IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.01.2016

CORAM:

THE HONOURABLE MR.JUSTICE M.JAICHANDREN
and
THE HONOURABLE MRS.JUSTICE S.VIMALA

C.M.A.Nos.97, 158 and 159 of 2016
and C.M.P.Nos.972, 1345, 1347 of 2016

M/s.Classic Builders (Madras) Pvt. Ltd.,
New No.24, Old No.5, De-Monte Street,
Santhome,
Chennai - 600 004. ... Appellant /Petitioner in all C.M.As.

Vs.

1. The Customs, Excise and Service Tax
Appellate Tribunal,
Shastri Bhavan, Annexe Building,
1st Floor, No.26, Haddows Road,
Nungambakkam,
Chennai - 600 006.

2. The Commissioner of Service Tax,
Service Tax II Commissionerate,
Newry Towers, 12th Main Road,
Anna Nagar,
Chennai - 600 040.

3. The Assistant Commissioner
of Service Tax,
Chennai IV Division,
II Commissionerate,
Newry Towers, 12th Main Road,
Anna Nagar, Chennai - 600 040. ... Respondents/Respondents in all C.M.As.



PRAYER in C.M.A.No.97 of 2016: Civil Miscellaneous Appeal filed under Section 35(G) of Central Excise Act, praying to set aside the Miscellaneous Order No.41282/2015 dated 14.10.2015 passed by the first respondent.

PRAYER in C.M.A.No.158 and 159 of 2016: Civil Miscellaneous Appeal filed under Section 35(G) of Central Excise Act, praying to set aside the Final Order Nos.40471/2013 and 41071/2014 dated

22.10.2013 and 24.06.2014 respectively, passed by the first respondent.

For Appellant in all C.M.As. : Mr.S.Jaikumar

For Respondents in all C.M.As.: Mr.A.P.Srinivas,
Standing counsel for customs

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COMMON JUDGMENT

(Judgment of the Court was delivered by S.Vimala, J.)

For non-compliance of the pre-deposit requirement under Section 129E of the Customs Act, 1962, the (CESTAT) Customs, Excise and Service Tax Appellate Tribunal, dismissed the appeal filed by the Assessee, vide Final Order No.40471/2013 dated 22.10.2013. Challenging the same, C.M.A.No.158 of 2016 has been filed.

1.1. The pre-deposit payable was Rs.65,00,000/-, as against which, the Appellant had paid only a sum of Rs.25,00,000/-. By obtaining a bank loan, a sum of Rs.3,00,000/- was paid by Challan dated 29.11.2013. Thereafter, Miscellaneous Petition was filed seeking permission to deposit the balance amount of Rs.37,00,000/- in instalments. Observing that, there is no provision for allowing to pay the balance in installments, the Tribunal dismissed the petition by passing the Miscellaneous Order No.41071/2014 dated 24.06.2014. This order is under challenge in C.M.A.No.159 of 2016.

1.2. Subsequently, the Appellant paid an amount of Rs.37,00,000/- on various dates and thereafter, filed an application for restoration of appeal, which was dismissed vide Miscellaneous Order No.41282/2015, dated 14.10.2015, observing that the Tribunal had become functus officio after passing the order. Challenging the same, C.M.A.No.97 of 2016 has been filed.

2. As the common question of law is involved in all the three cases, common judgment is pronounced.

3. The following is the substantial question of law raised in the respective cases:

C.M.A.No.158 of 2016

Whether, in the facts and circumstances of the present case, the Tribunal is correct in dismissing the appeal, vide Final Order No.40471/2013 dated 22.10.2013?

C.M.A.No.159 of 2016

Whether, in the facts and circumstances of the present case, the Tribunal is correct in dismissing the petition (permission to deposit the balance amount of Rs.37,00,000/- in installments) by Miscellaneous Order No.41071/2014 dated 24.06.2014?

C.M.A.No.97 of 2016

Whether, in the facts and circumstances of the present case, the Tribunal is correct in dismissing the application for restoration of appeal, vide Miscellaneous Order No.41282/2015 dated 14.10.2015?

4. The contention of the Revenue is that the order passed by the CESTAT is perfectly justified, as the Tribunal had become functus officio, after the passing of the final order and that the Tribunal has no power to restore the appeal, once it is dismissed. The further contention is that the Tribunal has no discretion to reduce the quantum of pre-deposit as it had been permissible, prior to the amendment made to Section 35F of Central Excise Act, 1944.

5. In view of the contentions raised by the Revenue, it is necessary to consider the provisions relating to pre-deposit being made as a condition precedent for maintainability of the appeal.

5.1. The provisions relating to mandatory pre-deposit payments as a pre-requisite for filing first stage and second stage appeals under Customs, Central Excise and Service Tax were introduced in the Finance Act (No.2), 2014 effective from the date of its enactment i.e. 6 August 2014.

5.2. The Finance Act (No.2), 2014, as amended Section 35F of Central Excise Act, 1944, would include mandatory pre-deposit provisions. As per the said provisions, an appeal against the order passed by the lower authority will not be entertained, unless the appellant has made a pre-deposit of 7.5%, in case of first stage appeal and 10% in case of second stage appeal, of the duty, where duty or duty and penalty are in dispute or penalty, where penalty is in dispute. Similar provision for mandatory pre-deposit was introduced in the Customs Legislation, by the Finance Act (No.2), 2014, by amendment of Section 129E of the Customs Act, 1962.

5.3. In Service Tax, the provisions of Section 35F of the Central Excise Act, 1944, as in force from time to time, have been made applicable to Service Tax matters, by virtue of Section 83 of the Finance Act, 1994. Therefore, the amended provisions of section 35F of the Central Excise Act, 1944 shall also apply to matters relating to Service Tax.

5.4. Prior to 6.8.2014, the pre-deposit of percentage of duty confirmed or penalty imposed for filing appeal before the Commissioner (Appeals) or CESTAT was not mandatory and decision in this regard was to be taken by the Commissioner (Appeals) and CESTAT, on the merits of the case. The Appellate Authority was competent to decide the amount of predeposit required to be made by the Appellant, after taking into consideration the merits of the case and / or considering the financial hardship to the assesse as well as to safeguard the interest of the Revenue. This decision was taken by the Commissioner (Appeals) or Tribunal, while considering the application of the Appellant for stay of the order against which he has preferred appeal. The appellate authorities were even competent to order a small amount of predeposit or to waive the predeposit altogether.

5.5. However w.e.f. 06.08.2014, no such discretion is now available with the Commissioner (Appeals) or CESTAT. If the prescribed pre-deposit is not made at the time of filing the appeal, the appeal is liable for rejection.

6. Whether the Tribunal will become functus officio, once the Tribunal passes an order, dismissing the appeal for non-compliance of the condition imposed, is the issue to be considered?

6.1. The meaning of Latin Maxim 'Functus Officio' has been explained with example in P.Ramanatha Aiyar's Law Lexicon (3rd Edition 2012)

Functus officio: (Lat.) - A term applied to something which once has had a life and power, but which has become of no virtue whatsoever. Thus, when an agent has completed the business with which he was entrusted his agency is functus officio. If a bill of exchange be sent to the drawee, and he passes it to the credit of the holder, it is functus officio and cannot be further negotiated; when arbitrators cannot agree and choose an umpire they are said to be functus officio - Cye law Dic. 2 Bouv. Ins. Note 1382.

As soon as a Registration Officer registered a document presented to him for registration, the function in the performance of which the document was produced before him is over and thereafter he becomes Functus Officio, having no power under Section 38 to impound the document, Kamalchand v. State of M.P., AIR 1966 MP 20, 22 (FB). [Indian Stamp Act (2 of 1899), S.33(1)].

6.2. A task performed. Board of School Trustees of Washington City Administrative Unit v. Benner, 22 NC 566, 24, SE

2d 259, 263. Having fulfilled the function, discharged office, or accomplished the purpose, and therefore of no further force or authority. Applied to an officer whose term has expired and who has consequently no further official authority; and also to an instrument, power, agency, etc., which has fulfilled the purpose of its creation, and is therefore of no further virtue or effect. Holmes v. Birmingham Transit Co., 270 Ala. 215, 116, So. 2d 912, 919.

6.3. One who has fulfilled his office or is out of office, an authority who has performed the act authorised, so that the authority is exhausted.

6.4. On the construction of the expression 'functus officio' to the facts of this case, it cannot be said that the Tribunal has become functus officio, once the Tribunal had passed an order, not on merits, not while finally determining the issue and not an order which has merged with the Appellate Court order.

7. The next issue is what is the interpretation to be given to the expression 'functus officio' with reference to the functioning of the Tribunal. While interpreting the tax law, the functioning of the State as a welfare state and the impact of tax law upon the life of the citizen have to be taken into account and it has to be balanced also.

7.1. Tax laws have an impact on every citizen's life, who pays taxes or who does not even pay any direct taxes because indirect taxation affects the life of everyone.

7.2. The needs of governance in a police State are limited but those in a welfare State are far more and which is understandable.

7.3. That is an area which requires serious reflection by everyone concerned with the framing of the tax laws and their implementation. It has been said, even in the ancient texts while describing the taxing power of the king, the political sovereign, that a good king is he who draws in the form of taxes from the subjects only as much as a bee draws honey from a flower so that the sustenance of the flower is not endangered.

8. It is appropriate to quote Arthashastra.

"Taxation should not be a painful process for the people. There should be leniency and caution while deciding the tax

structure. Ideally, Governments should collect taxes like a honeybee, which sucks just the right amount of honey from the flower so that both can survive. Taxes should be collected in small and not in large proportions."

8.1. Honourable Justice J.S.Verma, while delivering the lecture on Constitutional obligation of the Judiciary, said that the tax policy and imposition of tax should be like the Sun drawing vapour from the river, the water resources to return it back manifold to the earth itself.

8.2. When the policy of taxation is expected to be painless, no need to point out that the procedure to be adopted to challenge the imposition of tax should also be painless. There is a duty to obey the law, but Ciero said, The Chief Law is public good. While interpreting the law, the constitutional goal and constitutional purpose has to be kept in mind.

8.3. The constitutional obligation is to provide access to justice to the citizens. It is the duty of the Court to ensure that the function of law is to ensure justice. If procedure is the handmaid of justice and not the mistress of the justice and if the handmaid is entrusted with the power of mistress, then, the consequences will be disastrous. Therefore, substantive justice cannot be permitted to take the back seat, allowing the procedure to occupy the front seat.

9. The learned counsel for the Assessee would submit that the right to prefer an appeal is a statutory right touching the substantive right of the parties, while the provisions relating to pre-deposit is procedural in nature and that the procedural law is only a handmaid of justice and not the mistress of justice; so contending, the learned counsel for the Assessee would submit that having regard to the huge amount of pre-deposit to be made and also having regard to the financial hardship of the appellant (widow), the Tribunal should have been lenient in granting time and in any event, the Tribunal should have restored the appeal having regard to the merits of the claim involved in the main case.

9.1. It is contended by the learned counsel for the Assessee that the Assessee has a very good case, on merits, and in support of this contention, the learned counsel relied upon the decision reported in 2015 TIOL 187 SC ST (Larsen & Turbo Ltd. vs. CCE, Vadodara-II), wherein, it has been held that indivisible works contract are not taxable prior to 01.06.2007 and in view of the same, the Service Tax demand confirmed against the Assessee for the period prior to 01.06.2007 is not sustainable. The further contention is that having regard to the merits available in the main case, the Court should have accepted the belated pre-deposit made and should have afforded

an opportunity to agitate the appeal on merits.

9.2. It is further contended by the learned counsel for the assessee that the demand for service tax confirmed against the Assessee in respect of construction of residential complex is not sustainable for the period upto 01.07.2010, in view of the decision reported in 2014 TIOL 1491 (Jain Housing vs. CST, Chennai), where-under, this Court held that when the individual buyer is buying the flat only for his personal use, the same is not liable for service tax; similar view has been taken in the case of Josh P.John and others vs. CST (2014 TIOL 1753 Tri Bang). The grounds taken on merits and the supporting decisions relied upon give an indication that the Assessee has an arguable case on merits. This is one of the main factors to be considered, while considering an application for restoration.

9.3. It is pointed out by the learned counsel for the appellant / assessee that the decision relied upon, i.e. 2013 297 ELT A15 (SC) (Lindit Exports vs. Commissioner), by the CESTAT, is not applicable to the facts of this case. In the said case, the direction to pre-deposit of Rs.2.5 crore was taken in appeal; appeal was dismissed for non-compliance of the conditional order of stay; four years after the dismissal order, direction to pre-deposit was complied with and thereafter, the petition for restoration of appeal was filed; the Tribunal allowed the application; when it was challenged, the High Court held that the Tribunal had become functus officio and had no jurisdiction to entertain the application preferred for restoration of appeal; the said order was confirmed by the Apex Court.

It is to be pointed out that the Delhi Court, in the impugned Judgment held that once the Tribunal's order in dismissing appeal for failure to make pre-deposit is upheld by the High Court, it merges with the order of the High Court and attains finality and thus, the Tribunal becomes functus officio and there is no jurisdiction for restoration of appeal.

But, the cases on hand stand on a different footing. There is no merger of the order of the Tribunal with the order of the High Court. Challenge as to the dismissal of the restoration application, is under consideration. Therefore, as rightly contended by the learned counsel for the Assessee, the Tribunal did not become functus officio and the Tribunal has incorrectly relied upon the decision of Lindt Exports' case.

It is also pointed out that this Judgment has been distinguished by the same High Court, in the case of Handloom only vs. Commissioner of Customs, reported in 2014 307 ELT 106 (Delhi), wherein, it was held that this decision is not an

authority that in every case,where the order achieved finality, the Tribunal is bereft of jurisdiction.

9.4. It is contended by the learned counsel for the appellant that restoration of appeal which was dismissed for non-compliance of the stay order by the Tribunal does amount to review and Tribunal has power and jurisdiction to recall its order, in the ends of justice, as required in terms of Rules 20 and 41 of CESTAT (Procedure) Rules, 1982. The said Rules is reproduced hereunder:-

(i) Rule 20 - Action on appeal for appellant's default:

> Where on the day fixed for the hearing of the appeal or on any other day to which such hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Tribunal may, in its discretion, either dismiss the appeal for default or hear and decide it on merits: Provided that where an appeal has been dismissed for default and the appellant appears afterwards and satisfies the Tribunal that there was sufficient cause for his non-appearance when the appeal was called on for hearing, the Tribunal shall make an order setting aside the dismissal and restore the appeal.

(ii) Rule 41 - Orders and directions in certain cases:

> The Tribunal may make such orders or give such directions as may be necessary or expedient to give effect or in relation to its orders or to prevent abuse of its process or to secure the ends of justice.

9.5. Contending that the Tribunal has jurisdiction to recall its own order, to meet the ends of justice, the following decisions are relied upon by the learned counsel for the appellant :

(i) Hussein Haji Harun vs. Union of India (1995 (77) ELT 803 (Guj)).

> "It cannot be gainsaid that when the Act or the Rules in question do not specifically prohibit restoration of an appeal dismissed on the ground of non-deposit of the amount, the Tribunal certainly has the power and jurisdiction to recall its earlier order, if the ends of justice require such a course of action. It is more so because while dismissing the appeal on the ground of non-deposit of the amount, the Tribunal did not determine any issue or dispute and so

there was no question of reviewing the earlier decision in the present case. It is not possible to regard such order of dismissal as a final order."

(ii) Scan Computer Consultancy Vs. Union of India (2006 (204) E.L.T. 43 (Guj))

"Needless to state that, by mere default in making deposit as directed, the appellant does not stand to gain anything and only delays his right to have his case adjudicated. Nor does such a delay in making pre-deposit cause any justice prejudice to the revenue, in absence of any stay operating in favour of the appellant. It cannot be lost sight of that right of appeal is statutorily granted and it is hedged in by the requirement to make pre-deposit as directed by the appellate authority, as being a condition for hearing of the appeal on merits. However, that condition cannot be used by the appellate authority for the purposes of denying an appellant the right of adjudication which is otherwise statutorily granted. In a given case, even if no pre-deposit is made, the appeal may not be heard, but having dismissed the appeal for non-compliance of pre-deposit does not permit the appellate authority to refuse to restore the appeal upon compliance being shown."

(iii) Commissioner of Customs & Central Excise, Goa vs. Pankaj Jaju (2014 (313) ELT 5 (Bom.))

"As it has been held by the Apex Court in the case of J.K.Synthetics Ltd. (supra), under Rule 41, the CESTAT has wide powers to prevent abuse of its process and to secure the ends of justice. As such, though the application was filed under Rule 20, it will have to be held that jurisdiction exercised by the learned Tribunal was under Rule 41 of the said Rules. Apart from that, the similar view has been taken by the Division Bench of Gujarat High Court in the aforesaid three matters, stating therein that in the absence of any provision in the Act or Rules specifically prohibiting restoration of appeal dismissed on the ground of non-deposit of penality, the learned Tribunal has a power and jurisdiction to recall its order, if ends of justice require such course of action."

(iv) Venus Electronics and Control Pvt. Ltd. vs. CC, Kandla (2006 (198) ELT 547 (Tri – Mum))

While allowing the application filed for restoration of appeal following the judgment of the Apex Court in the case of Inventa Electronics Pvt. Ltd. as reported at 2004 (168) ELT A121 (SC), it was observed that "since right to appeal is a statutory right and pre-deposit requirement under Section 129E are only in nature of procedural requirements therefore for delay in meeting the pre-deposit requirement, the primary right of appeal cannot be extinguished."

10. From the decisions relied upon by the learned counsel for the Assessee, it is clear that it is not for the Tribunal to state that the Tribunal has no jurisdiction to hear it, but it has no jurisdiction to refuse to hear it, once the procedural requirement of pre-deposit is complied with. The legal reasoning, in support of that, runs as follows:

(a) When the Act or the Rules in question do not specifically prohibit restoration of an appeal, dismissed on the ground of non-deposit of the amount, the Tribunal certainly has the power and jurisdiction to recall its earlier order, if the ends of justice require such a course of action.

(b) When Rule 20 provides for restoration of appeal in case when the appeal is dismissed for default, there is no reason as to why the power of restoration should not be exercised in case of non-compliance with the provision for pre-deposit.

(c) even if no pre-deposit is made, the appeal may not be heard, but the dismissal of the appeal for non-compliance of pre-deposit does not permit the appellate authority to refuse to restore the appeal upon compliance being shown.

(d) under Rule 41, the CESTAT has wide powers to prevent abuse of its process and to secure the ends of justice.

(e) since right to appeal is a statutory right and pre-deposit requirement under Section 129E of the said Act are only in nature of procedural requirements, but for delay in meeting the pre-deposit requirement, the primary right of appeal cannot be extinguished.

10.1. From the case law discussed, it is apparent that the Tribunal cannot deprive the substantive right of the party to prefer the appeal on the mere ground that there is violation of procedure. Therefore, the order of the Tribunal, dismissing the restoration application and the order dismissing the appeal itself are liable to be set aside.

10.2. Considering the claim of availability of merits, the quantum of tax under challenge, and the financial distress

pleaded, it is just and necessary that the appellant should be allowed to present her case on merits in the appeal. It is ordered accordingly.

11. In the result:

(i) C.M.A.No.158 of 2016 is allowed. Final Order No.40471/2013 dated 22.10.2013 is set aside.

(ii) C.M.A.No.159 of 2016 is allowed. Miscellaneous Order No.41071/2014 dated 24.06.2014 is set aside. However, as the condition of pre-deposit has been subsequently complied with, by depositing the balance sum of Rs.37,00,000/-, no further orders are required in the application for permission to deposit and it is dismissed as infructuous as this stage.

(iii) C.M.A.No.97 of 2016 is allowed. Miscellaneous Order No.41282/2015 dated 14.10.2015 is set aside. The application to restore the appeal stands allowed. The appeal by the Assessee is ordered to be heard afresh. The Tribunal is directed to take the appeal on file and dispose of the same, on merits and in accordance with law, as expeditiously as possible, after affording opportunity to both sides to present their case.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

To
1. The Customs, Excise and Service Tax
Appellate Tribunal,
Shastri Bhavan, Annexe Building,
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+1 cc to Mr.A.P.Srinivas Advocate sr.6024
+1 cc to Mr.S.Jaikumar Advocate sr.5930

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