od 2

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION [CENTRAL EXCISE]
ORIGINAL SIDE

CEXA/11/2015
M/S PERFECT TECHNOLOGIES
VS
COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX,SILIGURI

BEFORE :
THE HON'BLE THE CHIEF JUSTICE T.S SIVAGNANAM
-A N D-
HON'BLE JUSTICE CHAITALI CHATTERJEE (DAS)
DATE : 21st February 2025.

Appearance :
Mr. D.Banerjee, Adv.
...for appellant
Mr. Bhaskar Prasad Banerjee, Adv.
Mr. Abhradip Maity, Adv.
...for respondent

The Court:- In the cause title the respondent has been shown as Commissioner of Central Excise and Service Tax Siliguri. At present since the CGST Act has come into force the respondent shall be the Commissioner of CGST and CX Siliguri Commissionerate. The cause title shall be accordingly amended.

This appeal has been filed by the assessee under Section 35G of the Central Excise Act, 1944 as made applicable to service tax matters by virtue of Section 83 of the Finance Act, 1994.

In this appeal the assessee challenges the order passed by the Customs, Excise and Service Tax Appellate Tribunal, East Zonal Bench, Kolkata (the Tribunal) dated 13.05.2015 and the rectified order dated 20.07.2015 in Appeal No. ST-76429/2014.

The appeal was admitted on 15.12.2015 on the following substantial questions of law :-

[a] Whether the appellant's right of appeal continues to be governed by the appellate provisions of the Central Excise Act, 1944 as they existed on the date of issuance of the show cause notices dated 25th September, 2008, 19th March, 2009 and 10th August, 2009 and the provisions of Section 35F substituted with effect from August 6, 2014 have no application in its case ?

[2] Whether the Tribunal was justified in law in dismissing the appellant's appeal in respect of adjudication order dated July 10, 2014 passed on the show cause notices dated 25th September, 2008, 19th March, 2009 and 10th August, 2009 as not maintainable because of non-compliance with the provisions of Section 35F of the Central Excise Act, 1944 as substituted with effect from August 6, 2014?

The learned Advocate on record of the appellant submitted that on earlier occasion Mr. Arijit Chakraborty was instructed to appear and he had appeared and as on date the Advocate-on-record does not have any instructions from the appellant to appear.

We have heard Mr. Bhaskar Prosad Banerjee, learned standing Counsel appearing for the respondent department duly assisted by Mr. Abhradip Maity.

As could be seen from the impugned order passed by the learned Tribunal dated 13.05.2015, the appeal filed by the assessee on 15.11.2014 challenging the order-in-original dated 9.12.2009 passed by the Commissioner of Central Excise and Service Tax, Siliguri Commissionerate was dismissed on the ground that appellant/assessee has not complied with the amended provision of Section 35F as applicable to Service tax matters by virtue of Section 83 of the Finance Act, 1994. The learned Tribunal while dismissing the appeal for non compliance of the statutory requirement under Section 35F of the Central Excise Act, relied upon two decisions of the Co-ordinate Bench of the Tribunal in the case of *AI Champdani Industries Murlidhar Ratanlal Exports Limited VS. CCE* dated 5.1.2015. The contention of the appellant/assessee is that the appellant's right to file an appeal continues to be governed by the appellate provisions of the Central Excise Act and as they existed on the date of the issuance of the show cause notice dated 25.09.2008, 19.03.2009 and 10.08.2009 and the provisions of Section 35F substituted with effect from August 06, 2015 has no application to the case of the assessee. This issue is no longer *res integra* and has been settled in the decision *Hindustan Petroleum Corporation Ltd. Vs. UOI, (2015) TIOL 2637 High Court, Karnataka High Court – Central Excise*. Among several other issues which were considered in the said matter the issue as to whether the amended provisions of Section 35F would have retrospective operation was also considered and it was held as follows :

> *31. While analyzing Section 35F, it becomes apparent that the said provision has a retrospective operation, particularly having regard to the second proviso. In case the second proviso was absent, then possibly the contention of petitioners' counsel that the amendment had only a prospective operation may have had greater force. But in light of the second proviso, the real intention of the Parliament can be discerned. If the contention of the petitioners' counsel is to be accepted, it has to be held that the amendment made to Section 35F does not have a retrospective operation and is prospective with effect from 6/8/2014 onwards i.e., the date on which it received the presidential assent and would not apply to a lis which had commenced prior to that date. Then, in that event, second proviso would become otiose and redundant. No provision of an enactment can be interpreted so as to make any part of it redundant or useless. The real intention of the Parliament is, to insert the second proviso as a saving clause, thereby applying the provision prior to amendment, only in respect of those appeals pending before the appellate authority as on 6/8/2014. In all other cases, the main amended provision would apply. The reason for such a proviso was necessitated so as to obviate a situation whereby, applications pending before the appellate authority or tribunal would become infructuous on account of the amendment made to Section 35F as the amendment has a*

> *retrospective effect. Parliament was also conscious of the fact that as on 6/8/2014, many appeals would be pending before various appellate authorities throughout the country where applications for exercise of discretion of such appellate authorities regarding pre-deposit of duty or penalty had to be considered and disposed of. Therefore, Parliament was vigilant to ensure that the appellate authority or tribunal would continue to have jurisdiction to exercise discretion in respect of the applications filed under the proviso to Section 35F as it stood prior to amendment. Thus, if prior to 6/8/2014, an appeal had been preferred by an aggrieved party and the application and appeal were pending before the appellate authority, then the appellate authority could exercise its discretion with regard to the pre-deposit to be made by such a party under the provision as it stood prior to amendment. But if no appeal had been filed prior to 6/8/2014, then the amended Section 35F would apply although the lis had commenced prior to 6/8/2014 as the amendment has a retrospective effect. The amendment, thus, has no bearing on the date on which the particular lis had commenced. This is for the obvious reason that in each case, the lis would commence on a different date. But the commencement of the amendment must be certain and from a particular date in respect of all lis. In order to ensure that object and in order to have a uniformity in the matter, Parliament has enacted the second proviso to the amended Section 35F. This would mean that in all cases not covered under the second proviso, the main amended Section 35F would apply, irrespective as to when the lis has commenced. Thus, the date on which the lis has commenced in each case has no bearing on the amendment as it has a retrospective effect. Even if the lis had commenced prior to the date of amendment and an appeal had not been filed on that date, even in such a situation, the main amended Section 35F would apply and a pre-deposit as per amended provision would have to be made.*

In the light of the above decision, all cases not covered under the second proviso, the main amendment and main amended Section 35F would apply irrespective of as to when the lis has commenced. The date on which the lis has commenced in each case has no bearing on the amendment as it has retrospective effect and even if the lis has commenced prior to the date of amendment and it had not been filed on that date, even in such a situation the amended Section 35F would apply and a pre-deposit as per amended provision would have to be made. The summary of the conclusions in the said decision is contained in paragraph 34 of the judgement which is reproduced hereunder.

34. Thus, from the aforesaid discussion the findings and the conclusions arrived at could be summarized as under:

(1) *It is held that in the instant case, the right to file an appeal, which is a substantive right granted under Sections 35 and 35B of the Act has not been amended and remains intact. That Section 35F of the Act as amended, consists of a mandatory requirement of pre-deposit for entertaining an appeal before the Appellate Authority i.e., before the Commissioner (Appeals) or the Appellate Tribunal as the case may be, is a piece of procedural legislation and does not fall within the realm of substantive law. Thus, Sections 35 and 35B do not confer an absolute right to file an appeal, but are subscribed or controlled by Section 35F of the Act. Hence, in the instant case, the right to file an appeal under Section 35 or 35B as the case may be is not an absolute right, but a conditional one.*

(2) *In view of a plethora of decisions of the Hon'ble Supreme Court, it is held that in the instant case, the right to file an appeal under Sections 35 and 35B of the Act is in no way affected by the amendment made to Section 35F of the Act requiring pre- deposit to be made at the time of preferring the appeal. Such a condition regarding pre-deposit is made with a view to regulate the exercise of the right of appeal so as to enforce the order appealed against in case the appeal is ultimately dismissed.*

(3) *Section 35F of the Act has retrospective operation and is not restricted to only prospective cases. It applies to all lis which have commenced prior to or after the enforcement of the amendment, except to cases covered under the second provisothereof.*

(4) *That in view of the insertion of second proviso to amended Section 35F of the Act, it is held that the same is in the nature of a saving clause, keeping intact the earlier provision of Section 35F to be made applicable to circumstances noted under the second proviso. That in all other cases not covered under the second proviso, the amended Section 35F is applicable as it has a retrospective operation. Such a legislation by amendment having a retrospective operation is a valid piece of legislation.*

(5) *It is reiterated that the second proviso in amended Section 35F is significant, which was absent in the provisions considered in Hoosien Kasam Dada and Garikapati Veerayya. The provisions of law considered by the Hon'ble Supreme Court in the aforesaid cases being not in pari materia to Section 35F of the Act under consideration and in view of the later judgments of the Hon'ble Supreme Court it is held that the ratio of those decisions are not applicable to the present case.*

(6) *As the amended Section 35F has a retrospective operation and none of the petitioners herein has filed an appeal prior to 6/8/2014 before*

the appellate authority or if the appeal has been preferred subsequently has not deposited the requisite predeposit before the appellate authority, as the case may be, they are required to comply with the conditions of the amended Section 35F.

(7) *The circulars dated 16/9/2014 and 4/10/2014 are also upheld in so far as they are in consonance with this order.*

Thus, following the above decision, the substantial questions of law which were admitted in this appeal are answered against the appellant/assessee and the appeal stands dismissed.

.

(T.S. SIVAGNANAM)
CHIEF JUSTICE

(CHAITALI CHATTERJEE (DAS), J.)

pkd/GH.