CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH

Service Tax Appeal No. 85318 of 2023

(Arising out of Order-in-Appeal No. DL/245/Appeals Thane/TH/2021-22 dated 15.02.2022 passed by the Commissioner of GST & Central Excise (Appeals), Thane) .

M/s. Rockwell V. V. Developers ....Appellant
A2-3B, Avani Appartments,
WEH, Dahisar West,
Mumbai – 400 068.

VERSUS

Commissioner of CGST, Thane ....Respondent
5th Floor, CGST Bhawan, Accel House,
Road No. 22, Wagale Industrial Estate,
Thane (W) – 400 604.

APPERANCE:

Shri D. H. Nadkarni, Advocate for the Appellant

Shri Prabhakar Sharma, Superintendent, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/85550/2023

Date of Hearing: 31.03.2023
Date of Decision: 31.03.2023

PER: ***Dr. Suvendu Kumar Pati***

Legality of Adjudication order confirming imposition of Service tax on the basis of turnover shown in the Income tax returns of 2013-14 and rejection of Appellant's appeal filed before the Commissioner (Appeals) challenging such order, solely on the ground of none payment of required pre-deposit amount in cash, is assailed in this appeal.

2. We have heard both the sides and perused the case record. On perusal of the case record it is observed that the Commissioner (Appeals), Thane GST and Central Excise, Mumbai in his order dated 10.05.2022 had observed that pre-deposit of Rs.4,33,000/- (Four Lakh Thirty Three Thousand Only) @ 7.5% of the disputed amount was paid by the Appellant through ITC (Input Tax Credit) reversal in GSTR-3B, which is meant for discharge of shortfall of tax liability in relation to CGST law but it mandates that deposit required to be made under the erstwhile law was to be made under the provision available therein. Placing reliance to Board Circular No. 984/8/2014-CX dated 16.09.2014 he had dismissed the appeal for non-compliance of Section 35F of the Central Excise Act 1944. Before coming to the issue, we consider it appropriate to reproduce the relevant provision contained in Section 35F and the Board Circular No. 984/8/2014-CX dated 16.09.2014, referred above.

> *"Section 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 [Principal Commissioner of Central Excise or Commissioner of Central Excise" (Underlined to emphasise)*

Relevant portion of Board Circular No. 984/8/2014-CX dated 16.09.2014 reads:

> *"In case of any short-payment or non-payment of the amount stipulated under Section 35F of the Central Excise*

> *Act, 1944 or Section 129E of the Customs Act, 1962, the appeal filed by the Appellant is liable for rejection."*

3. From the above referred two provisions *vis-à-vis* the case on hand, it can be stated that appeal should not be admitted for hearing by the Commissioner (Appeals) in the event of non-compliance of the provisions mentioned above but ones appeal is admitted for hearing Commissioner (Appeals) has to follow the dictates of law provided under Section 35A(iv) and dispose of the appeal stating the points for determination and the decision thereon with reasons for such decision and he should not have disposed of the appeal after hearing the appeal only for non-compliance of pre-deposit provisions in view of the wordings available in the text underlined above, namely "shall not entertain any appeal" and "appeal filed by the Appellant is liable for rejection". To put it otherwise, there is a difference between dismissal of appeal and rejection of the same. Therefore, while we endorse the reasons cited in the Commissioner (Appeals)'s order, in view of the requirement of mandatory pre-deposit to be made under the erstwhile Excise Act and in view of the decisions passed in M/s Johnson Matthey Chemical on dated 23.08.2022 by this Tribunal holding that pre-deposit by debiting Electronic Credit Ledger is not sufficient compliance, on that score he could have rejected the appeal at the admission stage and should not have dismissed the appeal without passing an order on merit.

4. Therefore, Having regard to the fact that Appellant had removed the defects and paid the entire pre-deposit amount of 10% in cash

through Challan for filing appeal before the CESTAT, as has been noted in order dated 28.02.2023 for admitting the appeal, we consider it proper to remind the appeal back to the Commissioner (Appeals) for determination of issues and his finding on the same as contemplated in Section 35A(iv). Hence the order.

THE ORDER

5. The appeal is allowed by way of remand to the Commissioner (Appeals) for re-hearing of appeal on merit and the order passed by the Commissioner of GST & Central Excise (Appeals), Thane *vide* Order-in-Appeal No. DL/245/APPEALS THANE/TH/2021-22 dated 15.02.2022 is accordingly set aside.

(Operative portion of the order pronounced in open court)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

Sujeet