CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70058 of 2023

(Arising out of Order-in-Appeal No. NOI-EXCUS-001-APP-225-22-23, dated - 10/10/2022 passed by Commissioner (Appeals) CGST, Noida)

NIESBUD **.....Appellant**
(Ministry of SSI, Govt. Of India,
A-23, Sector-62, Noida, UP 201301)

VERSUS

Commissioner, CGST, Noida **....Respondent**

(Noida)

APPEARANCE:

Shri Rajesh Chhibber, Advocate for the Appellant
Shri Santosh Kumar, Authorized Representative for the Respondent

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

FINAL ORDER NO.-70954/2024

DATE OF HEARING : 18.12.2024
DATE OF DECISION : 18.12.2024

SANJIV SRIVASTAVA:

This appeal is directed against order in appeal no NOI-EXCUS-001-APP-225-22-23 dated 10.12.2022. By the impugned order the appeal filed by the Appellant was dismissed observing as follows:

> *"8. I have carefully considered the contents, of the impugned Order, grounds of appeal and oral as well as written submission, made by the Appellant*
>
> *9. Brief facts of the case-are that the Appellant has filed the instant appeal against the adjudication order which was passed by the adjudicating authority confirming the demand.*
>
> *10. Without discussing the merits of the case at hand, ab initio, I find that the Appellant has requested for waiver of pre-deposit. In this regard I find it relevant to discuss the provisions of*

Section 35 F of the Central Excise Act, 1944, which mandates such pre-deposit; and the relevant part of the same reads as under

> ***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 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;*

11. A plain perusal of the above provisions of law makes it abundantly clear that there is no provision of law which empowers me to waive the pre-deposit. The provision of law are absolute and there is no ambiguity in the fact that no appeal can be entertained if the same is not accompanied by a proof evidencing that the Appellant has deposited seven and a half per cent of the duty demanded in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the Commissioner of Central Excise. Therefore, I observe that in terms of aforesaid quoted Section 35F of the Central Excise Act, 1944 the appeal in question is not entertainable and as such is fit for summarily rejection

12. Accordingly, without going into merits of the case I hereby reject the present appeal No.153/ST/Noida/Appl/NOI/2022-23 dated 22.07.2022 as filed by M/s NIESBUD, Ministry of SSI, Government of India, A-23,Sector-62, NOIDA-201301, due to the failure of the Appellant to make pre-deposit in terms of Section 35F of the Central Excise Act, 1994. as made applicable to Service Tax read with Section 83 Of the Finance Act, 1994.

2.0 By Order-In-Original No 13/ADC/ST/CGST/NOIDA/2022-23 dated 24.05.2022, following was held:

ORDER

(i) *I confirm the demand of Service Tax amounting to Rs.1,05,61,838/- (Rupees One Crore Five Lacs Sixty One Thousands and Eight Hundred and Thirty Eight Only) (inclusive all cess) and order to recover the same from the party under the proviso to Section 73 (1) of Finance the Finance Act, 1994 read with Section 174 of the Central Goods & Services Tax Act, 2017 as discussed above.*

(ii) *I order to-recover the interest under Section 75 of the Finance Act, 1994 read with Section 174 of the Central*

Goods '& Services Tax Act, 2017 from the party on the above amount referred in (i) above.

(iii) I impose penalty of Rs.1,05,61,838l- (Rupees One Crore Five Lacs Sixty One Thousands and Eight Hundred and Thirty Eight Only) upon the party under Section 78 of the Finance Act, 1994 read with Section 174 of the Central Goods & Services Tax Act, 2017, as discussed above for suppression of facts and contravention of the provisions of the Finance Act ibid and rules made there under. However, an option is given to party under sub Section (1) (ii) of Section 78 of the Finance Act, 1994 that if the Service Tax along with interest is deposited within thirty days of communication of this order, the amount of penalty liable to be paid by the party shall be twenty five percent of the Service Tax so determined in the order. Provided that the benefit of reduced penalty under the second proviso shall be available only if the amount of such reduced penalty is also paid within such period.

(iv) I refrain the penalty as proposed to be imposed upon the party under Section 77(1) (d) of the Finance Act, 1994 read with Section 174 of the Central GST Act, 2017 for failure to pay Service Tax electronically through net banking as discussed above."

3.0 In terms of the above Order-In-Original Appellant was reuired to make a pre-deposit of Rs 7,92,138/- for their appeal to be entertained by the Commissioner (Appeal) as per Section 35F of the Central Excise Act, 1944. However taking note of the failure to make the pre-deposit the appeal has been dismissed without rendering any decision on merits.

4.0 Now for filing this appeal the Appellant has made the pre-deposit of 10% as required in terms of Section 35F. They have also furnished a declaration vide their letter dated 16.02.2023 filed in court on 22.02.2023 stating as follows:

"This is hereby declared that the deposit of amount of Rs 10,56,184/- (Rupees ten lakh fifty six thousand one hundred and eighty four only) vide RTGS Number RTGS/SK/UTIBR52023010700354160/4390/RBI/ RESERVE DATED 07.01.2023, is towards mandatory pre deposit for filing of instant appeal against order in appeal No NOI-EXCUS-001-APP-225-22-23 dated 10.12.2022.

We have not utilized nor we shall utilize said deposit for any other purpose."

Taking note of the above appeal has been admitted and placed before us for consideration.

5.0 As Appellant has made pre-deposit of an amount which is more than the amount required to be pre-deposited for the appeal to be considered by the Commissioner (Appeal), and taking note of the fact that no order on merits has been made by the said authority, we remand the matter to the first appellate authority for a decision on merits.

6.1 Appeal is allowed and matter remanded to Commissioner (Appeal) for decision on merits. Appellant will not withdraw or make any use of the amount pre deposited for filing this appeal before the appeal filed before the said authority is disposed off by him in de-novo proceedings.

6.2 As the matter has been pending for quite some time Commissioner (Appeal) should dispose of the appeal of the Appellant within three months of receipt of this order.

(Operative part of the order is pronounced in open court)

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

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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