

Form No.J(2)

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Raja Basu Chowdhury

WPA 14715 of 2024

**M/s. Sashreek Constructors Private Limited & Anr.
Versus
The Customs, Excise and Service Tax
Appellate Tribunal & Anr.**

For the petitioners	:	Ms. Sutapa Roy Choudhury Ms. Aratrika Roy Mr. Ratnesh Kumar Rai Ms. Sakshi Kejriwal
For the CGST authorities	:	Mr. Tapan Bhanja
Heard on	:	8 th August, 2024
Judgment on	:	8th August, 2024.

Raja Basu Chowdhury, J:

1. The present writ petition has been filed, *inter alia*, challenging the order dated 5th January, 2024, passed by the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as the "Tribunal"), whereby the Tribunal having granted the petitioner no.1, 8 weeks time to make the pre-deposit for maintaining the appeal, had made it clear if such condition of pre-deposit is not

fulfilled, no further opportunity would be provided to the petitioner no.1.

2. Brief facts of the case are noted below.
3. The petitioner no.1 claims to be a company and is engaged in the business of providing work contract services to the State Government, local authorities or Government Undertakings by way of construction of roads, bridges etc. In the Financial Year 2015-16, the petitioner no.1, in usual course, having participated against the tenders issued was awarded work orders for construction of bailey bridges and accordingly contract agreements were executed on 24th March, 2015 and 19th January, 2016. It is the petitioners' contention that since the bailey bridges are used by the general public and are intended to be used as general road transportation, the construction of these bridges is not liable to service tax.
4. On or about 23rd April, 2021, a demand-cum-show cause notice was issued by the respondent no.2, thereby calling upon the petitioner no.1 to show cause within 30 days from the receipt of the notice as to why;
 - (i) Service Tax amounting to Rs.2,17,50,747/- (Two Crore Seventeen Lakh Fifty Thousand Seven Hundred Forty Seven) only for the period 2015-16 should not be demanded and recovered from them under proviso to

Section 73(1) of the Finance Act, 1994 read with Section 174(2) of the CGST Act, 2017;

(ii) Applicable Interest on the amount of unpaid Service Tax should not be demanded and recovered from them under Section 75 of the Finance Act, 1994;

(iii) Penalty should not be imposed under Section 77 of the Finance Act, 1994 for failure to furnish information and produce documents requisitioned by the department;

(iv) Penalty should not be imposed upon them under Section 78 of the Finance Act, 1994 for failure to pay the Service Tax by the due dates; and for suppression of vital facts from the department with intent to evade payment of Service Tax by various acts of omission and commission as explained in the preceding paragraphs;

(v) Penalty should not be imposed under Section 70 and Section 77(2) of the Finance Act, 1994 for non-submission of return under provision of Section 70 of the Finance Act, 1994 read with Rule 7C of Service Tax Rules, 1994.

5. Although the petitioner no.1 had duly responded to the show cause, such proceeding was disposed of by passing the order in original by the respondent no.2 on 14th March, 2022, whereby, the demand raised in the show cause was confirmed in terms of Section 73(2) of the Central Excise Act, 1944 (hereinafter referred to as the “said Act”), along with interest and penalty.

6. Being aggrieved, the petitioner no.1 had filed a writ petition before the Hon'ble High Court at Guwahati, which was registered as WP(C) No.3967 of 2022. By an order dated 22nd June, 2023, the Hon'ble High Court at Guwahati was, *inter alia*, pleased to dismiss the said petition with liberty to file statutory appeal. The petitioner no.1 has since filed a statutory appeal before the Tribunal.
7. By an order dated 5th January, 2024, the Tribunal by condoning the delay in preferring the appeal had set forth the conditions for maintaining such appeal.
8. Ms. Roy Chowdhury, would submit that it is within the competence of this Court to grant exemption in a fit case. In support of her contention she has placed reliance on the judgments delivered by the Hon'ble High Court of Delhi at New Delhi, in the case of ***Shubh Impex v. Union of India & Ors.***, reported in **2018 SCC OnLine Del 8793** and in the case of ***Pioneer Corporation v. Union of India***, reported in **2016 SCC OnLine Del 6758**.
9. By placing before this Court the judgment delivered in the case of ***Kusum Ingots & Alloys Ltd. v. Union of India & Anr.***, reported in **(2004) 6 SCC 254** she submits that although, original authority had passed the order from outside the jurisdiction of this Court, however, the Tribunal being situated

within the jurisdiction of this Court, there cannot be any impediment in this Court exercising jurisdiction.

10. By placing before this Court the judgment delivered in the case of ***State of Goa v. Summit Online Trade Solutions Pvt. Ltd. & Ors.***, reported in **(2023) 7 SCC 791**, it is submitted that the Hon'ble Supreme Court has reiterated in paragraph 15 of the said judgment that if the cause of action arises in part within the territories in relation to which the High Court exercises jurisdiction then notwithstanding that the seat of the Government or authority being outside the territories of the High Court, the same would not stand in the way of the High Court exercising jurisdiction.
11. She insists that the order passed by the Tribunal is amenable to the jurisdiction of this Court as the same does not finally dispose of the case, nor can the order which is impugned can be said to be an adjudicating order and thus not appealable.
12. According to her, admittedly, in this case, the petitioner no.1 is facing serious financial constrains. By placing before this Court the affidavit of assets disclosed by the petitioners, it is submitted that from the aforesaid it would appear that the financial condition of the petitioner no.1 does not permit the petitioner no.1 to make payment of the mandatory pre-deposit as is required for maintaining the appeal and this Court in exercise of its discretion is competent to grant such exemption.

13. Mr. Bhanja, learned advocate appearing on behalf of the respondents, on the other hand, while raising the point of territorial jurisdiction has argued that although, the Tribunal is situated within the jurisdiction of this Hon'ble Court, yet by reasons of Section 35G of the said Act, an appeal would lie to the High Court, in this case, the Guwahati High Court. He further states that although the Tribunal was competent to dispense with the pre-deposit, prior to the amendment of Section 35F of the said Act, however, subsequent to the amendment of Section 35F of the said Act with effect from 6th August, 2014, the Tribunal is no longer competent to entertain an appeal unless the mandatory pre-deposit as is required to be paid in terms of Section 35F(i) of the said Act is deposited.
14. By drawing attention of this Court to the language used in Section 35F(i), it is submitted that the statute specifically provides that the Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal 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. As such in absence of the mandatory pre-deposit, the appeal itself cannot be entertained. In support of his aforesaid

contention, he has placed reliance on the case of ***Diamond Entertainment Techno. Ltd. v. Commr. of CGST, Dehradun***, reported in **2019 (368) E.L.T. 579 (Del.)**. He further submits that in light of the above, the judgements delivered in the case of ***Shubh Impex*** (supra) and the case of ***Pioneer Corporation*** (supra) are no longer good law.

15. Again by drawing attention of this Court to the provisions of Section 35G of the said Act, it is submitted that the language used therein is wide enough to bring within its sweep any orders passed by the Tribunal and for that matter, it is the concerned High Court which may exercise jurisdiction in an appeal arising from every order passed by the Tribunal.
16. Mr. Bhanja, would submit in the alternative that if the order impugned is held not to be an appealable order, although, ordinarily, the Hon'ble High Court in terms of Clause (2) of Article 226 of the Constitution of India in such case, may have the jurisdiction to entertain the matter, however, by reasons of doctrine of *forum conveniens*, this Court ought not to entertain the same. In support of his aforesaid contentions, he has placed reliance on the following judgments.

- I. ***Ambica Industries v. Commissioner of Central Excise***, reported in **2007 (213) E.L.T. 323 (S.C.)**.
- II. ***Raj Kumar Shivhare v. Asstt. Director, Directorate of Enforcement***, reported in **2010 (253) E.L.T. 3 (S.C.)**.

17. Heard the learned advocates appearing for the respective parties and considered the materials on record.
18. It appears that the petitioner no.1 is aggrieved by the decision contained in the order dated 5th January, 2024, insofar as the same directs the petitioner no.1 to make payment of the mandatory pre-deposit as is required for maintaining the appeal.
19. I find that the learned advocate representing the petitioners has strenuously argued that the order directing payment of mandatory pre-deposit does not constitute an order within the meaning of Section 35G of the said Act, for maintaining an appeal before a High Court, I, however, notice that the Hon'ble Supreme Court in the case of **Raj Kumar Shivhare** (supra) while considering the scope of the provisions of Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 and Foreign Exchange Management Act, 1999 (hereinafter referred to as "FEMA"), in relation to an order passed in connection with an application for dispensation of pre-deposit of penalty and the right to prefer an appeal to the High Court in terms of Section 35 thereof, in paragraph 24 of such judgment was, *inter alia*, pleased to observe by taking note of the language used in Section 35 of FEMA that the word "any" in this context would mean "all". Having regard to the same, the Hon'ble Supreme Court had opined that the said Section confers right of appeal to any person aggrieved and such a right to appeal is a right which has been

conferred by the statute. Any decision passed, would be appealable under Section 35 of the FEMA and that the legislature has conferred such right to a person aggrieved from “any order” or “decision” of the Appellate Tribunal, though with certain limitations.

20. In the instant case, it may be noticed that by an order dated 5th January, 2024, the Tribunal has been, *inter alia*, pleased to direct the petitioner no.1 to make pre-deposit and fulfill the conditions within the time specified therein for maintaining the appeal. It has further been made clear in such order that if the condition is not fulfilled, no further opportunity would be given to the petitioner no.1 and the matter would be decided on the basis of the records available.
21. Having regard to the aforesaid and taking note of Section 35G of the said Act, it would appear that an appeal shall lie to the High Court from “every order” passed in appeal by the Appellate Tribunal, though the maintainability thereof would be dependent on certain statutory limitations.
22. To morefully appreciate the same, the relevant portion of Section 35G(1) of the said Act, is extracted hereinbelow:-

“ 35G. Appeal to High Court.- *An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for the*

purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law.”

23. Having regard to the above, it cannot be said that the order passed by the Tribunal on 5th January, 2024 does not qualify as an order for preferring an appeal before the High Court, simply because the same does not seek to adjudicate the rights of the parties. It is a different question whether the High Court would admit the same having regard to the substantial questions of law involved. There are limitations imposed by the statute which are required to be followed. Such statutory limitations, in my view, do not make an appealable order, non appealable, especially when there is no limitation on the nature of order or the decision to be appealed against, as in this case.
24. I find that the learned advocate appearing on behalf of the petitioners, having regard to the judgment delivered in the case of **Ambica Industries** (supra) has candidly admitted that in case of an adjudication order an appeal would lie before the High Court within whose territorial jurisdiction the original adjudicating authority functions.
25. It is not the case of the petitioners that the Tribunal lacked the jurisdiction to pass the order which is impugned or there has been violation of the principles of natural justice.
26. As such, without going into the issue as to whether the petitioners are entitled to exemption, notwithstanding the

mandate of Section 35F of the said Act, I am of the view that the present writ petition ought not to be entertained on the ground of alternative remedy as also on the ground of lack of territorial jurisdiction, having regard to the observations made in the case of **Raj Kumar Shivhare** (supra) and the case of **Ambica Industries** (supra). Allowing a petition of this nature would permit bypassing of statutory provision which is not ordinarily permissible.

27. The judgment cited by the petitioners in the case of **State of Goa** (supra) does not assist the petitioners in the facts of the case.
28. In view thereof, the writ petition fails and is accordingly dismissed.
29. There shall be no order as to costs.
30. Urgent photostat certified copy of this order, if applied for, be made available to the parties upon compliance of necessary formalities.

(Raja Basu Chowdhury, J.)