CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SCO 147-148, SECTOR 17-C, CHANDIGARH – 160 017

SINGLE MEMBER BENCH
COURT NO. II

APPEAL NO. ST/61223/2018

[Arising out of Order-in-Appeal No. APPL/ST/PKL/42/2018 dated 28.05.2018 passed by the Commissioner of Central Excise (Appeals), panchkula]

Date of hearing/ Decision: 10.09.2018

For approval and signature:

Hon'ble Mr. S.S. Garg, Member (Judicial)

M/s Mittal Construction Company	**:**	**Appellant(s)**
VS		
C.C.E., & S.T.- Panchkula	**:**	**Respondent(s)**

Appearance:
Present for the Appellant(s):Shri Om Prakash (Advocate)
Present for the Respondent(s): Shri Bhasha Ram (AR)

CORAM:
Hon'ble Mr. S.S. Garg, Member (Judicial)

FINAL ORDER NO. 62995 /2018

Per : **S.S. Garg**

The present appeal is directed against the impugned order dated 28.05.2018 passed by the Commissioner (Appeal).

2. Briefly the facts of the case are that the appellant are registered with this Service Tax Department for providing commercial & industrial construction service falling under Section 65(25b)/65(105)(zzb) of the Finance Act, 1944. Service tax demand of Rs. 36,55,455/- was confirmed against the appellant by the

Additional Commissioner of Central Excise & Service Tax Division, Panchkula vide Order-in-Original dated 30.10.2014.

3. Aggrieved by the same appellant filed appeal before the Commissioner (Appeal) and deposited Rs. 2,74,500/- in terms of Section 35F(i) of the Central Excise Act as made applicable to Service tax matter. The said appeal was dismissed vide order dated 11.08.2016, thereafter, the appellant filed an appeal before the CESTAT, Chandigarh and while filing the appeal, the appellant deposited another 10% of the amount of service tax demand that is Rs. 3,65,546/- as pre-deposit in terms of Section 35F(i) of the Central Excise Act, whereas only amount of Rs. 91,387/- equivalent to remaining 2.5% was required to be paid as pre-deposit. Thereafter, the appellant filed refund claim of Rs. 2,74,500/-paid in excess as pre-deposit, the said refund was allowed by the Assistant Commissioner and the Department filed appeal before the Commissioner (Appeal) who set aside the Order-in-Original and allowed the Department's appeal and ordered recovery of Rs. 2,74,500/- under Section 73 of the Act.

4. Heard both the parties and perused the record, Ld. Counsel for the appellant submitted that the impugned order is not sustainable in law as the same is contrary to the provisions of the Act and the binding judicial precedents, he further submitted that the appellant made a pre-deposit of 7.5% of the amount of service tax while filing the appeal before the Commissioner (Appeal) as per Section 35F and they again paid pre-deposit of 10% while filing appeal before the Customs Excise & Service Tax Appellate Tribunal under Section 35F in

total, the appellant has paid 17.5% whereas they were required to pay only 10% as per Section 35F. He further submitted that the legal position that 10% of amount (including) that deposit for filing the appeal before the Commissioner (Appeal) is required for filing appeal before the Tribunal stand settled by the High Court of Delhi in the case of ***M/s Santani Sales Organization Vs. CESTAT, Delhi and others,*** in writ petition no. 4551/2017 dated 31.05.2018, wherein the Hon'ble High Court held as under:-

It is directed that the petitioner and others on filing second appeal before the Tribunal are required to deposit 10% of the amount of duty/penalty as confirmed by the first appellate authority inclusive of 7.5% pre-deposit made for the first appeal.10% would not be in addition to and over and above 7.5% of pre-deposit made for the first appeal. However, contention that Section 35F of the C.E. Act does not apply to service tax appeals and therefore no pre-deposit is required to be made is rejected. In the facts of the case there would be no order as to costs.

5. On the other hand, Ld. AR defended the impugned order. After hearing both the parties and perusal of the material on record and the judgment of the Hon'ble High Court of Delhi in the case of ***M/s Santani Sales organization Vs. CESTAT, Delhi (Supra),*** I am of the considered view that as per the requirement of Section 35F the appellant is required to pay only 10% of the disputed demand for filing the appeal before the Tribunal and in the present case the appellant paid 7.5% before filing the appeal before the Commissioner (Appeal) and 10% of the impugned demand before filing the appeal

before the CESTAT, thereby making total of pre-deposit of 17.5% instead of 10%, as is required under Section 35F. Further, I find that the original authority after considering the submissions of the appellant has rightly allowed the refund of excess 7.5% of the pre-deposit, further I also find this position was also clarified by the board vide circular dated 10.03.2017 wherein the board has observed that refund of pre-deposit need not be subjected to the process of refund of duty under Section 11B of the Central Excise Act, 1944. Further, I find that this issue is squarely covered by the decision of the Delhi High Court in the case of ***M/s Santani Sales organization Vs. CESTAT, Delhi (Supra)*** and following the ratio of the said decision, I am of the considered view that the impugned order is not sustainable and the same is set aside by allowing the appeal with consequential relief if any.

(Order dictated and pronounced in the court)

S.S. Garg
Member (Judicial)

Kailash