



2024:DHC:9675-DB



\$~33

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

% ***Judgment delivered on: 09.12.2024***

+ **W.P.(C) 8896/2023**

JUST CLICK TRAVELS PRIVATE LIMITEDPetitioner

**Through: Mr. Sanjeev Anand, Sr. Adv
with Mr. Sameer Sood, Ms.
Madhumita Singh and Mr. Jatin
Mandovaria, Advs.**

versus

UNION OF INDIA & ORS.Respondents

**Through: Mr. Bhagvan Swarup Shukla,
CGSC with Mr. Sarvan Kumar,
Adv. for UOI.
Mr. Piyush Beriwal and Mr.
Sandip Munian, Advs. for R-2
to 4.**

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE DHARMESH SHARMA

J U D G M E N T

YASHWANT VARMA, J. (Oral)

1. This writ petition has been preferred seeking the following reliefs:

“(a) quash the impugned order dated 10th March 2023 passed by the Commissioner, CGST, Audit-1, Delhi (North) [respondent no.3 herein].

(b) in the alternative, grant the petitioner waiver of the mandatory pre-deposit under Section 35F of the Central Excise Act, 1944 for filing an appeal challenging the order dated 10th March, 2023 passed by the Commissioner, CGST, Audit-1, Delhi (North) [respondent no.3 herein] and direct CESTAT to hear the petitioner's said appeal on merits without insisting on pre-deposit and to condone the delay, if any, on the ground of limitation.

(c) award costs of the present petition to the petitioner and against



the respondents.

(d) pass such other order or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.”

2. Although the principal challenge is to the Order-in-Original dated 10 March 2023, the petitioner has been constrained to approach this Court in light of the provisions made in Section 35F of the **Central Excise Act, 1944**¹ and in terms of which a condition of pre-deposit has come to be created in terms of this statute.

3. Undisputedly, the statute no longer confers any discretion on the first appellate authority or the CESTAT to waive the condition of pre-deposit. It is in the aforesaid backdrop that the writ petitioner has approached this Court to submit that the facts of the present case would reveal that this is one of those rare and deserving cases where the Court would be justified in invoking its jurisdiction conferred by Article 226 of the Constitution.

4. From a reading of the Order-in-Original, we find that one of the liabilities which stood raised against the petitioner was with respect to commission income and while dealing with this the Adjudicating Authority took note of a letter dated 05 March 2019 in which the petitioner had admitted that it had short paid service tax amounting to INR 1,39, 32,179/-. It was on the aforesaid basis that the Adjudicating Authority proceeded to compute the demand payable in respect thereof. Insofar as the contention of amounts standing in the positive in the shape of CENVAT credit is concerned, the authority had noted that no documentary evidence of existing CENVAT credit had been

¹ Act



placed on the record.

5. However, the principal demand appears to have come to be created by virtue of certain incentive payments which were received by the petitioner in connection with the use of the Computer Reservation System and which enabled it to access the online computer booking network. Insofar as this aspect is concerned, the Adjudicating Authority had observed as follows:

“25. The Computer Reservation System (CRS) companies, also known as Global Distribution Companies (GDS), provide an on-line computer system which enables exchange of comprehensive information between the airline and the air travel agents through the said system regarding availability of seats, reservations, ticketing, communications, distribution and other travel related information, the only requirement being that the own network of airline (computer system) should respond on real time basis with confirmation to the request made by the travel agent accessing the data relating to the airline available in the data processing centre of CRS companies. To enable this, the travel agents, in turn, are provided with a computer by the CRS companies having suitable software and on line connectivity with their own data processing centre which in turn, is connected with the computer systems of airline. The data processing centre of the CRS companies makes available to the travel agents the database of the respective airline, for ascertaining seat availability, the fare structure etc. and thereafter, enables booking of a seat on a particular flight of the airline.

26. The airline computer network, in turn accesses and retrieves the data relating to booking of a seat by any travel agent from the data base of the CRS server on real time basis for updation for its own travel related data.

27. The payment for this service rendered by the CRS companies was made by the airline, being the beneficiary, directly to the concerned CRS. Evidently, the airline specific CRS software and the data processing centre maintained by the CRS companies, accessed and used by the airline and the travel agents, were for the sole benefit of airline, facilitating sale of their products and services. It was for this service that the airline paid to the CRS companies which resulted in the booking of air tickets of the airline.



XXX

XXX

XXX

29. The Assessee is an approved agent of International Air Ticketing Association (IATA). It was observed that they had agreements with M/s. Interglobe Technology Quotient Pvt. Ltd. The said companies were providing Central Reservation System (CRS) {a Global Distribution System} to the Assessee to book air ticket of various Airlines with which they had business tie up. By using this CRS, the travel agents are able to access the centralized data base and book a segment (air ticket/hotel room/car rental). The assessee uses this CRS for booking of air tickets of various airlines. The CRS enables the Air travel agents/tour operators such as the assessee to do their business efficiently. With the increased usage of CRS, business and market share increases. Therefore, as a marketing or sales strategy, CRS/GDS companies give incentive/commission to the assessee in order to increase the use of their CRS facility and thereby augmenting their own revenue. The fact that the CRS is being used by the assessee themselves does not alter the situation as by increased use of CRS in booking the Air tickets etc., the interest of CRS/GDS companies are also promoted. Further, it appears that on adding/booking of tickets of more and more airlines to/from their CRS/GDS companies receive commission from airlines and out of the said commission a part of the commission is paid to the Air Travel Agents who are using their GDS.

30. The assessee appears to be liable to pay Service Tax on such services provided by them as per the provisions of Section 66B of the Act *ibid*.

31. The tax liability for the period 2013-14 to 2016-17 is calculated as under based on CRS income declared by the assessee vide Table C of letter dated 05.03.2019 (RUD-III *supra*):

Table-10

(in Rs.)

Year	CRS Income	Rate of service tax	Tax payable including cess
2013-14 (01.10.2013 to 31.03.2014)	5440609	12.36%	672459
2014-15	15291335	12.36%	1890009
2015-16	20000000	14.5%	2900000
2016-17	20000000	15%	3000000
	Total	--	8462468/-

6. The petitioner while assailing the view taken by the Adjudicating Authority in this respect, however, had relied upon the



judgment rendered by a Larger Bench of the CESTAT in **Kafila Hospitality & Travels Pvt. Ltd. vs. Commr. Of S.T., Delhi**². In *Kafila Hospitality*, the central issue which arose for consideration was whether the use of the Central Reservation System created by companies by approved agents of the International Air Ticketing Association [IATA] could be classified as a business auxiliary service and thus exigible to tax.

7. The argument which was addressed on behalf of the Revenue stands reflected in Para 48 of the decision of the CESTAT and which is extracted hereinbelow: -

“48. The contention of the Department is that the target based incentives paid by airlines to IATA agents and the CRS incentives paid by the CRS Companies to IATA agents or the sub-agents are for promoting and marketing the business of the airlines and CRS companies respectively and so are leviable to service tax under the category of BAS.”

8. Ultimately and on a consideration of the statutory scheme which existed, the CESTAT came to hold as follows: -

“60. It is seen that the CRS commission is paid to a travel agent if he is able to attain an agreed level of segments to be booked. A passenger is not aware of the CRS Company being utilized by the travel agent for booking the segment nor can a passenger influence a travel agent to avail the services of a particular CRS Company. What is important to notice is that for an activity to qualify as "promotional", the person before whom the promotional activity is undertaken should be able to use the services. The passenger cannot directly use the CRS software provided by the Company to book an airline ticket. It cannot, therefore, be said that a travel agent is promoting any activity before the passenger.”

9. The Larger Bench then proceeded to frame its conclusions as under:

² Appeal No. ST/59716/2013 decided on 18 March 2021



“82. A perusal of the aforesaid decision would indicate that though in paragraph 2 of the decision, the Division Bench noted that the lower authorities had categorized the services rendered by the appellant as “tour operator”, but in paragraph 5 of the decision the Division Bench observed that the services provided by the appellant were rightly covered under “BAS”. In fact, the Division Bench also observed that since the appellant was providing “tour operator” services, the commission received by them is for “BAS” under Section 73(1) of the Finance Act. There is no discussion in the decision as to why the commission received would fall under “BAS”. The decision also does not specify the particular sub-clause of Section 65(19) of the Finance Act that defines “BAS”. It also needs to be noted that on behalf of the appellant it was contented that no marketing or promotion was conducted by the appellant since it is the choice of the appellant to choose a particular CRS Company and that the customer also does not even know under which CRS system the ticket was booked, but there is no discussion on this aspect nor is there any discussion on the submission of the appellant that the amount received from the CRS Companies cannot be treated as deemed commission since it was merely an incentive and did not attract service tax.

83. These contentions as to whether the air travel agent is promoting the business of the airlines or the CRS Companies have been dealt with in the earlier portion of this order. The order also discusses whether the classification of service would fall under “air travel agents” services or under “BAS” and whether incentives paid for achieving the targets are taxable.

84. The inevitable conclusion, therefore, that follows from the above discussion is as follows :-

- (i) the air travel agent is promoting its own business and is not promoting the business of the airlines;
- (ii) the air travel agent is not promoting the business of the CRS Companies;
- (iii) in any view of the matter, the classification of the service would fall under “air travel agent” service and not “BAS” in terms of the provisions of Section 65A of the Finance Act; and
- (iv) the incentives paid for achieving the targets are not leviable to service tax.”

10. The Adjudicating Authority, however, has chosen to rest its conclusions based on the Form 26AS statement and other material to come to render a finding that the incentive income so received was liable to be treated as commission. This becomes apparent from a



reading of the following passages as appearing in the Order-in-Original: -

“62. Whether service tax is leviable on the amounts claimed as productivity/performance linked benefit (PLB)/ incentive earned:

62.1 It has been alleged in the show cause notice that income was being collected by the noticee in addition to the commission being received from the Airlines or other IAT A agents. These incomes are generated while discharging of their Air Travel Agent's services. A demand of service tax amounting to Rs.47,20,541/- has been raised in Table-11 above. In TABLE E of their letter dated 05.03.2019 submitted to the department, the noticee had claimed the amounts shown in the column "PLB/Incentive", as productivity/performance linked benefit (PLB)/ incentive earned without placing any evidence in the form of contract/agreements with the Airlines or IATA Agent to substantiate their claim.

62.2 In their replies to the SCN, the noticee has contested the above demand on account of productivity/performance linked benefit (PLB)/ incentive and has drawn support from the case law cited therein. The noticee has submitted that from the bare perusal of the dictionary meaning of the term "incentive" and the phrase "productivity linked bonus", it could be inferred that incentive/PLB is something a person or an organization receives as an award or a thing that influences or encourages someone to do something beyond his/her capacity. The purpose behind giving incentive is to encourage someone to increase the productivity. As incentive is directly related to the performance of the individual/company, therefore, it cannot be related as the consideration for service and hence, cannot be treated as value of service for the purposes of levy of tax, because it was contingent on performance. The incentives could not be subjected to service tax.

62.3 On considering the case made out in the SCN on the basis of material placed on record by the noticee and the submissions made by the noticee, I observe that it was the noticee, who while explaining the difference in the amounts of commission received by them commission shown in the Form 26AS and that shown in the balance sheets had, in TABLE E of their letter dated 05.03.2019 had stated that a part of the said difference was "PLB/Incentive". Therefore, the burden of proof was on the noticee to prove, with documentary evidence in the form of contracts entered into by the noticee with the airlines and the IATA agents and which were in the possession of the noticee, that those mounts shown under the column of "PLB/INCENTIVE" represented PLB/Incentives only and not "commissions" paid by the airlines or



the IA TA agents inasmuch as the said amounts were booked under Form 26AS under section 194H of the Income Tax Act, 1961 which section pertained to commission/brokerage. But the noticee failed to discharge the said burden of proof and has not proved that the amounts in question were PLB/Incentive and PLB/Incentive alone and not the commission received from the airlines and IATA agents. Moreover, these commissions were generated while the noticee was discharging Air Travel Agent's services and, therefore, formed consideration for air travel service provided by the noticee.

A look at the entries in the Form 26AS submitted by the noticee for the period under dispute pertaining to the airlines and the IATA agents would reveal that the airlines and the IATA agents had paid amounts to the noticee on several occasions during a month. Such payments cannot be considered as incentives as incentives are paid on the performance judged for a particular period, not on such frequent occasions.

I observe that the amounts on which demand of Rs.47,20,541 has been worked out in Table-11 are commission received from the airlines and the IATA agents for the service provided to the passengers which were not covered under the list of negative services under section 66D *ibid*. In terms of charging section 66B read with sections 65B(44), 66D, and 67 *ibid*., such commissions are leviable to service tax inasmuch as the commission received by the air travel agent from the airlines/IATA agent has to be included in the value of the taxable service provided by the air travel agent under rule 6(1)(iv) of the Service tax (Determination of Value Rules, 2006.

I observe that whereas with effect from 01.07.2012, the concept of negative List was introduced vide Section 66D of the Finance Act, 1994 which states that only the services mentioned in the negative list are non-taxable barring the exemption by virtue of any notification of and rest all services are within the net of service tax. It is further observed that the said services has not been excluded from the purview of service tax vide the said -. negative list (Section 66D of The Act *ibid*) nor the same are exempted by the notification. Hence, the said taxable services are therefore, subjected to levy of service tax and the notice is liable to pay service tax.

I also observe that the case law cited by the noticee in respect of the demand under discussion is not relevant to the issue involved.

In view of the above discussion, I hold that service tax is leviable on the amounts on which service tax has been worked out in para 37 of the SCN as shown in the Table-11 above. Accordingly, I confirm demand of service tax amounting to Rs.47,20,541/-."



11. However, and undisputedly the legal position insofar as incentives are concerned and those earned by members of the IATA is no longer *res integra* and stands authoritatively settled in *Kafila Hospitality*.

12. We have also been shown an order passed by the Supreme Court on 15 May 2023 in Civil Appeal 3702/2023 and where it took on board the statement of the learned Additional Solicitor General, who had conceded to the fact that no appeal had been preferred by the Revenue against the judgment of the CESTAT in *Kafila Hospitality*.

13. All of the above, leads us to conclude that the petitioner appears to have a strong prima facie case and that the test of “*likelihood of success*” is liable to be answered in its favour.

14. That only leaves us to examine whether circumstances exist warranting this Court invoking its extraordinary jurisdiction under Article 226 of the Constitution and waiving the condition of pre-deposit as imposed by Section 35F of the Act.

15. We note that while dealing with the ambit of Section 35F as well as situations where Courts would be justified in intervening and dispensing with a condition of pre-deposit had directly arisen for consideration in **Ajay Sagar vs Principal Commissioner of Customs (Imports)**³. While dealing with that question, we had on that occasion rendered the following observations:-

“ 2. The petitioner is constrained to approach this Court since Section 129E of the Act no longer incorporates a provision which

³ [2023 SCC Online 6024]



may be invoked by either the *Commissioner (Appeals) Customs and Central Excise* or the **Customs, Excise & Service Tax Appellate Tribunal** to waive the condition of pre-deposit in case of undue hardship. It becomes pertinent to note that Section 129E of the Act as it stood prior to its amendment by Finance Act (No. 2) of 2014 had conferred a discretion on the Commissioner (Appeals) as well as the CESTAT to dispense with the deposit liable to be made for the purposes of an assessee pursuing an appeal where it was found that the deposit of duty, interest or penalty levied would cause undue hardship.

XXXX

XXXX

XXXX

4. Our attention was drawn to the recent decision rendered by a Division Bench of the Court in *Mohd. Akmam Uddin Ahmed v. Commissioner Appeals Customs and Central Excise* where the question of the power of a High Court to dispense with the requirement of pre-deposit and to frame appropriate directions reducing the burden on an assessee in extraordinary and exceptional circumstances was answered in the following terms:—

“26. The petitioners placed reliance on judgments of Coordinate Benches of this Court in *Pioneer Corpn. case* [*Pioneer Corpn. v. Union of India*, 2016 SCC OnLine Del 6758 : (2016) 340 ELT 63], *Narender Yadav case* [*Narender Yadav v. Commr. of Customs*, 2019 SCC OnLine Del 12415] and *Shubh Impex case* [*Shubh Impex v. Union of India*, 2018 SCC OnLine Del 8793] to canvas the argument that the court has in special circumstances, waived the payment of mandatory pre-deposit amount as envisaged in Section 129-E of the Act.

27. A Coordinate Bench of this Court in *Pioneer Corpn. case* [*Pioneer Corpn. v. Union of India*, 2016 SCC OnLine Del 6758 : (2016) 340 ELT 63], where the court, while discussing the amendment made to Section 35-F of the Central Excise Act, 1944 (hereinafter referred to as “the CE Act”) (which section is *pari materia* to Section 129-E of the Act and also requires a pre-deposit in the case of an appeal), held that prior to the amendment of Section 35-F of the CE Act, a discretion was available to the Central Excise and Service Tax Appellate Tribunal (hereinafter referred to as “Cestat”) to consider financial hardship and accordingly determine the pre-deposit amount post the amendment, a direction of waiver of the pre-deposit would be contrary to the express legislative intent of the amendment. However, it further held that the jurisdiction of the High Court under Article 226 cannot be taken away and that such power should be used only in rare and



deserving cases where a clear justification is made out for such interference as follows:

“9. ... A direction, therefore, to the Cestat that it should waive the pre-deposit would be contrary to the express legislative intent expressed in the amended Section 35-F with effect from 6-8-2014. *While, the jurisdiction of the High Court under Article 226 of the Constitution to grant relief notwithstanding the amended Section 35-F cannot possibly be taken away, the court is of the view that the said power should be used in rare and deserving cases where a clear justification is made out of such interference.* Having heard the submissions of Mr. Datta and having perused the adjudication order, the court is not persuaded to exercise its powers under Article 226 to direct that there should be a complete waiver of the pre-deposit as far as the petitioner's appeal before the Cestat is concerned.”

(emphasis supplied)

28. The Coordinate Benches of this Court in *Narender Yadav* case [*Narender Yadav v. Commr. of Customs*, 2019 SCC OnLine Del 12415] and *Shubh Impex* case [*Shubh Impex v. Union of India*, 2018 SCC OnLine Del 8793], both of which, while dealing with the amended provision of Section 129-E of the Act, have permitted waiver of the mandatory pre-deposit as is envisaged in the said provision but, in exceptional circumstances.

29. In *Narender Yadav* case [*Narender Yadav v. Commr. of Customs*, 2019 SCC OnLine Del 12415], a Coordinate Bench of this Court, while recording that the petitioner was a salaried employee drawing Rs. 14,500 per month (i.e., Rs. 1,74,000 per annum) and that the order-in-original did not give any reasons for the penalty imposed on the petitioner, directed that the requirement of pre-deposit under Section 129-E of the Act be waived. The relevant extract is below:

“... The petitioner's grievance is that as H-card holder, imposition of over Rs. 3.8 crores penalty in the overall circumstances of the case, *given that the order-in-original did not record any specific adverse finding against him, is unwarranted.* The petitioner, therefore, seeks a direction that the requirement of pre-deposit as a condition for the hearing and disposal of the appeal — before the Commissioner (Appeal), should be dispensed with.



The court has considered the submissions, and the fact that the order-in-original discloses no reason why penalty was imposed upon the petitioner — a salaried employee drawing Rs. 14,500 per month. In the circumstances, the petitioner's appeal to the Commissioner (Appeals) shall be heard on its merits without insisting upon the requirement of pre-deposit; it is accordingly directed to be waived....”

30. In *Shubh Impex* case [*Shubh Impex v. Union of India*, 2018 SCC OnLine Del 8793], a direction to make a pre-deposit of Rs. 1.27 crores, being 7.5% of the duty imposed, under Section 129-E of the Act was challenged by the appellant. While discussing the judgment in *Pioneer Corpn.* case [*Pioneer Corpn. v. Union of India*, 2016 SCC OnLine Del 6758 : (2016) 340 ELT 63], a Coordinate Bench of this Court recognised the existence of the power available to the court under Article 226 of the Constitution albeit under rare and compelling circumstances. The court, thus, directed that a pre-deposit be made in the sum of Rs. 5 lakhs in addition to the token pre-deposit already made by the appellant therein. The relevant extract is below:

“10. Given the aforesaid facts, while we are inclined to accept the preliminary objection of the respondents on the alternative remedy, we are also inclined to interfere and relax the condition of pre-deposit. We would direct that on the petitioner making a pre-deposit of Rs. 5,00,000 in addition to Rs. 3,70,008, the appeal which would be filed by the petitioner would be entertained by the first appellate authority. The pre-deposit would abide by the result of the appeal. First appeal, if preferred within 21 days, would not be rejected on the ground of limitation.

11. In *Pioneer Corpn. v. Union of India* [*Pioneer Corpn. v. Union of India*, 2016 SCC OnLine Del 6758 : (2016) 340 ELT 63], a Division Bench of this Court has held that the High Court while exercising writ jurisdiction under Article 226 of the Constitution can exercise discretion and reduce the pre-deposit in rare and deserving case, notwithstanding the amendment made under Section 35-F of the Customs Act (sic — Central Excise Act).

The statute has not withdrawn or taken away the said power vested in the writ court, which should be



exercised in rare but compelling and deserving cases, when the cause of justice requires such reduction.”

(emphasis supplied)

31. Another Coordinate Bench of this Court in *Manoj Kumar Jha v. DRI* [*Manoj Kumar Jha v. DRI*, (2019) 365 ELT 166], allowed the appeal to be prosecuted on payment of partial pre-deposit, given the financial stringency of the appellant in the case, subject to the furnishing of bond or reasonable security. Reference can be made to para 3 of this judgment, which reads as follows:

“3. To this Court, it appears that the petitioner is a man of limited means. It is not clear whether any prosecution has been launched against the petitioner. In these circumstances, *in view of the material-on-record which suggests that the petitioner has very limited means to deposit any amounts*, this Court is of the opinion that the relief is warranted. *The requirement of pre-depositing of any amount directed to be waived, however, the petitioner shall furnish a bond and also provide reasonable security* having regard to the list of immovable properties produced before the court. Subject to this, the requirement of pre-deposit is hereby waived. The petitioner's appeal shall be revived and now Cestat shall proceed to hear the parties on its merits after issuing adequate notice to the counsel.”

(emphasis supplied)

32. The Allahabad High Court in *Ganesh Yadav case* [*Ganesh Yadav v. Union of India*, 2015 SCC OnLine All 9174], while upholding the requirement of pre-deposit under Section 35-F of the CE Act as mandatory and dismissing the constitutional challenge, held that the High Court under Article 226 of the Constitution of India is vested with the jurisdiction in an appropriate case to dispense with the requirement of a pre-deposit. Reliance is placed on the following extract:

“8. ... The requirement of a deposit of 10% is in the case of an appeal to the Tribunal against an order of the Commissioner (Appeals). This requirement cannot be regarded or held as being arbitrary or as violative of Article 14. Above all, as the Supreme Court held in *Shyam Kishore v. MCD* [*Shyam*



Kishore v. MCD, (1993) 1 SCC 22] the High Court under Article 226 of the Constitution is vested with the jurisdiction in an appropriate case to dispense with the requirement of pre-deposit and the power of the court under Article 226 is not taken away. This was also held by the Supreme Court in *Govt. of A.P. v. P. Laxmi Devi* [Govt. of A.P. v. P. Laxmi Devi, (2008) 4 SCC 720] in which the Supreme Court observed that recourse to the writ jurisdiction would not be ousted in an appropriate case....”

(emphasis supplied)

xxx

xxx

xxx

34. A Coordinate Bench of this Court in *Dish TV India Ltd. case* [*Dish TV India Ltd. v. Union of India*, 2020 SCC OnLine Del 2580], in a matter concerning the import of satellite/viewing cards by the petitioner company, upheld the mandatory pre-deposit in view of the amendment to the Act. The aforesaid judgment while discussing the amendment of Section 129-E of the Act noted the fact that the petitioner's annual turnover for Financial Year 2018-2019 was more than Rs. 6000 crores and that the mandatory pre-deposit would be a miniscule percent thereof, has directed the pre-deposit be made.

35. The Coordinate Bench in *Dish TV India Ltd. case* [*Dish TV India Ltd. v. Union of India*, 2020 SCC OnLine Del 2580] relied on the previous decision in *Diamond Entertainment Technologies (P) Ltd. v. Commr., CGST* [*Diamond Entertainment Technologies (P) Ltd. v. Commr., CGST*, 2019 SCC OnLine Del 12414 : (2019) 368 ELT 579] and *Anjani Technoplast Ltd. v. Commr. of Customs* [*Anjani Technoplast Ltd. v. Commr. of Customs*, 2015 SCC OnLine Del 13070 : (2015) 326 ELT 472] to hold that waiver of pre-deposit cannot be granted.

xxx

xxx

xxx

41. Thus, an analysis of the conspectus of law as enunciated above gives a clear understanding that after passing of the Amendment Act on 6-8-2014, the amended Section 129-E of the Act and also Section 35-F of the CE Act shall be applicable in those cases where the appeal has been filed after 6-8-2014.

42. However, as discussed above, the Coordinate Benches of this Court have exercised and, thus, preserved the power as available under Article 226 of Constitution of



India to either waive the pre-deposit condition or to grant the right to appeal subject to a part deposit or security. The power, albeit, has been exercised only in rare and exceptional cases.

43. It was held by the Allahabad High Court, speaking through Dr. D.Y. Chandrachud, Chief Justice (as His Lordship then was) in *Ganesh Yadav case* [*Ganesh Yadav v. Union of India*, 2015 SCC OnLine All 9174] that:

“8. ... Whether the writ jurisdiction under Article 226 should be exercised, having due regard to the discipline which has been laid down under Section 35-F of the Act, is a separate matter altogether but it is important to note that the power under Section 226 (sic: Article 226) has not been, as it cannot be, abridged.”

(emphasis supplied)”

5. As would be evident from the conclusions recorded in *Mohd. Akmam Uddin Ahmed*, the Court came to conclude that notwithstanding the amendments introduced in Section 129E of the Act, the powers conferred upon a High Court by Article 226 of the Constitution stand preserved and would not detract from its authority to either waive the condition of pre-deposit or to grant a right of appeal subject to a deposit being made lower than the minimum as prescribed in Section 129E of the Act. Our Court had also approved the judgment rendered by the Allahabad High Court in *Ganesh Yadav v. Union of India* which had held that whether the invocation of the jurisdiction of the High Court under Article 226 of the Constitution is merited or not would be one which would have to be considered on the basis of the facts obtaining in individual cases.

6. *Mohd. Akmam Uddin Ahmed* thus constitutes an authoritative precedent for the proposition that Section 129E of the Act as it stands presently, would not detract from the powers of a High Court in appropriate cases to absolve assesses’ of the financial burden flowing from the requirement of a pre deposit. However, the judgment enters a note of caution by holding that the said power would be liable to be invoked in “rare and deserving” cases or where extraordinary situations and circumstances warrant the exercise of that discretion.

7. While affirming the principles that were enunciated in *Narender Yadav v. Joint Commissioner of Customs (Exports)*, the Court in *Mohd. Akmam Uddin Ahmed* reaffirmed the principle that the writ jurisdiction would be liable to be exercised “in rare but compelling and deserving cases, when the cause of justice requires such



reduction". We are thus left only to consider whether the case of the petitioner would fall in the rare and exceptional category.

XXXX

XXXX

XXXX

12. From the material gathered in the course of investigation, the statements attributed to the persons involved including the petitioner as well as the conclusions drawn and recorded in the Order-in-Original it is manifest that the respondents had found that the petitioner was complicit and actively involved in the evasion of duty and the intent of these parties to mis-declare imports while acting in concert. Bearing in mind the material which has been relied upon and the nature of the allegations levelled against the petitioner, we find ourselves unable to hold that his case would fall in the category of *rare and exceptional* cases. Prima facie, and solely for the purposes of examining whether waiver is merited, we have delved through the relevant record and find that the conclusions drawn by the respondents insofar as the petitioner is concerned can neither be said to be wholly perverse or unsustainable. We thus find that the circumstances do not warrant the invocation of the extraordinary power conferred by Article 226 of the Constitution."

16. When we evaluate whether the condition of pre-deposit is liable to be waived, we necessarily have to approach the issue bearing in mind the decision of the Larger Bench of the CESTAT insofar as incentive payments are concerned. Viewed in that light, we have no hesitation in coming to the conclusion that insofar as this part of the demand is concerned, it would clearly qualify the test of rare and exceptional cases.

17. We, accordingly, allow and dispose of the writ petition in the following terms. Subject to the petitioner discharging its service tax liability with respect to the demands which stand created and quantified in the Order-in-Original, and more particularly as specified in paragraph 20 thereof, the other liabilities which may stand raised in light of the findings returned by the Adjudicating Authority and pertaining to incentive income shall stand waived for the purposes of



2024:DHC:9675-DB



quantifying the pre-deposit that is to be made. Subject to the petitioner complying with the aforesaid stipulation, the appeal may be entertained and decided in accordance with law and without insistence of compliance being made with the statutory condition of a pre-deposit to the extent indicated above.

18. We further observe that the observations which appear in this decision are restricted to the issue of whether the petitioner had been able to establish a case which would justify the Court invoking its writ jurisdiction under Article 226 of the Constitution. In view of the aforesaid, we clarify that all rights and contentions of respective parties on merits are kept open.

YASHWANT VARMA, J.

DHARMESH SHARMA, J.

DECEMBER 09, 2024/DR