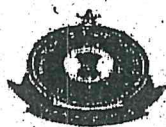


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OFFICE OF
THE COMMISSIONER OF CUSTOMS, CENTRAL EXCISE & SERVICE TAX (APPEALS-II)
7th FLOOR, KENDRIYA SHULK BHAVAN, L.B. STADIUM ROAD,
BASHEER BAGH, HYDERABAD - 500004.

Appeal No.201/2012 (H-II)STax

Date: 21.12.2012

ORDER- IN -APPEAL No. 187/2012 (H-II) S.Tax
(Passed By Dr. S.L. Meena Commissioner of Customs, Central Excise &
Service Tax (Appeals-II), Hyderabad)

PREAMBLE

This copy is granted free of cost for the private use of the person to whom it is issued.

2. Any assessee aggrieved by this order may file an appeal under Section 86 of the Finance Act, 1994 to the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, 1st Floor, WTC Building, FKCCI Complex, Kemp Gowda Road, Bangalore-560 009.
3. Every appeal under the above Para (2) shall be filed within three months of the date on which the order sought to be appealed against is received by the assessee, the Board or by the [Commissioner] of Central Excise, as the case may be.
4. The appeal, as referred to in Para 2 above, should be filed in S.T.5/S.T.-7 proforma in quadruplicate; within three months from the date on which the order sought to be appealed against is communicated to the party preferring the appeal and should be accompanied by four copies each (of which one should be a certified copy), of the order appealed against and the Order-In-Original which gave rise to the appeal.
5. The appeal should also be accompanied by a crossed bank draft drawn in favour of the Assistant Registrar of the Tribunal, drawn on a branch of any nominated public sector bank at the place where the Tribunal is situated, evidencing payment of fee prescribed in Section 86 of the Act. The fees payable are as under:
 - (a) where the amount of service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is five lakh rupees or less, one thousand rupees;
 - (b) where the amount of service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is more than five lakh rupees but not exceeding fifty lakh rupees, five thousand rupees;
 - (c) where the amount of service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is more than fifty lakh rupees, ten thousand rupees.No fee is payable in the case of Memorandum of Cross Objection referred to in Sub-Section 4 of Section 86 Ibid.
- 5A. Every application made before the Appellate Tribunal,
 - (a) in an appeal for grant of stay or for rectification of mistake or for any other purpose; or
 - (b) for restoration of an appeal or an application shall be accompanied by a fee of five hundred rupees.No fee is payable in case of an application filed by Commissioner under this sub-Section.
6. The appeal should be filed within three months from the date of communication of the order.
7. Attention is invited to the provisions governing these and other related matters, contained in the Central Excise Act, 1944 and Central Excise Rules, 2002 and the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982.

The subject appeal along with stay petition filed by M/s Paramount Builders, 5-4-187/3&4, 2nd Floor, M.G.Road, Secunderabad-500 003 (hereinafter referred to as Appellants) against Order-in-Original No. 50/2012-Adjn.(ST) dated 31.08.2012 passed by the Additional Commissioner of Service Tax, Hyderabad-II Commissionerate (hereinafter referred to as Respondent), wherein the lower authority confirmed the demand of service tax of Rs. 4,46,403/- for the period Jan., 2010 to Dec., 2010 in respect of SCN O.R.No. 60/2011-Adjn.(ST) dt. 23.04.2011 under Section 73(2) of the Finance Act, 1994 (FA); confirmed demand of applicable interest under Section 75 of FA and also imposed penalty of Rs. 200/- per day or at the rate of 2% of such tax per month, which ever was higher, for the period of default till the date of payment, under Section 76 and also imposed a penalty of Rs. 1,000/- under Section 77 of the FA. Further in respect of SCN O.R.No. 54/2012-Adjn.(ST) dt. 24.4.2012, the lower authority confirmed the demand of service tax of Rs. 46,81,850/- for the period Jan., 2011 to Dec., 2012 under Section 73(2) of the Finance Act, 1994 (FA); confirmed demand of applicable interest under Section 75 of FA and also imposed penalty of Rs. 200/- per day or at the rate of 2% of such tax per month, which ever was higher, for the period of default till the date of payment, under Section 76 and also imposed a penalty of Rs. 1,000/- under Section 77 of the FA. A corrigendum C.No. IV/16/35/2012-S.Tax(Gr.X), O.R. Nos. 60/2011-Adj.(ST)ADC & O.R.No. 54/2012-Adjn(ST)ADC dt. 18.9.2012 was issued correcting the amount demanded under O.R.No. 54/2012 as Rs. 2,05,658/-.

2. Brief facts of the case are that the appellants are engaged in providing works contract service. Verification of their records revealed that they had undertaken a single venture by name M/s Paramount Residency located at Nagaram Village, Keesara Mandal R.R. District and received amount from customers towards sale of land and agreement of construction of 122 flats for the period Jan., 2010 to Dec., 2010. It was also found that the appellant had not filed ST.3 returns for the said period. The subject venture of M/s Paramount Builders qualified to be a residential complex as it contained more than 12 residential units with common area and common facilities like park, common water supply etc. and the lay out was approved by HUDA. From the records verified it was found that the appellant entered into a sale deed for sale of undivided portion of land together with semi-finished portion of the flat and an agreement for construction with their customers. On execution of sale deed the right in a property got transferred to the customer, hence the construction service rendered by the appellant thereafter to their customers under agreement of construction were taxable under service tax as there existed service provider and receiver relationship between them. The total amount received by the appellant towards such service was Rs. 1,08,35,016/- during the period Jan., 2010 to Dec., 2010 and the service tax including cess worked out to Rs. 4,46,403/-. Therefore it appeared that the appellants in spite of being well aware of the provisions and liability of service tax did not assess and pay the service tax with an intention to evade payment of service tax and also did not file ST.3 returns for the said period, thereby become liable for recovery under sub-section(1) of Section 73 of the FA. Therefore two show cause notices were issued to the appellants covering the period Jan., 2010 to Dec., 2010 vide O.R.No. 60/2011-Adj(ST)Gr.X dt. 23.4.2011 for Rs. 4,46,403/- along with interest and proposing penal action and for the period Jan., 2011 to Dec., 2011 vide O.R.No. 54/2012-Adj(ST)Gr.X dt. 24.4.2012 for Rs. 2,05,658/- along with interest and proposing penal action. As the issue involved was same, the lower authority took up disposal of both the SCNs and confirmed them vide the impugned order and later issued a corrigendum dt. 18.9.2012, as

mentioned in para 1 above. Aggrieved by the Impugned order, the appellant filed the subject appeal along with stay petition.

3. A Personal hearing was granted on 26.11.2012. CA Sudhir V.S. along with Shri M.Jaya Prakash, Manager, Accounts & Finance appeared and reiterated the submissions made in the grounds of appeal. Further submitted that the total demand for two SCNs of Rs. 6,52,061/- is as per the impugned OIO but the same should be Rs. 3,59,486/- as per their books of accounts. Requested to take lenient view with regard to pre-deposits. After going through grounds put forth by the appellants regarding waiver of pre-deposits in their grounds of stay petition as well as during personal hearing, an Order-in-Stay Petition No. 64/2012(H-II)S.Tax dated 07.12.2012 was issued directing the appellants to deposit the total tax amounts as confirmed i.e. Rs. 4,46,403/- and Rs. 2,05,658/- vide the impugned order by 17.12.2012. However pre-deposit of the interest and penalties were waived. It was also categorically mentioned in para 5 of OISP that if they do not comply with the conditions of pre-deposit, the appeal will be disposed of without any further opportunity of hearing. The appellants have not complied with the conditions of the Order in Stay Petition instead they have filed a petition seeking modification of the above mentioned stay order.

4. I have gone through the records of this appeal, the OISP issued. The point for determination before me is whether or not the appeal filed by the appellants is liable for dismissal for non-compliance of conditions OISP is correct or not?

4.1. Before deciding the issue on hand, it is pertinent to examine the following relevant statutory provisions

SECTION 35F: Deposit, pending appeal, of duty demanded or penalty levied. — Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of Central Excise authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied :

Provided that where in any particular case, the [Commissioner (Appeals)] or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the [Commissioner (Appeals)] or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue.

Provided further that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so, decide such application within thirty days from the date of its filing.

4.3 I find that as per the above statutory provisions, it is clear and evident that waiver of deposit is a discretionary power vested with the Commissioner (A). By exercising the power vested in Section 35F of CEA, 1944 and also taking into consideration the facts and circumstances of the case, the stay petition has to be disposed of on its own merit. I also find that there is no scope of modification in case of stay order passed by the same authority. **Therefore by taking note of the statutory provisions, it is to be construed that Section 35 F is a provision stipulating condition for maintaining of appeal.**

4.4. In addition to the above, I also hold that in each case a balance between the interest of the exchequer and what is just and fair, has to be drawn keeping in view the nature of the controversy. Therefore directions to deposit the tax amount as confirmed by the lower authority

in the impugned order and waiver of interest and the penalty is as per the discretionary powers vested in Section 35F. In this regard, I rely and draw support from the following judgement rendered by the jurisdictional Hon'ble High Court in the case of Sri.Chaitanya Educational Committee vs CCE, Guntur reported in 2011 (22) STR 135 (AP) wherein it was held that 7 principles to be kept in mind while considering stay applications or dispensing with pre-deposit and the same is reproduced hereunder:

4.5 From the judicial decisions analyzed as above, the following principles would emerge which have to be kept in mind while considering the applications for stay or for dispensing with the requirement of pre-deposit under Section 35F of the Central Excise Act, or under Section 129E of the Customs Act, or other similar provisions.

- (1) The applications for stay should not be disposed of in a routine manner unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand;
- (2) Three aspects to be focused while dealing with the applications for dispensing of pre-deposit are : (a) *prima facie* case, (b) balance of convenience, and (c) irreparable loss;
- (3) Interim orders ought not to be granted merely because a *prima facie* case has been shown;
- (4) The balance of convenience must be clearly in favour of making of an interim order and there should not be the slightest indication of a likelihood of prejudice to the interest of public revenue;
- (5) While dealing with the applications twin requirements of consideration i.e., consideration of undue hardship, and imposition of conditions to safeguard the interests of revenue have to be kept in view;
- (6) When the Tribunal decides to grant full or partial stay, it has to impose such conditions as may be necessary to safeguard the interests of the revenue. This is an imperative requirement; and
- (7) An appellate Tribunal, being a creature of the statute, cannot ignore the statutory guidance while exercising general powers or expressly conferred incidental powers.

The above case law has been relied by the jurisdictional Hon'ble High Court in the case of M/s.Sanghi Polymers Pvt Ltd vs CCE, Hyderabad reported in 2011-TIOL-858-HC-AP-CX wherein it was held that no infirmity is discernable with the impugned order passed by the Commissioner (A) directing for pre-deposit of certain amounts.

5. Therefore it is evident that the appellant has failed to comply with the conditions of the stay petition. They also failed to produce any evidence in support of deposit of tax amount. The appeal is therefore liable to be dismissed for non-compliance under Section 35F of the Central Excise Act, 1944.

6. In this regard, I place reliance on the ratio of the following decisions :

- (i) 2011 (271) E.L.T. 75 (Tri. - Mumbai)- LIZER TECHNOLOGIES LTD. vs COMMISSIONER OF C. EX., BELAPUR

It is duty of appellant-assessee to deposit amount demanded under order passed by adjudicating authority - Waiver thereof or part thereof is in discretion of appellate authority

to be exercised judicially based on facts pleaded by party - Section 35F of Central Excise Act, 1944. [para 6]

(ii) 2009 (243) E.L.T. 420 (Tri. - Del.) - IN THE CESTAT, PRINCIPAL BENCH, NEW DELHI
D.K. MISHRA vs COMMISSIONER OF CENTRAL EXCISE, ALLAHABAD

When statute regarding pre-deposit mandates that failure in that regard shall result in dismissal of appeal or that obligation regarding pre-deposit is a pre-condition for hearing the appeal on merits, the authorities constituted under the statute cannot travel beyond the statutory provisions -

7. Having regard to the above discussion and facts, I dismiss the appeal filed by the appellants for failure to comply with the provisions of Section 35F of CEA without further going into merits.

(Dr.S.L.Meena)

Commissioner(Appeals-II)
 Customs Central Excise & Service Tax
 Hyderabad

To

1. M/s Paramount Builders, 5-4-187/3&4, 2nd Floor, M.G.Road, Secunderabad-500 003
2. The Additional Commissioner of Service Tax, Hyderabad-II Commissionerate..
3. CA Sudhir V.S., M/s. Hiregange Associates, Basheervilla, H.No. 8-2-268/1/16/B, 2nd Floor, Sriniketan Colony, Rd. No. 3, Banjara Hills, Hyderabad-500 034.

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1. The Chief Commissioner of Customs & Central Excise, Hyderabad Zone, Hyderabad.
2. The Commissioner of Central Excise, Hyderabad II Commissionerate, Hyderabad.
3. Master Copy.