CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Miscellaneous (Early Hearing)
Application No.70058 of 2024
(On behalf of appellant)
IN
Service Tax Appeal No.70061 of 2024

(Arising out of Order-in-Appeal No.NOI-EXCUS-001-APP-229-23-24 dated 01/09/2023 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Noida)

M/s Prakash & Co (Amit Prakash Agrawal),.....Appellant
(A-58, Sector-19, Noida)

VERSUS

Commissioner of Central Goods &

Service Tax, Noida ....Respondent

(4th Floor, Sector 48 Noida-201305)

APPEARANCE:

Shri Shubham Agarwal, Advocate for the Appellant
Shri A.K. Choudhary, Authorised Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70081/2024

DATE OF HEARING : 13 February, 2024
DATE OF DECISION : 13 February, 2024

P.K. CHOUDHARY:

The present Miscellaneous Application is filed by the appellant for out of turn hearing of the appeal.

2. In view of the submissions as made by the learned Counsel for the Appellant, prayer for out of turn hearing of the appeal is allowed. Early Hearing Application filed by the Appellant is allowed.

3. Further, with the consent of both the sides, we proceed to hear the appeal today itself.

4. We find that the Learned Commissioner (Appeals) has not decided the appeal before him on merits but dismissed the same for failure to make mandatory pre-deposit before filing of appeal before him. He observed that such delayed payment of pre-deposit is failure of the Appellant to make pre-deposit in terms of Section 35 F of the Central Excise Act, 1944 and treated that the appeal in question was filed without any pre-deposit. Section 35F provides as follows:-

> *"35F: 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 Commissioner of Central Excise;*
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> *(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;"*

From the perusal of the said Section, it is very clear that there is no bar in filing the appeal without complete mandatory pre-deposit. However, Tribunal or Commissioner (Appeals) could not have entertained the appeal till the time of mandatory pre-deposit of appeal. The word 'entertain' in the Section 35F has been equated to the filings, which are contrary to all principles interpretations of statute. The approach of Commissioner (Appeals) in dismissing such appeals cannot be justified.

5. Accordingly, we find that the Appellant had complied with the requisite mandatory pre-deposit and deposited 7.5% i.e. Rs.8,51,974/- on 25.05.2023 and 2.5% i.e. Rs.2,83,992/- on 17.10.2023. Under the facts and circumstances of the case, we

find it appropriate to remand the matter back to Commissioner (Appeals) to decide the appeal on merits without further raising the aspect of pre-deposit. Needless to mention that all issues are kept open. The Appellant is directed to Co-operate during the hearing before the Learned Commissioner (Appeals) and to avoid unnecessary adjournments.

6. The appeal filed by the Appellant is allowed by way of remand to the Learned Commissioner (Appeals).

(Dictated and pronounced in open court)

Sd/-
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

akp