636 001.

+1cc to Mr.Rajnish Pathiyil , Advocate SR.No. 9587
+1cc to M/s.Kanthivisalakshi , Advocate SR.No. 9595

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A.SK(29/03/2019)