CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT No. I

Service Tax Appeal No.70032 of 2023

(Arising out of Order-in-Appeal No.462/ST/AALD/2022 dated 22.09.2022 passed by Commissioner (Appeals) Customs, CGST & Central Excise, Allahabad)

M/s Namrata Enterprises, **.....Appellant**
((Neeraj Srivastava) Chak Garibdas
(Mamta Bhanja Talab), Rewa Road, Naini
Karchanna, Allahabad, U.P.-211008)

VERSUS

Commissioner of Central Excise &
CGST, Allahabad **....Respondent**
(38, M.G. Marg, Civil Lines, Allahabad-211001)

APPEARANCE:

Shri Ramji Khare, Advocate for the Appellant
Shri A. K. Choudhary, Authorized Representative for the Respondent

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

FINAL ORDER NO.- 70773/2025

DATE OF HEARING : 04.11.2025
DATE OF DECISION : 04.11.2025

The present appeal has been filed by the Appellant assailing the Order-in-Appeal No.462/ST/ALLD/2022 dated 22.09.2022 passed by Commissioner (Appeals) Customs, CGST & Central Excise, Allahabad.

2. Heard both the sides and perused the appeal records.

3. I find that the learned Commissioner (Appeals) has not decided the appeal on merits but has rejected the appeal before him on two grounds:-

Issue I. Non-compliance of statutory requirement of pre-deposit;

Issue II. Appeal filed beyond the statutory time limit as specified under Section 85(3A) of the Act;

4. On the issue (I) of failure to make mandatory pre-deposit in terms of Section 35F of the Central Excise Act, 1944, as made applicable to Service Tax cases vide the Section 83 of the Finance Act, 1994, I find that the Appellant deposited an amount of Rs.79,372/- and submitted copy of DRC-03 ARN No.22070900051481 dated 07.07.2022 under CGST Act, 2017. Further learned Commissioner (Appeals) in the impugned Order-in-Appeal at paragraph 4 has observed as under:-

> ***"4. Discussion and Findings:*** *It is observed that the appellants have claimed that the pre deposit has been made through FORM GST DRC-03 dated 07.07.2022 under CGST Act, 2017. However, pre deposit made in this way is not in accordance with provisions of Section 35F of the Central Excise Act, 1944, as no such option of making pre deposit by way of depositing amount under CGST Act, 2017 is provided in the said Section of the Central Excise Act, 1944. Thus, I observe that the appellant has filed the appeal without complying with the statutory requirement of pre-deposit, when the Commissioner (Appeals) had no jurisdiction to entertain or admit the appeals, I, therefore, find that this appeal is not maintainable in terms of Section 35F of the Act."*

5. I find that the Hon'ble High Court of Bombay in the case of Sodexo India Services Pvt. Ltd. vs. Union of India in Writ Petition No.6220/2022 decided on 03.10.2022 reported as 2022 (66) G.S.T.L. 257 (Bom.) held thus :-

> ***"6.*** *We find that this is a matter that requires to be resolved by the Central Board of Indirect Taxes and Customs (CBI & C). From the affidavit filed by Mr. Lal, it appears that many appellants/assessees were paying the pre-deposit under Section 35F of the Central Excise Act, 1944 through service tax challans, whereas few appellants/assessees were using DRC-03 mode under CGST Act, 2017. This, in our view, could be for various reasons. It appears that this problem has been taken up by the CBI & C with the Principal Chief Commissioner, Mumbai CGST & CE Zone by a letter dated 3rd June 2022. The subject itself states "Non-acceptance of pre-deposit*

paid through Form GST DRC-03 for appeal under Service Tax law-Request for issuance of instructions to accept such payment as no other option available for making the pre-deposit before filing of appeals-reg." Paragraph 2 of the said letter also reads as under :

> *2.Vide said representation, the party has mentioned in their letter that the numerous appeals have been rejected on the ground that the payment made for pre-deposit mandatory under Section 35F of the Central Excise Act, 1944 through CGST cannot be accepted and hence, the appellants have failed to comply with the provisions of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994.*

7. *Ms. Masurkar also informed the Court, on instructions from Mr. Lal, who is present in Court, that Mr. Lal himself as Commissioner (Appeals) has raised this issue with the Principal Chief Commissioner, CGST and Central Excise by a letter dated 10th February, 2022. Ms. Masurkar states that the impugned order passed by Mr. Lal, therefore, should not be viewed as something which has been done without applying his mind. We accept Ms. Masurkar's explanation having considered the letter dated 10th February 2022 that is placed on record.*

8. *Therefore, it does appear that the confusion seems to be due to there being no proper legal provision to accept payment of pre-deposit under Section 35F of the Central Excise Act, 1944 through DRC-03. Some appellants are filing appeals after making pre-deposit payments through DRC-30/GSTR-3B. In our view, this has very wide ramifications and certainly requires the CBI & C to step in and issue suitable clarifications/guidelines/ answers to the FAQs. We would expect CBI & C to take immediate action since the issue has been escalated by Mr. Lal over eight months ago.*

9. *In the circumstances, we hereby quash and set aside the impugned orders dated 13th April, 2022 and direct respondent No.3 to hear petitioner de novo and pass such orders as he deems fit on merits in accordance with law."*

6. I find that the learned Commissioner (Appeals) could have granted the refund of amount of pre-deposit wrongly made by

DRC-03 to the Appellant and give an opportunity to deposit the said amount on its Integrated Portal instead of dismissing the appeal in limine. Because dismissing the appeal filed by the Appellant, even after making the pre-deposit, merely on the ground that it has not been deposited in the prescribed manner or by the prescribed Form, amounts to denial of substantial justice and the Commissioner (Appeals) has erred in shirking from its responsibility of deciding the appeal on merits. CBIC has issued another Circular/Instruction dated 18.04.2023, by which it has clarified the earlier Instruction dated 28.10.2022. It has been provided that DRC-03 is a prescribed mode for payment of pre-deposit under the GST Act. From perusal of paragraph 3 of the Instruction dated 28.10.2022, it is evident that the tax under the existing law (Service Tax) shall be recovered as an arrear of tax under the CGST Act and the pre-deposit is neither in the nature of duty nor can be treated as arrears under the Service Tax law. Thus, when the service tax could be recovered as an arrear of Service Tax under CGST Act, after commencement of the CGST Act, then pre-deposit made through DRC-03 prior to 28.10.2022 has to be treated as sufficient compliance, in view of the subsequent Instruction dated 18.04.2023.

7. On issue (II) I find that the Order-in-Original dated 07.02.2022 was dispatched on 15.02.2022 and was received by the assessee on 18.02.2022 and statutory period for filing of appeal was 02 months i.e. upto 18.04.2022 and within the condonable period upto 18.05.2022. However, the appeal was filed only on 11.07.2022 which is beyond the condonable period. The learned Commissioner (Appeals) was justified in holding that the appeal was barred by limitation of time in view of the judgement of the Hon'ble Supreme Court in the case of Singh Enterprises vs. CCE, Jamshedpur reported in 2008 (221) E.L.T. 163 (S.C.) The Hon'ble Supreme Court held as under:-

> ***"6.****At this juncture, it is relevant to take note of Section 35 of the Act which reads as follows :*

"35. Appeals to Commissioner (Appeals). - *(1) Any person aggrieved by any decision or order passed under this Act by a Central Excise Officer, lower in rank than a Commissioner of Central Excise, may appeal to the Commissioner of Central Excise (Appeals) [hereafter in this Chapter referred to as the Commissioner (Appeals)] within sixty days from the date of the communication to him of such decision or order :*

Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.

(2) Every appeal under this section shall be in the prescribed form and shall be verified in the prescribed manner."

7.*It is to be noted that the periods "sixty days" and "thirty days" have been substituted for "within three months" and "three months" by Act 14 of 2001, with effect from 11-5-2001.*

8.*The Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of Statute are vested with jurisdiction to condone the delay beyond the permissible period provided under the Statute. The period upto which the prayer for condonation can be accepted is statutorily provided. It was submitted that the logic of Section 5 of the Indian Limitation Act, 1963 (in short the 'Limitation Act') can be availed for condonation of delay. The first proviso to Section 35 makes the position clear that the appeal has to be preferred within three months from the date of communication to him of the decision or order. However, if the Commissioner is satisfied that the appellant was prevented by sufficient cause from* *presenting the appeal within the aforesaid period of 60 days, he can allow it to be presented within a further period of 30 days. In other words, this clearly shows that the appeal has to be filed within 60 days but in terms of the proviso further 30 days time can be granted by the appellate authority to entertain the appeal. The proviso to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only upto 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act. The Commissioner and the High Court were therefore justified in holding that there was no power to condone the delay after the expiry of 30 days period.*

9.*Learned counsel for the appellant has emphasized on certain decisions, more particularly, I.T.C.'s case (supra) to contend that the High Court and this Court in appropriate cases condoned the delay on sufficient cause being shown.*

10.*Sufficient cause is an expression which is found in various statutes. It essentially means as adequate or enough. There cannot be any straitjacket formula for accepting or rejecting the explanation furnished for delay caused in taking steps. In the instant case, the explanation offered for the abnormal delay of nearly 20 months is that the appellant concern was practically closed after 1998 and it was only opened for some short period. From the application for condonation of delay, it appears that the appellant has categorically accepted that on receipt of order the same was immediately handed over to the consultant for filing an appeal. If that is so, the plea that because of lack of experience in business there was delay* *does not stand to be reason. I.T.C.'s case (supra) was rendered taking note of the peculiar background facts of the case. In that case there was no law declared by this Court that even though the Statute prescribed a particular period of limitation, this Court can direct condonation. That would render a specific provision providing for limitation rather otiose. In any event, the causes shown for condonation have no acceptable value. In that view of the matter, the appeal deserves to be dismissed which we direct. There will be no order as to costs."*

8. In view of the above discussion, the issue of pre-deposit has been complied with by the Appellant assessee. However, since the appeal was filed beyond the condonable period before the first Appellate Authority, the same cannot be interfered with.

9. In view of the above, the appeal is dismissed.

(Dictated and pronounced in open court)

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

LKS