HIGH COURT OF MADHYA PRADESH : JABALPUR

Heard through Video Conferencing

Writ Petition No.15473/2020
Ravi Kale vs. Union of India & others

Writ Petition No.15475/2020
Mahesh Kumar Verma vs. Union of India & others

Writ Petition No.15476/2020
Sheonarayan Verma @ Sam Verma vs. Union of India & others

Jabalpur, dated : 19.11.2020

Shri Atulanand Awasthy, learned counsel for the petitioners.

These writ petitions are directed against order passed by Customs, Excise and Service Tax Appellate Tribunal, New Delhi; whereby, the Tribunal has declined to entertain the Appeal preferred by the petitioners for non-compliance of the provisions contained under Section 35F of the Central Excise Act, 1944 (for short 'the Act of 1944').

2. Section 35F of the Act of 1944 mandates deposit of certain percentage of duty demanded or penalty imposed before filing of appeal. It stipulates:

> "35F. 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--
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> (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 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 sub-section (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 the decision or order appealed against;
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> (iii) against the decision or order referred to in clause (b) of sub-section (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 penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against:
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> 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 appellate authority prior to the commencement of the Finance (No.2) Act, 2014."

3. Evident it is from the provisions of Section 35F that no discretion is vested in the Tribunal or Commissioner (Appeals) to waive the condition of pre-deposit.

4. Though learned counsel for the petitioner has placed reliance on the order dated 18.11.2016 passed in Writ Petition 17271/2016, wherein a Co-ordinate Bench taking note of totality of the circumstances and in the interest of justice directed pre-deposit of Rs.2,00,000/- in place of pre-deposit of Rs.3,00,000/-. Evidently the order does not take into consideration the mandate of Section 35 F of the Act of 1944.

5. A Division Bench of the Delhi High Court in *Diamond Entertainment Techno P. Ltd. vs. Commissioner of CGST, Dehradun 2019 (368) ELT 579, Delhi* had an occasion to dwell upon the scope of Section 35F of the Act of 1944. It held :

> "18. A reading of Section 35F of the Central Excise Act reveals, by the usage of the peremptory words "shall not" therein, that there is an absolute bar on the CESTAT entertaining any appeal, under Section 35 of the said Act, unless the appellant has deposited 7.5% of the duty confirmed against it by the authority below.
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> 19. The two provisos in Section 35F relax the rigour of this command only in two respects, the first being that the amount to be deposited would not exceed 10 crores, and the second being that the requirement of pre-deposit would not apply to stay applications or appeals pending before any authority before the commencement of the Finance (No.2) Act, 2014, i.e. before 6th August, 2014.
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> 20. Allowing the CESTAT to entertain an appeal, preferred by an assessee after 6th August, 2014, would, therefore, amount to allowing the CESTAT to act in violation, not only of the main body of Section 35F but also of the second proviso thereto, and would reduce the command of the legislature to a dead letter."

6. We are in respectful agreement with the view taken by the Division Bench of the Delhi High Court which is also relied upon by the Tribunal.

7. In view whereof, when the impugned order is tested on the anvil of above analysis, the same cannot be faulted with as would warrant any indulgence.

8. Consequently, petitions fail and are dismissed. No costs.

(Sanjay Yadav)
Acting Chief Justice

(Vijay Kumar Shukla)
Judge

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