IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.09.2023

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THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.25921 of 2023
and
W.M.P.Nos.25356 and 25357 of 2023

M/s.Linde India Ltd,
(Formerly known as M/s.BOC India Ltd)
Rep by its Authorised Signatory Mr.Charan Kumar,
No.30,31 and 32, SIDCO Industrial Estate,
Pudukottai, Tiruchirappalli,
Tamil Nadu – 622 515. ... Petitioner

Vs

1.The Commissioner of GST and Central Excise,
No.26/1, Mahatma Gandhi Road,
Nungambakkam, Chennai -34.

2.The Commissioner of GST and Central Excise
(Appeals-I),
26/1, Mahatma Gandhi Road,
Nungambakkam, Chennai – 34. ... Respondents
(Suo moto impleaded by this Court
in W.P.No.25921 of 2023
vide order dated 13.09.2023)

Prayer: Writ Petition filed under Article 226 of the Constitution of India, for issuance of a Writ of Certiorari, to call for the records relating to the impugned Order in Appeal No.93-99/2023(CTA-I) dated 24.03.2023 passed by the respondent and quash the same as arbitrary and illegal.

For Petitioner : Mr.N.Sairam Ganapathi

For Respondent : Mr.V.Sundareswaran
Senior Standing Counsel

ORDER

The Commissioner of GST and Central Excise (Appeals-I), is suo moto impleaded as respondent No.2.

2. The petitioner has challenged the impugned Order in Appeal No.93-99/2023 passed by the respondent/Commissioner of GST and Central Excise (Appeals-I).

3. Operative portion of the impugned Order in Appeal No.93-99/2023(CTA-I) dated 24.03.2023 reads as under:-

"5. The impugned orders were claimed to be received on 24.12.2021 and the instant Appeals were filed on 30.05.2022 along with application for condonation of delay in light of Hon'ble Apex court directions in Misc.Application No.21 of 2022. As per the said directions, limitation period of ninety days was extended to all persons (in judicial and quasi-judicial proceedings) starting from 01.03.2022 where the actual limitation would have expired during the period 15.03.2020 till 28.02.2022. Therefore, any appeal for the order in original issued during the said period shall be preferred on or before 29.05.2022, whereas in the instant case, Appeals were filed on 30.05.2022 i.e., beyond the allowed period of ninety days. Further, the condonation application filed by them had not sought any condonation on account of delay beyond the allowed period of ninety days. Therefore, the instant Appeals are hit by limitation of time and are time barred. Further, it is noticed that the pre-deposits at the rate of 7.5% of the demanded amount were actually paid under CGST challans.

6. In order to verify legality of amount paid in CGST head towards pre-deposit for a Central Excise duty related Appeal, it is warranted to revisit the governing Sections of the statute in light of Circulars/Instructions/Clarifications issued thereof. Section 35F of the Central Excise Act, 1944 prescribes the pre-deposit for any Appeal preferred. The same is reproduced hereunder for ease of reference.

"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 penalty is in dispute, in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the Principal Commissioner of Central Excise or Commissioner of Central Excise".

7.It is pertinent to mention here that the Central Board of Indirect Taxes & Customs (CBIC)vide instructions dated 28.10.2022 issued from F. No. CBIC/240137/14/2022-SERVICE TAX SECTION-CBEC clarified the method to pay pre-deposit for cases pertaining to Central Excise and Service Tax. The said clarification is placed here under for better appreciation.

It has been brought to the notice of the Board that appeals have been rejected by some Commissioner (Appeals) for non-compliance of pre-deposit requirements as mandated under Section 35F of the Central Excise Act, 1944 (CEA) and Section 83 of the Finance Act, 1994 read with section 35F of the CEA, where such payments have been made through Form GST DRC-03 on common GST portl, by holding that it is not a prescribed method of payment of such pre-deposit. The issue has also been referred to the Board by Hon'ble High Court of Mumbai in writ petition No. 6220 of 2012 in the matter of Sodexo India Services Pvt. Ltd Vs Union of India and Ors. with directions to examine and issue suitable instructions in this regard.

2. The matter has been examined. It may be seen that Form GST DRC -03 is prescribed for payment of tax, interest, penalty under sub-sections (5) and (8) of both sections 73 and 74, and section 129(1) of the CGST Act, 2017 or any other payment due in accordance with the provisions of the CGST Act, 2017 as specified in Rule 142(2) and 142(3) of the CGST Rules, 2017. Further, in GST regime, in connection with appeal mechanism under section 107 of the CGST Act, 2017.

Rule 108 (1) of the CGST Rules, 2017 provides Form GST APL-01 for filing an appeal with option of payment of admitted amount and pre-deposit through electronic cash/credit ledger. Thus, under GST Act also, Form GST DRC-03 is not a prescribed made for payment of pre-deposit.

3.Attention is invited to Miscellaneous transitional provisions sub-section (6)(b), sub- Section (7)(a) and sub-section (8)(a) of section 142 of the CGST Act, 2017, which, inter alia, provides that any credit, tax, interest, fine or penalty recoverable from the person before, on or after 1st July, 2017 under the existing law (Central Excise Act and Chapter-V of Finance Act, 1994) shall be recovered as an arrear of tax under CGST Act. It is, however, settled that pre-deposit as a requirement for exercising the right to appeal neither is in the nature of duty nor can be treated as arrears under the existing law and hence cannot be said to be covered under transitional provisions of CGST Act.

4. In view of above, it is clarified that payments through DRC-03 under CGST regime is not a valid mode of payment for making pre-deposits under section 35F of the Central Excise Act, 1944 and Section 83 of Finance Act 1994 read with section 35F of the CEA. There exists a dedicated CBIC-GST Integrated portal, https://cbic-gst.gov.in (Board's Circular No. 1070/3/2019-CX dated 24th June, 2019 refers in this regard), which should only be utilized for making pre-deposits under the Central Excise Act, 1944 and the Finance Act, 1994.

It is noticed from the above that the CBIC has clarified that the payment of pre-deposit for service tax matter shall be made by utilising the existing dedicated CBIC-GST Integrated portal only, as communicated in

CBIC Circular No.1070/3/2019-CX dated 24.06.2019, payment through DRC-03 is not a valid mode of payment for making pre-deposits under Section 35F. From the above, it is ample clear that the amount of CGST paid by the Appellant shall not be treated as pre deposits.

8. In light of the above discussed legal provisions, I hold that the instant appeals are liable to be dismissed on account of (i) time bar and (ii) for reasons of non-compliance of the condition stipulated under Section 35F of the Central Excise Act, 1944. Accordingly, refrain from going into merits of the Appeals.

9.Appeals dismissed."

4. By the aforesaid order, the respondent has rejected the appeal filed by the petitioner on the ground of limitation. All the seven appeals have been dismissed on the ground that limitation having been filed beyond the statutory period of 90 days prescribed under the Act. The impugned order has been passed on 24.03.2023.

5. The petitioner had filed an appeal against the Order-in-Original No.23/2021 (CE/ST – AC) all dated 29.11.2021 as detailed below:

Sl.No	O in O NO. and date	Appeal No and Date
1	23/2021 (CE/ST-AC) dated 29.11.2021	87/2022(CTA-1)(CN) dated 30.05.2022
2	24/2021 (CE/ST-AC) dated 29.11.2021	88/2022(CTA-1)(CN) dated 30.05.2022
3	25/2021 (CE/ST-AC) dated 29.11.2021	89/2022(CTA-1)(CN) dated 30.05.2022
4	26/2021 (CE/ST-AC) dated 29.11.2021	90/2022(CTA-1)(CN) dated 30.05.2022
5	27/2021 (CE/ST-AC) dated 29.11.2021	91/2022(CTA-1)(CN) dated 30.05.2022
6	28/2021 (CE/ST-AC) dated 29.11.2021	92/2022(CTA-1)(CN) dated 30.05.2022
7	29/2021 (CE/ST-AC) dated 29.11.2021	93/2022(CTA-1)(CN) dated 30.05.2022

6. The learned Senior Standing Counsel for the respondent would submit that this writ petition is without any merits in the light of the decision of the Hon'ble Supreme Court in **Assistant Commissioner (CT) LTU, Kakinada and others** Vs. **Glaxo Smith Kline Consumer Health Care Limited**, 2020 SCC Online SC 440.

7. I have considered the arguments advanced by the learned counsel for the petitioner and the learned Senior Standing Counsel for the respondent.

8. Considering the fact that there is only a marginal delay in filing the appeal and considering the fact that the petitioner may have a case to substantiate on merits, Court is inclined to set aside the impugned order and remits the case back to the second respondent herein to pass a fresh order on merits and in accordance with law, within a period of 45 days from the date of receipt of a copy of this order. Subject to the petitioner making required pre-deposit in cash as is required under Section 107 of the CGST Act, 2017. Needless to state before passing such order, the petitioner shall also be heard.

9. This writ petition stands disposed of. No costs. Consequently, connected writ miscellaneous petitions are closed.

13.09.2023

Index : Yes/No
Internet : Yes/No
Speaking Order/Non-Speaking Order
Neutral Citation : Yes/No
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To

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C.SARAVANAN, J.

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