IN THE HIGH COURT OF ORISSA AT CUTTACK
W.P. (C) No.17548 of 2022

M/s Ethics Assets Pvt. Ltd., ... ***Petitioner***

Mr. Tushar Kanti Satapathy, Advocate

-versus-

Central Board of Indirect Taxes & Customs & Another .... ***Opposite Parties***

Mr. Radheshyam Chimanka, Sr. Standing Counsel for CGST

CORAM:
JUSTICE JASWANT SINGH
JUSTICE M.S. RAMAN

ORDER (Oral)

Order No. **22.07.2022**

01. **1.** This matter is taken up by virtual/physical mode.

2. Challenging the propriety of Order-in-Appeal bearing No.95/ST/BBSR-GST/2022, dated 28.04.2022 passed by the Commissioner (Appeals), Bhubaneswar, the Petitioner has knocked the doors of this Court invoking provisions of Article 226/227 of the Constitution of India.

3. Mr. Tushar Kanti Satapathy, counsel for the Petitioner alleging violation of principles of natural justice urged that the Appellate Authority has ignored to afford opportunity of hearing before rejecting the appeal filed under Section 83 of the Chapter-V of the Finance Act, 1994 read with Section 35F of the Central Excise Act, 1944. It is contended by the Counsel for the Petitioner that though he has deposited an amount of Rs.7,43,879/- in the account with IFSC No.002000STWJ0101701202006l256746 way back on 15th July, 2020, in connection with statutory requirement of pre-deposit for entertainment of appeal, the Appellate Authority without verifying the records ought not to have rejected the appeal on erroneous impression that pre-deposit was not made "for filing the appeal".

4. Counsel for the Petitioner has taken this Court to the provisions of Section 35F of the Central Excise Act as reflected in the appellate order dated 28th April, 2022, the relevant portion of the said provision is quoted hereunder:-

> ***"****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):*
>
> *(ii) Against the decision or order referred to in clause (a) of sub-section (1) of Section 35B, unless the appellant has deposited seven and a half percent, 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 the decision, or order appealed against:*
>
> *(iii) Against the decision or order referred to in clause (b) of sub-section (1) of Section 35B, unless the appellant has deposited ten 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 the decision or order appealed against:*
>
> *Provided that the amount required to be deposited under this section shall not exceed rupees ten crores:*
>
> *Provided further that the provisions of this section shall not apply to the stay applications and appeals pending before*

> *any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.*
>
> *Explanation.—*
>
> *For the purposes of this Section "duty demanded" shall include.—*
>
> *(i) amount determined under Section 11D:*
>
> *(ii) amount of erroneous Central credit token:*
>
> *(iii) amount payable under Rule 6 of the Cenvat Credit Rules, 2001 or "the Cenvat Credit Rules, 2002 or the Central Credit Rules, 2004.)"*

Mr. Tushar Kanti Satapathy, counsel for the Petitioner, therefore, submitted that though Section 35F clearly stated that the pre-deposit of seven and a half per cent of the duty is required to be made to "entertain any appeal", the Appellate Authority quoted as follows:

> **"***From the above it is evident that though discretion is vested with the Appellate Authority to give personal hearing in the facts and circumstances of the particular case, before disposing off the case, I hold that in the instant case the Appellant has not made the mandatory Pre deposit required for* ***filing the Appeal****. This statutory requirements cannot be dispensed with while admitting & deciding the appeal. In this circumstances giving of Personal Hearing does not arise in the instant case."*
>
> *(Emphasis supplied)*

He also submitted that the mistaken notion of the Appellate Authority is apparent on the face of the reason ascribed by him in the Appellate Order itself. Therefore, the Appellate Order has no legs to stand.

5. Mr. Radheshyam Chimanka, Senior Standing Counsel for the Central Goods & Service Tax and Customs on advance notice appears for the Opposite Parties and has not disputed the legal position *vis-à-vis* the reason assigned by the Appellate Authority.

6. This Court, without entering into merits of the matter, feels it just and proper to relegate the Petitioner to approach the Appellate Authority namely Commissioner (Appeals), Central GST and Customs and submit before him the necessary documents showing compliance of statutory requirement including pre-deposit being made as required under Section 83 of the Chapter-V of the Finance Act, 1994 read with Section 35F of the Central Excise Act, 1944. The First Appellate Authority, subject to verification and statutory compliance, shall restore the Appeal bearing No.95/ST/BBSR-GST/2022 to file and proceed with the matter on its merits in accordance with law.

7. With the aforesaid observation and direction, the writ petition is disposed of.

(Jaswant Singh)
Judge

(M.S. Raman)
Judge

Laxmikant July 22, 2022 Cuttack