IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.03.2021

CORAM:

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.4076 of 2017
and
W.M.P.No.4224 of 2017

M/s.ITC Limited,
SBU-Packaging and Printing,
Post Box No.2277,
Thiruvottiyur,
Chennai - 600 019. ... Petitioner

Vs.

1.The Customs Excise and Service Tax Appellate Tribunal,
1st Floor, Shastri Bhawan Annexure,
No.26, Haddows Road, Chennai - 600 006.

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

Prayer: Writ Petition is filed under Article 226 of the Constitution of India praying for the issuance of Writ of Mandamus, to direct the 1st respondent to entertain the Appeal filed by the petitioner against Order-in Appeal Nos.183, 184 and 185/2016 (CXA-I) dated 20.09.2016 passed by the 2nd respondent, allotted Diary No.DEFECT/427612016 to 427632016, without any pre-deposit.

For Petitioner : Mr.A.L.Somaiyaji for
M/s.Maithili Associates
For Respondent : Mr.A.P.Srinivas

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O R D E R

The writ petition has been filed by the petitioner for a writ of mandamus to direct the 1st respondent to entertain the Appeal filed by the petitioner against Order-in Appeal Nos.183, 184 and 185/2016 (CXA-I) dated 20.09.2016 passed by the 2nd respondent, allotted Diary No.DEFECT/427612016 to 427632016, without any pre-deposit.

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2.By the impugned order, the Registry of the First Respondent Tribunal has called upon the petitioner to pre-deposit 10% of the disputed tax liability in terms of amended Section 35F of the Central Excise Act, 1944.

3. Mr.A.L.Somaiyagi, the learned Senior Counsel appearing on behalf of the petitioner submitted that on merits, the issue before the first respondent Tribunal is squarely covered by the order of the first respondent Tribunal in petitioner's own appeal vide Interim Order No.37/2014 dated 11.02.2014 in Appeal No.E/388/12 reported in 2015 (315) ELT 143 (Tri-Chennai) and Miscellaneous Order No.42078/2014 dated 17.11.2014.

4.It is submitted that the second respondent Commissioner of Central Excise (Appeals) vide Order-in-Appeal Nos.183 to 185 of 2016 (CXA-I) dated 20.09.2016 refused to follow the above order of the first respondent Tribunal on the ground that a SLP was pending before the Hon'ble Supreme Court against the said order of the first respondent Tribunal.

5.Alternatively, it was submitted that during investigation, a sum of Rs.2.32 crores was debited by the petitioner in its Personal Ledger Account and therefore, the amount lying with the respondent as deposit was more than 10% of the amount to be pre-deposited by it in terms of the impugned defect memo of the Registry of the first respondent Tribunal.

6.In this connection, reliance was placed on several decisions of the other High Courts, wherein, even in the context of amended Section 35 F of the Central Excise Act, 1944, these High Courts have granted a complete waiver of pre-deposit to be made under the aforesaid provision pending disposal of the appeals. They are as under:-

i.Sulzer Friction Systems (I) Ltd Vs. Commissioner of C.Ex.Chennai -I, 2015 (325) ELT 325 (MAD) and

ii.Superintendent of Police Vs. Commissioner of Customs C.Ex & Service Tax, 2017 (50) STR 7 (MP) and

iii.Vega Auto Accessories Pvt. Ltd Vs. Registrar, CESTAT, 2018 (14) GSTL 7 (DEL) and

iv.Cyquator Media Services P Ltd Vs. UOI, 2018 (10) GSTL 297 (ALL) and

v.Valentine Jewellers (I) Pvt. Ltd Vs. UOI, 2016 (338) ELT 109 (RAJ) and

vi.Rama Mohana Rao & Co, Guntur Vs. UOI, passed by the Hon'ble A.P.High Court in W.P.No.44708 of 2017.

7.Per Contra, the learned Senior Standing Counsel for the respondent submits that this Writ Petition was misconceived and

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was liable to be dismissed. It is submitted that the petitioner cannot ask for waiver of pre-deposit contrary to the express language of Section 35F of the Central Excise Act, 1944.

8.I have considered the arguments advanced by the learned senior counsel for the petitioner and the respondent. I have also considered the decisions cited by the learned senior counsel for the petitioner.

9.Irrespective of the fact whether the issues is covered on merits or not and covered by an order of the Tribunal for the previous period, the petitioner is required to pre-deposit 7.5% of the disputed tax and/or penalty or both together at the stage of the first appeal before the second respondent Commissioner of Central Excise (Appeals) and another sum of 2.5% totalling to 10% at the stage of Appeal before the first respondent Tribunal. This statutory minimum cannot be waived.

10.The idea of rationalizing this amount to a statutory minimum is to spur final hearing of the appeal by the Tribunals and Commissioner (Appeals). Further, the Registry of the first respondent is really not concerned with the merits of the case and therefore, cannot waive the amount.

11.Therefore, it is not possible under the scheme of the amendment to the Act for the petitioner to expect the Registry of the first respondent Tribunal to adjudicate the same. Therefore, the challenge to the impugned communication on the score has to fail.

12.It would have been different if the petitioner had challenged the order impugned before the first respondent Tribunal before this Court. Perhaps, on merits, the issue would have been resolved in the light of the decision of the Hon'ble Supreme Court in Union of India Vs. Kamalakshi Finance Corporation Ltd., 1991 (55) ELT 433.

13.Since the writ petition is predicated and a different relief is sought for and is confined to only the issue relating to pre-deposit, this Court is unable to grant the relief as prayed for notwithstanding few decisions of the other High Courts granting relief to the assessees as the jurisdiction of this Court under Article 226 of the Constitution of India is intended to effectuate the law and not abrogate it.

14.At the same time, I find sufficient force in the submission of the learned senior counsel for the petitioner that already an amount of Rs.2.32 Crores was debited by the petitioner in its Personal Ledger Account during investigation.

15.The total amount of duty as confirmed by the Deputy Commissioner of Central Excise as affirmed by the Commissioner

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of Central Excise (Appeals) vide Order in Appeal Nos.183, 184 & 185/2016 (CXA-I) impugned before the first respondent Tribunal is about Rs.10,95,70,702/- as detailed below:-

Sl. No.	Appeal No./Date	Order- in-Original No./Date	Period	Amount involved
(1)	(2)	(3)	(4)	(5)
1.	13/2013(M-I) dated 28.02.2013	37/2012 dated 24.12.2012	2005-06	Rs.3,72,60,594/-
2.	14/2013(M-I) dated 28.02.2013	36/2012 dated 24.12.2012	2004-05	Rs.3,60,96,503/-
3.	15/2013(M-I) dated 28.02.2013	38/2012 dated 24.12.2012	2006-07	Rs.3,62,23,605/-
		Total		Rs.10,95,80,702/-

16.Therefore, petitioner may obtain a certificate from the jurisdictional officer or Supt of Central Excise to the effect that the amount of Rs.2.32 Crores paid by the petitioner has not been adjusted against any of the duty liability or refunded back to the petitioner.

17.The petitioner shall approach the jurisdictional officer of Supt of Central Excise with necessary particulars and endeavor to get such certificate within a period of two months from the date of receipt of a copy of this order.

18.If such certificate is obtained, such certificate shall be produced before the Registry of the first respondent Tribunal. The Registry of the first respondent Tribunal shall treat the same towards 10% of mandatory deposit under Section 35F of the Central Excise Act, 1944 and number the appeal and list then for final hearing.

19.Accordingly, this Writ Petition stands disposed of with the above observations. No cost. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS-VII)

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Sub Assistant Registrar

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To

1.The Customs Excise and Service Tax
Appellate Tribunal,
1st Floor, Shastri Bhawan Annexure,
No.26, Haddows Road, Chennai - 600 006.

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

+1cc to Mr.L.Maithili, Advocate, S.R.No. 20619
+1cc to Mr.A.P.Srinivas, Advocate, S.R.No.21210

W.P.No.4076 of 2017
and
W.M.P.No.4224 of 2017

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