CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Service Tax Appeal No. 53890 of 2018

[Arising out of Order-in-Appeal No. IND-EXCUS-000-APP-228/18-19 dated 17.07.2018 passed by the Commissioner(Appeals) Customs, CGST & Central Excise, Indore (M.P.)]

M/s. U.P. Gujrat Freight Carrier **...Appellant**
9-10, SDA Compound
Dewas Naka, Indore (M.P.)

Vs.

Commissioner of C.G.S.T. & C.E., Indore **...Respondent**
Manik Bagh Palace, Post Box No. 10
Indore (M.P.)

APPEARANCE:

Mr. Satyanarayan Goyal, C.A. for the Appellant
Ms. Tamana Alam, Authorised Representative for the Respondent

Coram: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

FINAL ORDER No. 50848/2019

DATE OF HEARING : **20.06.2019**
PRONOUNCED ON : **04.07.2019**

RACHNA GUPTA

Present is an Appeal preferred against the Order of Commissioner(Appeals) bearing No. 228/18-19 dated 17.07.2018 whereby the Appeal is held to be hit by bar of non-payment of mandatory pre-deposit of 7.5% of the service tax involved in this case.

The appellant herein was served with a show cause notice No. 2982 dated 13.09.2017 proposing the recovery of service tax amounting to Rs.1,52,430/- alongwith the interest and the penalty for allegedly not discharging the liability for rendering the services as that of transport of goods by road and renting of immovable property during the period 2012-13 to 2015-16. The said proposal was confirmed vide the Order-in-Original No. 01/2018-19 dated 19.04.2018. Bering aggrieved, the Appeal was preferred which has been dismissed *in limini*.

2. I have heard Shri Satyanarayan, learned C.A. for the appellant and Ms. Tamana Alam, learned Authorised Representatives for the Department.

3. It is submitted on behalf of the appellant that the appellant had deposited an amount of Rs.18,930/- in lieu of the impugned demand on 22.08.2017. Again an amount of Rs.18,930/- has been paid by the appellant in lieu of the impugned demand after the Order under challenge vide Challan dated 28.08.2018. The total amount deposited has to be adjusted with respect to the pre-deposit as is to be mandatorily made by the appellant at the time of filing Appeal (7.5% of demand confirmed at the time of Appeal before Commissioner (Appeals) and 10% of the demand confirmed at the time of filing Appeal before this Tribunal). The learned Counsel has also relied upon the Circular of Ministry of Finance bearing No. 984/08/2014–CX dated 16.09.2014 about the payment made during the course of investigation or audit, prior to the date on which Appeal is filed can be considered to be the deposit made towards fulfilment of pre-deposit. The Order under challenge is, therefore, prayed to be set aside. Appeal is prayed to be allowed.

4. Per contra, it is submitted by the Department that amount deposited after the Order-in-Original has duly been considered by Commissioner(Appeals) however, the said amount was short of

7.5% of the demand confirmed that the Appeal has rightly been dismissed.

5. After hearing both the parties and perusing the record, I observe and hold as follows:

5.1 Two payments have been made by the appellant with respect to the impugned demand as is apparent from the copies of Challans annexed on record dated 22.08.2017 and 28.08.2018 vide which Rs.18,930/- each has been deposited by the appellant. There is no denial to these nor even to the fact that both these payments are in lieu of the demand in question.

5.2 Circular as relied upon by the appellant is perused. It reads as follows:

> "***3. Payment made during investigation***:
>
> *3.1 Payment made during the course of investigation or audit, prior to the date on which appeal is filed, to the extent of 7.5% or 10%, subject to the limit of Rs 10 crores, can be considered to be deposit made towards fulfilment of stipulation under Section 35F of the Central Excise Act, 1944 or Section 129E of the Customs Act, 1962. Any shortfall from the amount stipulated under these sections shall have to be paid before filing of appeal before the appellate authority. As a corollary, amounts paid over and above the amounts stipulated under Section 35 F of the Central Excise Act, 1944 or Section 129E of the Customs Act, 1962, shall not be treated as deposit under the said sections."*

6. The perusal makes is abundantly clear that the 10% of the amount of demand confirmed as is mandatorily to be deposited by the appellant at the time of filing the Appeal before this Tribunal is a mandatory deposit in terms of Section 35F of the Central Excise Act. However, any payment made by the appellant during the course of the investigation has to be adjusted against the said percentage of mandatory deposit. In view of the above admissions, the amount which stands deposited is Rs.37,860/-. The demand confirmed is

Rs.1,57,050/- alongwith the penalty of the same amount and the interest. Section 35F(i) reads as follows:

> *"(i) under sub-section (1) of section 35, unless the appellant has deposited seven and a half per cent. of the duty demanded or penalty imposed or both, in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the Commissioner of Central Excise;"*

7. Thus, 7.5% on the amount of duty confirmed was to be paid at the time of filing of the Appeal before the Commissioner(Appeals). The amount of duty confirmed in this case was Rs.1,57,050/-. The amount already stands deposited, as discussed above is Rs.37,860/- and 7.5% thereof will be Rs.11,778.75. The amount admittedly already stands deposited is Rs.37,860/-. Hence, we are of the opinion that the Commissioner (Appeals) has committed an error while dismissing the Appeal *in limini* to be barred by Section 35F. Order accordingly is set aside. Appeal stands allowed by way of remand requiring the Commissioner(Appeals) to adjudicate the Order-in-Original on merits thereof.

[Order pronounced in the open Court on 04.07.2019]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

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