

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL, NEW DELHI**

LARGER BENCH

SUBJECT/ISSUE : Quantum of Mandatory Deposit

Date of Hearing: 27.02.2017

Date of Decision: 20-04-2017

CORAM:

Hon'ble Justice Dr. Satish Chandra, President
Hon'ble Mr. M.V. Ravindran, Member (Judicial)
Hon'ble Mr. V. Padmanabhan, Member (Technical)

Appearance:

Shri Amresh Jain, D.R. for Revenue
Shri Govind Dixit, D.R.

Shri Joseph K. Antony, Advocate for Bar Association, Chennai

I. ORDER NO. 39/2017

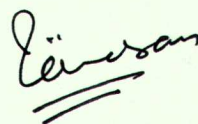
Per: M.V. Ravindran

This Larger Bench has been constituted for resolving the issue as to quantum of mandatory deposit in the case of 2nd appeal preferred before the Tribunal against Commissioner (Appeals) order.

M.V. Ravindran

2. The issue in dispute is whether an appellant has to pay 10% mandatory deposit over and above the mandatory deposit of 7.5% of the duty liability/penalties, as the case may be, as provided under Section 35F of the Central Excise Act, 1944 and Section 129E of the Customs Act, 1962. The dispute arises due to different orders of the Tribunal more specifically, Delhi Bench of the Tribunal in the case of *Balajee Structural (India) Pvt. Ltd. vs. Commissioner of Central Excise, Raipur* held impliedly deposit of 10% of the amount of duty and penalty as the case may be for preferring an appeal before the Tribunal against Commissioner (Appeals) order is inclusive of 7.5% deposited at the time of preferring appeal before the first appellate authority from the adjudication order, while the Bench of the Tribunal in the case of *Hindalco Industries Ltd. and ors. – 2016-TIOL-3050-CESTAT-Kol* and *ASR Multimetals Pvt. Ltd. and ors – 2016-TIOL-3154-CESTAT-Ahm.* held that pre-deposit of 10% of the amount of the duty and penalty and as the case may be needs to be deposited over and above the amount mandated to be deposited before the first appellate authority.

3. None appeared on behalf of the Bar Associations despite notices. Shri Joseph K. Antony, Advocate from Indirect Taxes Bar Association, Chennai filed a written submission which are considered.



4. Learned D.R. Shri Amresh Jain/Shri Govind Dixit appeared on behalf of Revenue and submitted that the plain reading of provisions indicate that the appellant if he wants to prefer a 2nd appeal has to deposit additional 10% of the amount of duty/penalty as the case may be, over and above the amount of mandatory deposit made for preferring appeal before the first appellate authority. It is the submission that the pre-deposit before first appellate authority and second appellate authority are independent. He would take us through the decision of Ahmedabad Bench in the case of *ASR Multimetals Pvt. Ltd. (supra)*. He would also rely upon the CBEC Circular No. 984/8/2014 dated 16.09.2014 for the same preposition.

5. We have considered the submissions made at length.

6. The provisions of Section 35F of the Central Excise Act, 1944 and Section 129E of the Customs Act, 1962 are reproduced herein under:-

Section 35 F and other connected provisions of the CE Act, 1944.

SECTION 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-

(i) under sub-section (1) of section 35, unless the appellant has

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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 358, 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 358, 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 129E and other connected provisions under the Customs Act, 1962.

Section 129E. Deposit of certain percentage of duty demanded or penalty imposed before filing appeal.



(i) under sub-section (1) of section 128, 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 customs lower in rank than the [Principal Commissioner of Customs or Commissioner of Customs];

(iii) against the decision or order referred to in clause (b) of sub-section (1) of section 129A, 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:

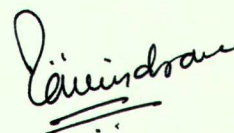
Provided further that the provisions of this section shall not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.J

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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 16.09.2004 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.

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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, if 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.

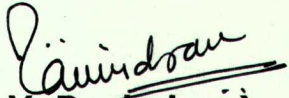


6.3 In view of the foregoing we hold that the decision of the Division Bench of the Tribunal in the case of ASR Multimetals Pvt. Ltd. (supra) is correct and the appellant is required to deposit separately 10% of the amount of the duty confirmed/ penalty imposed, for preferring of appeal before the Tribunal against the order of Commissioner (Appeals).

7. Larger Bench reference is answered accordingly.

(Order pronounced in Court on 20-4-17)


Justice Dr. Satish Chandra)
President


(M.V. Ravindran)
Member (Judicial)


(V. Padmanabhan)
Member (Technical)