

NAFR

HIGH COURT of CHHATTISGARH, BILASPUR

Order Reserved on 19.04.2023

Order Delivered on 09.05.2023

WPT No. 116 of 2021

M/s Nava Raipur Atal Nangar Vikas Pradhikaran (Former Naya Raipur Development Authority) (An Authority Incorporated Under Chhattisgarh Nagar Tatha Gram Nivesh Adhiniyam 1973) Through Its Authorized Signatory, Sh. Ayyaj Fakirbhai Tamboli, Chief Executive Officer, Nava Raipur Atal Nagar

---- Petitioner

Versus

1. The Union Of India Through The Secretary, Department Of Revenue, Ministry Of Finance, North Block, New Delhi 110001
2. Commissioner Central Excise And CGST Raipur Central GST Building, Dhamtari Road Tikrapara Raipur Chhattisgarh 492001

---- Respondents

For Petitioner : Mr. Yogendra Aldak with Ms. Katyayani Vishnupriya , Advocate

For Respondent No.2 : Mr. Maneesh Sharma, Advocate

S.B.: Hon'ble Shri Parth Prateem Sahu, Judge

CAV Order

1. The petitioner has filed this writ petition under Article 226 of the Constitution of India seeking following relief:-

“10.1 Issue a writ of Certiorari or any other appropriate writ, order or direction in the nature thereof, quashing the Defect Notice dated 16.04.2021 issued by the Registry of the Hon'ble Tribunal.

10.2 Issue a writ of Mandamus or any other appropriate writ, order or direction in the nature thereof, directing the Hon'ble Tribunal to admit and hear the appeal on merits, without insisting on payment of pre-deposit.

10.3 Issue any other writ, order or direction as this Hon'ble Court may deem just and fair under the circumstances of the case.

10.4 For such further and other reliefs as the nature and circumstances of the case may require.”

2. Facts relevant for disposal of this writ petition is that petitioner is a statutory body created through Notification dated 8th January 2002 issued by the State Govt. under Chhattisgarh Nagar Tatha Gram Nivesh Adhiniyam, 1973 (for short “*Adhiniyam of 1973*”). It was created as Special Development Authority with an object to prepare the development plan for the special areas after approval by the State Govt. and for purpose of implementation of the plan, to acquire, hold, develop, manage and dispose of lands and other property. Petitioner is registered with the Service Tax Department under the erstwhile tax regime. Officers of Directorate General of Goods and Service Tax Intelligence, Bhopal (Former 'Directorate General of Central Excise Intelligence') (hereinafter referred as “*DGGI*”). Based on the report of short payment of service tax, an inquiry was initiated

against the petitioner and, thereafter, a show cause notice dated 23.02.2018 was also issued. Petitioner submitted reply refuting the allegation made therein. Upon adjudication, Principal Commissioner, Central Tax and Central Excise, Raipur vide order dated 18.12.2020 passed an order demanding service tax of Rs.134,83,58,448/- for the relevant periods with interest under Section 75 of the Finance Act, 1994 (for short "the *Act*") and penalty under Section 78 of the Act. Aggrieved with the order passed by the adjudicating authority, petitioner preferred an appeal before the Customs, Excise and Service Tax Appellate Tribunal, New Delhi. As the petitioner has not deposited the requisite pre-deposit in terms of Section 35-F of the Central Excise Act 1944 (hereinafter referred to as the "*Act of 1944*") read with Section 83 of the Act, information letter was issued to the petitioner intimating that mandatory deposit as envisaged under Section 129-E of the Customs Act. 1962 read with Section 35-F of the Act of 1944 has not been adduced. Aggrieved with the issuance of letter/notice dated 16.04.2021, petitioner has filed this petition.

3. Learned counsel for the petitioner would submit that the petitioner is suffering with financial hardship of post Covid -19 Pandemic. Due to lock-down during the effect of Covid -19 Pandemic in the State of Chhattisgarh, commercial operation and activities of the petitioner was adversely affected resulting in acute cash crunch. Due to various lock-down during Covid-19 pandemic, there was recession in the market and considering the said period, the petitioner waived off the delayed interest recoverable on delayed payment of lease rent/lease

premium which reduced revenue collection of the petitioner. Petitioner, due to financial hardship, is not able to pay outstanding installments of loans and the loan account may be declared as non-performing asset. Due to financial crises and shortage of funds, petitioner is unable to clear various bills of creditors/contractors. Petitioner is suffering loss which is evident from the balance sheet filed along with the writ petition and, therefore, petitioner is not in a position to pay such a huge amount of pre-deposit which is 7.5 percent of the tax demanded, to the maximum of Rs.10 crores. He contended that the petitioner is having a good prima facie case. Demand made in the order dated 18.12.2020 is erroneous. Hence, the pre-deposit before the Appellate Tribunal be waived. He contended that as the petitioner is unable to pay mandatory deposit, he might lose opportunity of contesting the appeal on merits, hence, pre-deposit before the Appellate Tribunal be waived. He places reliance upon the decision in the case of **M/s Pioneer Corporation Vs. Union of India & Ors.** 2016 (6) TMI 437 (Delhi High Court), **Manoj Kumar Jha Vs. DRI** 2018 (12) TMI-1434 (Delhi High Court) and **Shubh Impex Vs. Union of India & Ors.** 2018 (5) TMI 572 (Delhi High Court). Learned counsel for the petitioner, in alternate, submits that if for any reason, this Court is not inclined to accept the prayer made in the writ petition for waiver of the mandatory deposit under Section 35-F of the Central Excise Act 1944, then reasonable period of time may be granted for compliance the provision under Section 35-F of the Act of 1944 for depositing the pre-deposit amount.

4. Mr. Maneesh Sharma, learned counsel for the respondent opposes the submission of learned counsel for the petitioner and would submit that writ petition is not maintainable making prayer only of waiver of mandatory pre-deposit under Section 35-F of the Act of 1944. He also pointed out that the notice which is under challenge in this writ petition is a 'Defect Notice' issued by the Customs, Excise & Service Tax Appellate Tribunal. It is only the information forwarded to the petitioner after scrutiny of appeal. He also contended that the decisions relied upon by learned counsel for the petitioner was considered by High Court of Delhi in the case of **M/s Vish Wind Infrastructure LLP Vs. Additional Director General (Adjudication) New Delhi** in WPC No.2178 of 2019, decided on 28th August 2019. Considering its earlier decision in the case of **M/s Pioneer Corporation (supra), Manoj Kumar Jha (supra) and Shubh Impex (supra)**, held those earlier decisions to be contrary to law laid down in **Anjani Technoplast Ltd. Vs. Commissioner of Customs 2015 (326) ELT 472 (Del.)**. He contended that the decision in the case of **Anjani Technoplast (supra)** was challenged in an appeal before Hon'ble Supreme Court and the appeal was dismissed.
5. I have heard learned counsel for the parties and perused the records of the writ petition.
6. The subject matter of the petition is of waiver of mandatory deposit under Section 35-F of the Act of 1944 along with appeal against adjudicating authority. The provision under Section 35-F of the Act of 1944 reads as under:-

“ 35-F 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-

(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 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 subsection (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."

7. The reason assigned in the writ petition is only of financial crises during Covid-19 Pandemic period. Documents like balance sheet filed along with the petition would show that the petitioner is in profit after the Covid -19 Pandemic period.

8. In the case of **Ganesh Yadav Vs. U.O.I**, 2015 (320) ELT 711 (All.), it was observed thus :

"9. Dealing with the specific question as to whether the amended Section 35F of the CE Act would apply to the case of the Assessee, the Allahabad High Court held that the words in the amended Section 35F indicated that on and after the date of its enforcement an Assessee in appeal was required to deposit the stipulated percentage of duty and if it failed to do so, the CESTAT shall

not entertain the appeal. The amended Section 35A would, therefore, apply to all appeals filed on and from the date of the enforcement of the amended Section 35F of the CE Act....”

(Emphasis supplied)

9. High Court of Delhi in the case of **M/s Vish Wind Infrastructure LLP** (supra) held thus:

“28. Equally, it is trite that *no court can issue a direction to any authority, to act in violation of the law*. A reading of Section 35 F of the Central Excise Act reveals, by the usage of the peremptory words “shall not” therein, that there is an absolute bar on the CESTAT entertaining any appeal, under Section 35 of the said Act, unless the appellant has deposited 7.5% of the duty confirmed against it by the authority below.

29. The two provisos in Section 35F relax the rigour of this command only in two respects, the first being that the amount to be deposited would not exceed Rs.10 crores, and the second being that the requirement of pre-deposit would not apply to stay applications or appeals pending *before any authority before the commencement of the Finance*

(No.2) Act, 2014, i.e. before 6th August, 2014.

30. Allowing the CESTAT to entertain an appeal, preferred by an assessee after 6th August 2014, would, therefore amount to allowing the CESTAT to act in violation, not only of the main body of Section 35F but also of the second proviso thereto, and would reduce the command of the legislature to a dead letter.”

10. In above decision, High Court took note of its earlier decisions in case of M/s. **Pioneer Corporation** (supra) and **Manoj Kumar Jha** (supra) and held that once the decision in **Anjani Technoplast Ltd.** (supra) stood merged with the dismissal of Civil Appeal preferred there-against, by the Supreme Court, there could be no question of the Court adopting a view that appeal could be maintained without pre-deposit of entire amount.
11. In view of the aforementioned facts of the case and decision in the case of **M/s. Vish Wind Infrastructure LLP** (supra), I am not inclined to accept this prayer made by learned counsel for the petitioner of waiver of mandatory pre-deposit and, therefore, the prayer made by learned counsel for the petitioner is rejected.
12. However, considering the alternate prayer made by learned counsel for the petitioner for extension of time for depositing the amount of pre-deposit before the Customs, Excise & Service Tax Appellate

Tribunal is concerned, though in this petition only the notice/information of defect is put to challenge and no subsequent order is placed on record, considering the submission of learned counsel for petitioner of facing difficulties during Covid-19 Pandemic period, with a view to provide an opportunity to contest the appeal on merits, I am inclined to allow the alternate prayer made by learned counsel for the petitioner and extend the time for mandatory deposit. Accordingly, three months further time is granted to the petitioner to deposit the amount of mandatory pre-deposit before the Tribunal, from the date of passing of this order.

13. In the event petitioner deposits the pre-deposit as envisaged under Section 35-F of the Act of 1944 within the period as mentioned above, the appeal of petitioner will be heard and decided on merits in accordance with law.

14. For the foregoing discussion, writ petition stands disposed of.

Sd/-
(Parth Prateem Sahu)
Judge