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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **WRIT PETITION (CIVIL) No. 4551/2017**

Reserved on : 16th February, 2018
Date of decision: 31st May, 2018

M/S SANTANI SALES ORGANISATION ..... Petitioner
Through Mr. J. K. Mittal, Advocate.

versus

CENTRAL EXCISE, CUSTOMS AND SERVICE TAX APPELLATE TRIUBNAL, DELHI AND OTHERS ..... Respondents
Through Mr. Rajender Sahu, Advocate for respondent Nos. 1 & 3.
Mr. Harpreet Singh, Sr. Standing Counsel for Respondent No. 2.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J.:

Question raised in the present writ petition is whether as per Section 35F of the Central Excise Act, 1944 (C.E. Act, for short) the petitioner-assessee on filing of second appeal before the Central Excise, Customs and Service Tax Appellate Tribunal (Tribunal, for short) is required to make an additional pre-deposit of 10% of the duty and penalty in dispute, over and above 7.5% pre-deposit made for filing of first appeal before the Commissioner (Appeals).

2. The petitioner contends that they are required to make pre-deposit of the balance 2.5%, of the duty and penalty, i.e., difference between 10% as mandated for filing of second appeal before the Tribunal and 7.5% as mandated for filing of first appeal before the Commissioner (Appeals).

3. The petitioner has challenged validity of circular dated 27th April, 2017 issued by the Tribunal, based on the larger Bench decision of the Tribunal in ***In Re: Quantum of Mandatory Deposit,*** reported as 2017 (349) ELT 477 (Tri.-LB), stipulating that while preferring an appeal against an order of Commissioner (Appeals), the appellants are required to deposit 10% of the amount of duty and penalty imposed and confirmed separately and over and above pre-deposit of 7.5% for filing first appeal before Commissioner (Appeals).

4. Second contention of the petitioner is that requirement of pre-deposit mandated vide Section 35F of the C.E. Act, does not apply to service tax appeals preferred under Sections 85 and 86 of the Finance Act, 1994.

5. In view of the limited controversy and question for consideration, we need not refer to the factual matrix in detail, except notice that the writ petitioner - M/s Santani Sales Organisation has preferred second appeals bearing Nos. ST 52898/2016 and ST 50372/2017 before the Tribunal against the orders passed in the first appeal by the Commissioner (Appeals). Disputed duty demand including Education and Secondary and Higher Education Cess confirmed by Commissioner (Appeals) under challenge in Appeal No. ST 52898/2016 is Rs.15,05,046/- and Rs.27,46,819/-, and in Appeal No. ST 50372/2017 is Rs.24,44,138/-. The petitioner had deposited

7.5% of the total duty and cess demand, amounting to Rs.3,19,000/- and Rs.1,83,310/- respectively for the two appeals, as a pre-deposit before the Commissioner (Appeals). While filing the second appeal before the Tribunal, the petitioner made a further deposit of 2.5% of the duty and cess demand under challenge of Rs.1,06,296/- and Rs.61,000/- respectively in order to reach a figure of 10% of the disputed tax demand.

6. The contention of the respondent-Revenue is that in terms of Section 35F of the C.E. Act, which is applicable to appeals before the Tribunal against adjudication orders-in-original and appeals against the first appellate orders, there has to be a fresh and separate deposit of 10% of total tax demand and/or penalty in dispute. In other words, in case of second appeal, the assessee would have to deposit 10% of the disputed duty demand and penalty in addition to the pre-deposit of 7.5% already made before the first appellate authority. Therefore, 17.5% of the duty demand and penalty has to be paid.

7. In order to decide the controversy, we would like to reproduce Section 35F of the C.E. Act, as it exists, after amendment made vide Finance (No. 2) Act, 2014. The Section reads:-

> "**35F. Deposit of certain percentage of duty demanded or penalty imposed before filing appeal**.-The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal—
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> (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;

(ii) against the decision or order referred to in clause (a) of sub-section (1) of section 35B, 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 the decision or order appealed against;

(iii) against the decision or order referred to in clause (b) of sub-section (1) of section 35B, unless the appellant has deposited ten 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 the decision or order appealed against:

Provided that the amount required to be deposited under this section shall not exceed rupees ten crores:

Provided further that the provisions of this section shall not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

Explanation.— For the purposes of this section "duty demanded" shall include,—

(i) Amount determined under section 11D;

(ii) Amount of erroneous Cenvat credit taken;

(iii) Amount payable under rule 6 of the Cenvat Credit Rules, 2001 or the Cenvat Credit Rules, 2002 or the Cenvat Credit Rules, 2004."

Section 35F requires mandatory deposit of specified percentage of duty demanded or penalty imposed before filing an appeal and stipulates that the Tribunal or Commissioner (Appeals) shall not entertain any appeal, unless pre-deposit of 7.5% or 10%, as the case may be, has been made. The

said provisions are not applicable to stay applications or appeals pending before any appellate authority prior to commencement of the Finance (No. 2) Act, 2014.

8. In order to interpret these clauses and the requirements stipulated therein, we would like to first reproduce Section 35B(1) of the C.E. Act, which reads as under:-

> **"Section 35B. Appeals to the Appellate Tribunal. -**
> (1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order -
> (a) a decision or order passed by the Principal Commissioner of Central Excise or Commissioner of Central Excise as an adjudicating authority;
> (b) an order passed by the Commissioner (Appeals) under Section 35A;
> (c) an order passed by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) (hereafter in this Chapter referred to as the Board) or the Appellate Principal Commissioner of Central Excise or Commissioner of Central Excise under Section 35, as it stood immediately before the appointed day;
> (d) an order passed by the Board or the Principal Commissioner of Central Excise or Commissioner of Central Excise , either before or after the appointed day, under Section 35A, as it stood immediately before that day :
> ***Provided*** that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to, -
> (a) a case of loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory, or from one warehouse to another, or during the course of processing of the

goods in a warehouse or in storage, whether in a factory or in a warehouse;

(b) a rebate of duty of excise on goods exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India;

(c) goods exported outside India (except to Nepal or Bhutan) without payment of duty ;

(d) credit of any duty allowed to be utilised towards payment of excise duty on final products under the provisions of this Act or the rules made thereunder and such order is passed by the Commissioner (Appeals) on or after the date appointed under Section 109 of the Finance (No. 2) Act, 1998:

Provided further that the Appellate Tribunal may, in its discretion, refuse to admit an appeal in respect of an order referred to in clause (b) or clause (c) or clause (d) where -

(i) in any disputed case, other than a case where the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved;

(ii) the amount of fine or penalty determined by such order, does not exceed Two lakh rupees;"

9. As per clause (a) to Section 35B (1), any person aggrieved by an order or decision of the Principal Commissioner of Central Excise or Commissioner of Central Excise as the adjudicating authority, can file an appeal before the Tribunal. In terms of clause (ii) of Section 35F, the appellant, while filing an appeal against order referred to in clause (a) of sub-section (1) of Section 35B, is required to deposit 7.5% of the duty, or duty and penalty, or penalty, which is in dispute.

10. As per clause (b) to sub-section (1) of Section 35B, an assessee can also file an appeal before the Tribunal against an order passed by the Commissioner (Appeals), which is the first appellate authority in some cases. As per clause (iii) of Section 35F, where an appeal is preferred against an order referred to in clause (b) to sub-section (1) of Section 35B, the appellant has to deposit 10% of the duty, or duty and penalty, or penalty, which is in dispute in pursuance of the decision and order appealed against. The distinction between clause (ii) and clause (iii) of Section 35F is predicated on whether an appeal has been preferred against the order-in-original or against the order passed by the first appellate authority, i.e., Commissioner (Appeals). In the former case, 7.5% of the duty and penalty which is in dispute is to be pre-deposited. In the latter case, 10% of the duty and penalty in dispute has to be pre-deposited. Thus, Section 35F draws distinction on the quantum of pre-deposit depending on whether the appeal is the first or the second appeal. In case decision of the first appellate authority is challenged before the Tribunal, the pre-deposit is to be at the higher figure of 10%, as opposed to a pre-deposit of 7.5%, which is required to be made when the order-in-original is challenged in the first appeal before the Tribunal.

11. Clause (1) of Section 35 relates to appeals before Commissioner (Appeals). Section 35(1) of the C.E. Act reads as under:-

> **"Section 35. Appeals to Commissioner (Appeals). -**
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> (1) Any person aggrieved by any decision or order passed under this Act by a Central Excise Officer, lower in rank than a Commissioner of Central Excise , may appeal to the

> Commissioner of Central Excise (Appeals) hereafter in this Chapter referred to as the Commissioner (Appeals) within sixty days from the date of the communication to him of such decision or order :
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> ***Provided*** that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days."

As per clause (i) of Section 35F, the appellant-assessee is required to deposit 7.5% of the duty and penalty in dispute pursuant to the order passed by an officer below the rank of Principal Commissioner or Commissioner of Central Excise.

12. It is clear from the aforesaid provisions that a graded scale of pre-deposit has been provided. In case of first appeal, whether before the Tribunal or before the Commissioner (Appeals), 7.5% of the duty and penalty in dispute must be deposited. In case of second appeal before the Tribunal, the amount gets enhanced from 7.5% to 10%.

13. An appeal, whether first or second, is continuation of original proceedings. Further, appeal being a substantive right created by the statute can be circumscribed by the conditions imposed by the Legislature, including condition of pre-deposit. However, there are rulings that condition of pre-deposit should not be so onerous and harsh so as to amount to an unreasonable restriction, thereby rendering and making the right of appeal illusory and delusive [See ***Seth Nand Lal And Another Vs. State of Haryana And Others*** AIR 1980 SC 2097 and ***Mardia Chemicals Ltd. And***

Others Vs. Union of India And Others (2004) 4 SC 311]. In Law and practice appeals are remedial right of critical importance because it empowers the superior forum or court to come to the aid and redress error and mistakes of the authority or courts below (See ***Sita Ram And Others Vs. State of Uttar Pradesh*** AIR 1979 SC 745). Appellate Courts and Tribunals in accord and in terms of the discretion vested by the statute and depending on factual matrix would not impose conditions which are disproportionate as to pare down this right to invoke a remedy and correct any error and, therefore, violate the provisions creating the right i.e. reducing the right to appeal to a farce and rendering it unrealistic. What would be harsh, onerous and disproportionate depends on the facts and circumstances of each case and what is stipulated and mandated by the statute.

14. It would be appropriate here to refer to the two judgments of the Supreme Court on the question of court fees in ***Lakshmi Ammal Vs. K.M. Madhavakrishnan And Others,*** (1978) 4 SCC 15, and ***Gujarat State Financial Corporation Vs. Natson Manufacturing Co. Pvt. Ltd. And Others*** (1979) 1 SCC 193. In ***Lakshmi Ammal*** (supra) it was observed as under:

> "**2.** It is unfortunate that long years have been spent by the courts below on a combat between two parties on the question of court fee leaving the real issues to be fought between them to come up leisurely. Two things have to be made clear. Courts should be anxious to grapple with the real issues and not spend their energies on peripheral ones. Secondly, the court fee, if it seriously restricts the rights of a person to seek his remedies in courts of justice, should be strictly construed. After all access to

> justice is the basis of the legal system. In that view, where there is a doubt, reasonable, of course, the benefit must go to him who says that the lesser court fee alone be paid."
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> (emphasis supplied)

In ***Gujarat State Financial Corporation*** (supra) it was observed as under:

> "**11.** ……Let it be recalled at this stage that if the Court Fees Act is a taxing statute its provisions have to be construed strictly in favour of the subject litigant (vide *State of Maharashtra*v. *Mishri Lal Tarachand Lodha*). In a taxing statute the strict legal position as disclosed by the form and not the substance of the transaction is determinative of its taxability [vide *Joint Commercial Tax Officer, Harbour Div. II, Madras* v. *Young Men's Indian Association (Regd.), Madras*]. If it is a fee, the enormity of the exaction will be more difficult to sustain. While we do not pronounce, we indicate the implication of the High Court's untenable view.
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> **15.** When dealing with a question of court fee, the perspective should be informed by the spirit of the magna carta and of equal access to justice which suggests that a heavy price tag on relief in Court should be regarded as unpalatable."
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> (emphasis supplied)

These decisions relate to interpretation of Statutes imposing court fees and taxing enactments on charging provisions in general. Charging provision of the taxing law must be strictly construed. In taxing enactment one should normally look at what is said in the provision, without reading anything into it impliedly or on the basis of presumption, for there is no

room for any intendment [***Federation of A.P. Chambers of Commerce of Industry Vs. State of A.P***, (2001) 247 ITR 36 (SC)]. We would keep the said principles in mind while interpreting the provisions of law relating to pre-deposit which curtails the right to appeal.

15. Language of Section 35F of the C.E. Act is unchallenging and meaning of words and conditions placed is plain and lucid. Requirement is to pre-deposit 7.5% of the duty and penalty in dispute; and in case of the second appeal pre-deposit of 10% of the duty and penalty in dispute is mandated. We say so because of syntactic and adverbial clarity which is apparent. The provision suffers from no ambiguity and is not open to diverse interpretations. Section 35F of the C.E. Act should not be construed by adding or substituting words to clarify and ironout assumed doubts. Intent as cogently reflected in simple words is that the assessee on second appeal should pre-deposit 10% of the total tax and penalty subject matter of the appeal. It is not to ignore the pre-deposit of 7.5% already made to file first appeal. There is logic in increasing pre-deposit by 2.5% when second appeal is filed, but we would be adding words to the plain and unambiguous provision if we stipulate that 10% pre-deposit will be over and above 7.5% pre-deposit made at the time of the first appeal. Expression or words 17.5% or an additional 10% deposit instead of using mere 10% pre deposit have not been used. Appropriateness of the meaning attached to 10% pre-deposit in the context is apparent. In this context, two decisions of the Supreme Court in ***Lakshmi Ammal*** (supra) and ***Gujarat State Financial Corporation*** (supra) on strict construction of statutes relating to Court fee and charging

section of tax enactments are relevant and support our interpretation on pre-deposit of tax. In ***Sita Ram and Others*** (supra) it was observed:-

> "43. Of course, procedure is within the Court's power, but where it pares down pre-judicially the very right, carving the kernel out, it violates the provision creating the right. Appeal is a remedial right and if the remedy is reduced to a husk by procedural excess, the right became a casualty. That cannot be."

16. On careful perusal of the aforesaid provisions as elucidated, it is difficult to accept the plea and contention of the Revenue and the reasoning given by the Larger Bench of the Tribunal in ***In Re: Quantum of Mandatory Deposit*** (supra), which is as under:-

> "6.1 It can be seen from the above reproduced Sections, the dispute is basically only on the point as to the pre-deposit mandated for preferring second appeal before the Tribunal. It was submitted that CBEC's Circular dated 16-9-2004 (*sic*) indicates the clear intention of legislature. On reading the said Circular we find in Paragraph No. 2, more specifically 2.1, the Circular only states that in the event of appeal of appellant against order of Commissioner (Appeals) before the Tribunal, 10% is to be paid on the amount of duty demanded or penalty imposed by the Commissioner (Appeals). In fact, the clarification given by the Board does not indicate what is in the mind of the law makers enacting while the provisions of Section 35F of the Central Excise Act, 1944 and Section 129E of the Customs Act, 1962. Be that as it may, we find that the said provisions of pre-depositing an amount for preferring 1st appeal against the adjudication order needs to be done so, at the rate of 7.5% of the duty confirmed or the penalty imposed as the case may be. This would mean that the first appeal can be entertained only deposit of such an amount and on conclusion of the proceedings, he has option to go further in appeal before

first appellate authority or if the appeal is disposed of, amount pre-deposited by him which is equivalent to 7.5% of the duty confirmed or penalty imposed as the case may be, needs to be refunded in accordance with law.

6.2 As regards the second appeal preferred against the first appellate authority's order, the quantum of pre-deposit has been set at 10% instead of 7.5% of the duty confirmed or penalty imposed. In our view both the appellate proceedings i.e. before the first appellate authority and before the Tribunal, it is to be treated as an independent provisions then deposits as mandated needs to be made. In short, in order to prefer an appeal before the Tribunal, an assessee/appellant needs to deposit 10% of the amount of duty confirmed or the penalty imposed as the case may be irrespective of the amounts equivalent to 7.5% deposited by them for preferring an appeal to the first appellate authority. On reading of provisions of pre-deposits under Central Excise Act, 1944 and Customs Act, if an assessee or importer wishes to exercise his statutory right of second appeal, then the said exercise of right it needs to be considered as an independent right and proceeding subsequent to pre-deposit of the amount to exercise first appeal needs to be considered as having come to closure. In that case, an assessee or importer as the case may seeks legal remedies available to them, as regards mandatory pre-deposits made before first appellate authority, it needs to be decided in accordance with law."

Paragraph 6.1 of the order in ***In Re: Quantum of Mandatory Deposit*** (supra) refers to the circular issued by the Central Board of Excise and Customs dated 16th September, 2014, which we will refer to subsequently. Thereafter, reference is made to the statutory provisions and the requirement to pre-deposit 7.5% or 10%, as the case may be, in case of first appeal and second appeal. It is observed that on decision of an appeal being in favour of the assessee, the amount deposited has to be refunded in accordance with

law. Paragraph 6.2 refers to second appeal and states that the quantum of deposit has been set at 10% instead of 7.5% of the duty confirmed or penalty imposed. This is the correct legal position, as noticed above, on which there cannot be any *lis*. Thereafter, in our opinion, it has been erroneously observed that this deposit of 10% has to be independent of the deposit at the first appellate stage, or a fresh deposit for once the duty or penalty has been confirmed, the pre-deposit of 7.5% made for preferring an appeal before the first appellate authority stands obliterated and is of no consequence. The reasoning correctly observes the legal position that the right to second appeal is a statutory right, but then states that second appeal is independent of the right of first appeal. Appeals whether first or second are continuation of the original proceedings.

17. In the counter affidavit filed on behalf of the first respondent, reference is made to a decision of the Principal Bench of the Tribunal dated 27th March, 2015 in the case of ***M/s Balajee Structural (India) Private Limited versus CCE, Raipur***, Interim Order No. IO/14/2015-[CR], holding that if the appellant had deposited 10% of the duty confirmed before preferring the appeal before the Tribunal, there would be sufficient compliance of the provision for mandatory deposit. The decision does not support the stand and stance of the Revenue.

18. However, similar view in favour of the Revenue was expressed by the Tribunal, Eastern Zonal Bench, Kolkata in ***Hindalco Industries Limited and Others versus Commissioner of Central Excise, Kolkata-II***, 2016-TIOL-

3050-CESTAT-KOL. The reasoning given by the Tribunal in this case, which is in paragraph 4.2, is rather interesting and reads as under:-

> "4.2 It is observed from the case records that neither Section 35F(iii) of the Central Excise Act, 1944 nor CBEC Circular dated 16.09.2014 specifically mention whether 10% deposit required before appeal is entertained should be inclusive or exclusive of 7.5% deposit made before the first appellate authority. It is a well known fact that success rate of departmental cases before the appellate authorities is very poor. That is the reason that percentage of deposit required to be made before the first appellate authorities is as low as 7.5% of the disputed amounts or penalties. After success at the level of first appellate authority may be Legislature wants that the case has passed one test of first appeal successfully and Revenue deserves an additional 10% of the duty or penalty as deposit till the issue is finally decided in the second appellate stage. In any case, Appellant is not at a loss in the above procedure of paying additional 10% of deposit, because in case Appellant wins then appellant is eligible to interest from the date of deposit it made, as per Section 35FF of the Central Excise Act, 1944 or Section 129EE of the Customs Act, 1962, all introduced w.e.f. 06.08.2014. In case appellant looses(sic) the case, then also Appellant will have to pay lesser interest for the period when amount was lying with the department as deposit."

The Tribunal in the aforesaid paragraph records that the success rate of departmental cases before the Tribunal was very poor. This was the reason why pre-deposit of 7.5% in case of first appeal, and 10% in case of second appeal, was required to be made. Higher deposit of 10% was justified as the demand had survived test of first appeal. Reasoning observes that the assessee would not be at loss even if they were asked to pay an additional amount of 10%, for the amount would be refunded to the assessee with applicable interest in case they succeed.

19. It is difficult to accept and appreciate the second part of reasoning, for we have to interpret the provision as it exists. When required and necessary, principles applicable to jurisprudence and law of appeals can be applied for assistance and clarification in interpretation. Refunds are always paid when tax, duty or penalty is not due and payable. It is not a grace or peculiar. Interest is compensatory in character, as the compulsory pre-deposit denies and deprives the assessee of the right to utilize his money. The two grounds recorded would not matter and help us in interpreting Section 35F of the C.E. Act.

20. Our opinion and ratio that difference between 7.5% and 10% is required as a pre-deposit, gets affirmation in view of Circular No.984/08/2014-CX dated 16th September, 2014, which has been referred to by the Tribunal in ***In Re: Quantum of Mandatory Deposit*** (supra). Paragraphs 2 and 3 of the said Circular read as under:-

> "2. **Quantum of pre-deposit in terms of Section 35F of Central Excise Act, 1944 and Section 129E of the Customs Act, 1962**:
>
> 2.1 Doubts have been expressed with regard to the amount to be deposited in terms of the amended provisions while filing appeal against the order of Commissioner (Appeals) before the CESTAT. Sub-section (iii) of Section 35F of the Central Excise Act, 1944 and Section 129E of the Customs Act, 1962 stipulate payment of 10% of the duty or penalty payable in pursuance of the decision or order being appealed against i.e. the order of Commissioner (Appeal). It is, therefore, clarified that in the event of appeal against the order of Commissioner (Appeal) before the Tribunal, 10% is to be paid on the amount of duty demanded or penalty imposed by the Commissioner (Appeal). This need not be the same as the amount of duty demanded or penalty imposed in the Order-in-Original in the said case.

2.2 In a case, where penalty alone is in dispute and penalties have been imposed under different provisions of the Act, the pre-deposit would be calculated based on the aggregate of all penalties imposed in the order against which appeal is proposed to be filed.

2.3 In case of any short payment or non-payment of the amount stipulated under Section 35F of the Central Excise Act, 1944 or Section 129E of the Customs Act, 1962, the appeal filed is liable for rejection.

3. **Payment made during investigation**:

3.1 Payment made during the course of investigation or audit, prior to the date on which appeal is filed, to the extent of 7.5% or 10%, subject to the limit of Rs.10 crores, can be considered to be deposit made towards fulfillment of stipulation under Section 35F of the Central Excise Act, 1944 or Section 129E of the Customs Act, 1962. Any shortfall from the amount stipulated under these sections shall have to be paid before filing of appeal before the appellate authority. As a corollary, amounts paid over and above the amounts stipulated under Section 35F of the Central Excise Act, 1944 or Section 129E of the Customs Act, 1962, shall not be treated as deposit under the said sections.

3.2 Since the amount paid during investigation/audit takes the colour of deposit under Section 35F of the Central Excise Act, 1944 or Section 129E of the Customs Act, 1962 only when the appeal is filed, the date of filing of appeal shall be deemed to be the date of deposit made in terms of the said sections.

3.3 In case of any short-payment or non-payment of the amount stipulated under Section 35F of the Central Excise Act, 1944 or Section 129E of the Customs Act, 1962, the appeal filed by the appellant is liable for rejection."

Paragraph 2.1 above supports interpretation propounded by the petitioner, for it stipulates pre-deposit of 10% of the duty or penalty is

payable on an appeal filed against an order of the Commissioner (Appeals). The quantum to be deposited should be computed based on the amount of duty demanded or penalty imposed confirmed by the Commissioner (Appeals), and need not be the same as the duty or demand of penalty imposed in the order-in-original. Thus, where the amount of duty or penalty is partly reduced, computation of 10% pre-deposit for filing a second appeal would be done from the reduced amount, and not on the basis of duty and penalty imposed in the order-in-original. Paragraph 3 stipulates that the pre-deposit would include deposits or payments made prior to the passing of the order-in-original. This is relevant. Deposits made during the pendency of the proceedings, or even after the order-in-original is passed, have to be taken into consideration for determining and deciding whether condition of pre-deposit of 7.5% or 10% has been satisfied. Earlier deposits do not get obliterated and are not to be treated as inconsequential. Equally pertinent is the second sentence in paragraph 3.1, which states that any shortfall from the amount stipulated in the Section shall have to be paid before filing of an appeal before the appellate authority.

21. Second contention of the petitioner relating to inapplicability of section 35F of the C.E. Act, i.e. Central Excise Act, to appeals preferred before the Tribunal under Section 86 of the Finance Act, is however, without merit and has to be rejected. Sections 83, 85 and 86 of the Finance Act, as they presently are, read as under:

> **"83. Application of certain provisions of Act 1 of 1944**.—The provisions of the following sections of the Central Excises Act, 1944,

as in force from time to time, shall apply, so far as may be, in relation to service tax as they apply in relation to a duty of excise:—

[sub-section (2-A) of Section 5-A, sub-section (2) of Section 9-A], 9AA, 9B, 9C, 9D, 9E, 11B, 11BB, 11C, 12, 12A, 12B, 12C, 12D, [12E, 14, [15, 15A, 15B], 31, 32, 32A to 32P (both inclusive), 33A, 34A, 35EE, 35F] [35FF] to 35-O (both inclusive), 35Q, [35R,] 36, 36A, 36B, 37A, 37B, 37C, 37D, 38A and 40.

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85. Appeals to the Commissioner of Central Excise (Appeals).— (1) Any person aggrieved by any decision or order passed by an adjudicating authority subordinate to the Commissioner of Central Excise may appeal to the Commissioner of Central Excise (Appeals).

(2) Every appeal shall be in the prescribed form and shall be verified in the prescribed manner.

(3) An appeal shall be presented within three months from the date of receipt of the decision or order of such adjudicating authority, relating to service tax, interest or penalty under this Chapter made before the date on which the Finance Bill, 2012 receives the assent of the President:

Provided that the Commissioner of Central Excise (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months, allow it to be presented within a further period of three months.

(3-A) An appeal shall be presented within two months from the date of receipt of the decision or order of such adjudicating authority, made on and after the Finance Bill, 2012 receives the assent of the President, relating to service tax, interest or penalty under this chapter:

Provided that the Commissioner of Central Excise (Appeals) may, if he is satisfied that the appellant was prevented by sufficient

cause from presenting the appeal within the aforesaid period of two months, allow it to be presented within a further period of one month.

(4) The Commissioner of Central Excise (Appeals) shall hear and determine the appeal and, subject to the provisions of this Chapter, pass such orders as he thinks fit and such orders may include an order enhancing the service tax, interest or penalty:

Provided that an order enhancing the service tax, interest or penalty shall not be made unless the person affected thereby has been given a reasonable opportunity of showing cause against such enhancement.

(5) Subject to the provisions of this Chapter, in hearing the appeals and making order under this section, the Commissioner of Central Excise (Appeals) shall exercise the same powers and follow the same procedure as he exercises and follows in hearing the appeals and making orders under the Central Excise Act, 1944.

86. Appeals to Appellate Tribunal.—(1) Save as otherwise provided herein, an assessee aggrieved by an order passed by a Commissioner of Central Excise under Section 73 or Section 83-A xxx, or an order passed by a Commissioner of Central Excise (Appeals) under Section 85, may appeal to the Appellate Tribunal against such order within three months of the date of receipt of the order:

Provided that where an order, relating to a service which is exported, has been passed under Section 85 and the matter relates to grant of rebate of service tax on input services, or rebate of duty paid on inputs, used in providing such service, such order shall be dealt with in accordance with the provisions of Section 35-EE of the Central Excise Act, 1944:

Provided further that all appeals filed before the Appellate Tribunal in respect of matters covered under the first proviso, after the coming into force of the Finance Act, 2012 and pending before it up to the date on which the Finance Bill, 2015 receives the assent of the

President, shall be transferred and dealt with in accordance with the provisions of Section 35-EE of the Central Excise Act, 1944

(1-A)(*i*) The Board may, by order, constitute such Committees as may be necessary for the purposes of this Chapter.

(*ii*) Every Committee constituted under clause (*i*) shall consist of two Chief Commissioners of Central Excise or two Commissioners of Central Excise, as the case may be.

(2) The Committee of Chief Commissioners of Central Excise] may, if it objects to any order passed by the Commissioner of Central Excise under Section 73 or Section 83-A [xxx], direct the Commissioner of Central Excise to appeal to the Appellate Tribunal against the order:

Provided that where the Committee of Chief Commissioners of Central Excise differs in its opinion against the order of the Commissioner of Central Excise, it shall state the point or points on which it differs and make a reference to the Board which shall, after considering the facts of the order, if is of the opinion that the order passed by the Commissioner of Central Excise is not legal or proper, direct the Commissioner of Central Excise to appeal to the Appellate Tribunal against the order.

(2-A) The Committee of Commissioners may, if it objects to any order passed by the Commissioner of Central Excise (Appeals) under Section 85, direct any Central Excise Officer to appeal on its behalf to the Appellate Tribunal against the order:

Provided that where the Committee of Commissioners differs in its opinion against the order of the Commissioner of Central Excise (Appeals), it shall state the point or points on which it differs and make a reference to the jurisdictional Chief Commissioner who shall, after considering the facts of the order, if is of the opinion that the order passed by the Commissioner of Central Excise (Appeals) is not legal or proper, direct any Central Excise Officer to appeal to the Appellate Tribunal against the order.

Explanation.—For the purposes of this sub-section, "jurisdictional Chief Commissioner" means the Chief Commissioner having jurisdiction over the concerned adjudicating authority in the matter.

(3) Every appeal under sub-section (2) or sub-section (2-A) shall be filed within four months from the date on which the order sought to be appealed against is received by the Committee of Chief Commissioners or, as the case may be, the Committee of Commissioners.

(4) The Commissioner of Central Excise or [any Central Excise Officer subordinate to him or the assessee, as the case may be, on receipt of a notice that an appeal against the order of the Commissioner of Central Excise or the Commissioner of Central Excise (Appeals) has been preferred under sub-section (1) or sub-section (2) or sub-section (2-A) by the other party may, notwithstanding that he may not have appealed against such order or any part thereof, within forty-five days of the receipt of the notice, file a memorandum of cross-objections, verified in the prescribed manner, against any part of the order of the Commissioner of Central Excise or the Commissioner of Central Excise (Appeals), and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in sub-section (3).

(5) The Appellate Tribunal may admit an appeal or permit the filing of a memorandum of cross-objections after the expiry of the relevant period referred to in [sub-section (1) or sub-section (3)] or sub-section (4) if it is satisfied that there was sufficient cause for not presenting it within that period.

(6) An appeal to the Appellate Tribunal shall be in the prescribed form and shall be verified in the prescribed manner and shall, irrespective of the date of demand of service tax and interest or of levy of penalty in relation to which the appeal is made, be accompanied by a fee of,—

(*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:

Provided that no fee shall be payable in the case of an appeal referred to in sub-section (2) or sub-section (2-A) or a memorandum of cross-objections referred to in sub-section (4).

(6-A) Every application made before the Appellate Tribunal,—

(*a*) in an appeal [xxx] 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:

Provided that no such fee shall be payable in the case of an application filed by the Commissioner of Central Excise or Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, as the case may be, under this sub-section.]

(7) Subject to the provisions of this Chapter, in hearing the appeals and making orders under this section, the Appellate Tribunal shall exercise the same powers and follow the same procedure as it exercises and follows in hearing the appeals and making orders under the Central Excise Act, 1944."

Section 83 of the Finance Act states that stipulated provisions of the C.E. Act, as in force from time to time and as they apply in relation to a duty of excise, shall apply in relation to service tax. Section 35F of the C.E. Act by virtue of Section 83 of the Finance Act equally applies to service tax appeals. The words or expression "as in force from time to time" and "as they apply to in relation to duty of excise" in Section 83 of the Finance Act with reference to the stated provisions of the C.E. Act, clearly reflects and clinches the issue that the legislature wanted subsequent amendments in the enumerated sections of the C.E. Act, would equally apply to service tax. This is the case of reference or citation of one or more sections into other statute and not reference by incorporation. Sometimes distinction between incorporation by reference and adoption of provisions by mere reference or citation is difficult to draw, but in the present case in view of the clear legislative mandate and the language used in Section 83 of the Finance Act, this difficulty does not arise. We, therefore, need not expound and refer to the said distinction in detail in the present case. Contention of the petitioner that Section 35F of the C.E. Act, has undergone drastic amendments w.e.f. 6th August, 2014 and the new stipulations in Section 35F of the C.E. Act are completely different, whereas reference under Section 83 of the Finance Act to Section 35F of the C.E. Act was with reference to earlier Section 35F, consequently fails and has to be rejected. As already indicated above, this is a case of reference or citation, therefore, the amended provisions of Section 35F would apply, as it is specifically stipulated in Section 83 of the Finance Act that relevant provisions of C.E. Act indicated therein as in force from time to time will apply. No doubt, Section 35F of the C.E. Act as quoted

above refers to appeals under Section 35(1) or Section 35 of the C.E. Act but this quotation and reference is to the C.E. Act. In the context of service tax appeals, Sections 85 and 86 of the Finance Act apply, albeit by virtue of Section 83 of the Finance Act stipulations and requirements of Section 35F of the C.E. Act will get attracted and apply.

22. Reliance was placed by counsel for the petitioner on decision of the Delhi High Court in ***M/s.Glyph International Limited Vs. Union of India*** 2014 (34) STR 727 (Delhi). In the said case the Tribunal had ruled that an appeal in respect of refund or rebate claim was not maintainable before them in view of Section 35EE of the C.E. Act, which section finds mention in Section 83 of the Finance Act after its amendment in the year 2011 (sic, 2012). The said ruling was over-turned and set aside, observing that the Parliament had always intended that the remedy should be available in respect of refund or rebate claims and amendment of Section 83 in 2012 did not disturb the appeal remedy under Section 86 of the Finance Act. The amendment did not limit the appellate power in any manner whatsoever and reliance was placed upon the decision of the Supreme Court in ***Subal Paul Vs. Malina Paul and Another*** (2003) 10 SCC 361, wherein it has been held as under:

> "21. If a right of appeal is provided for under the Act, the limitation thereof must also be provided therein. A right of appeal which is provided under the Letters Patent cannot be said to be restricted. **Limitation of a right of appeal in absence of any provision in a statute cannot be readily inferred.** It is now well-settled that the appellate jurisdiction of a superior court is not taken as excluded simply because

subordinate court exercises its special jurisdiction. In G.P. Singh's 'Principles of Statutory Interpretation'. It is stated:

> "The appellate and revisional jurisdiction of superior courts is not taken as excluded simply because the subordinate court exercises a special jurisdiction. The reason is that when a special Act on matters governed by that Act confers a jurisdiction to an established court, as distinguished from a persona designata, without any words of limitation then, the ordinary incident of procedure of that court including any general right of appeal or revision against its decision is attracted."

22. But an exception to the aforementioned rule is on matters where the special Act sets of it a self-contained Code the applicability of the general law procedure would be impliedly excluded. (See Upadhyaya Hargovind Devshanker v. Dhirendrasinh Virbhadrasinnhji Solanki).

(emphasis supplied)"

23. Section 86 of the Finance Act provides for an appeal before the Tribunal and Section 83 of the Finance Act makes Section 35F of the C.E. Act equally applicable. Section 35F of the C.E. Act is the provision which relate to pre-deposit, a mandatory provision for the appeal to be maintainable and heard. If the interpretation given by petitioner is accepted we would be rendering a part of Section 83 of the Finance Act referring to Section 35F of the C.E. Act altogether otiose and redundant. Decision is ***Glyph International Limited*** (supra) is in different context of right to appeal before the Tribunal given vide Section 86 of the Finance Act, and whether the right to appeal before the Tribunal was subsequently taken away and withdrawn. The court felt that reference to Section 33 EE of the C.E. Act in Section 83 of the Finance Act would not make any difference and the

Tribunal continues to possess jurisdiction vide Section 86 of the Finance Act to decide matters relating to rebate or refund. This decision is of no avail and does not help us to decide the controversy in question. Second contention raised by the petitioner is accordingly decided against them.

24. Accordingly, we would allow the present writ petition and set aside the order and direction of the Tribunal that the petitioner must deposit additional 10% of the duty and penalty in dispute for the second appeal to be heard and adjudicated. We would also quash the circular dated 27th April, 2017 issued by the Tribunal. It is directed that the petitioner and others on filing second appeal before the Tribunal are required to deposit 10% of the amount of duty/ penalty as confirmed by the first appellate authority inclusive of 7.5% pre-deposit made for the first appeal. 10% would not be in addition to and over and above 7.5% of pre deposit made for the first appeal. However, contention that Section 35F of the C.E. Act does not apply to service tax appeals and therefore no pre-deposit is required to be made is rejected. In the facts of the case there would be no order as to costs.

(SANJIV KHANNA)
JUDGE

(CHANDER SHEKHAR)
JUDGE

May 31st, 2018
VKR/ssn