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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CM-6120-CWP-2024 in/and
CWP-4498-2024 (O&M)
Date of Decision:23.04.2024

SUMAT GUPTA AND CO. CHARTERED ACCOUNTANTS
........Petitioner

V/s.

UNION OF INDIA AND OTHERS *........Respondents*

CORAM: ***HON'BLE MR. JUSTICE SANJEEV PRAKASH SHARMA.***
HON'BLE MRS. JUSTICE SUDEEPTI SHARMA.

Present Ms. Aakriti, Advocate for the petitioner.

Mr.Sourabh Goel, Senior Standing Counsel,
with Ms. Geetika Sharma, Advocate for the respondents.

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SANJEEV PRAKASH SHARMA, J. (Oral)

CM-6120-CWP-2024

1. Application is allowed and replication to the Written Statement filed on behalf of respondent No.2 is taken on record.

CWP-4498-2024 (O&M)

2. This Writ Petition has been preferred by the partnership firm aggrieved of the order dated 23.12.2023 (Annexure P-11) passed in the Appeal filed by it before the Office of the Commissioner (Appeals) Central Goods and Services Tax Appeals, Commissionerate, Jammu which was rejected on the ground of non-payment of pre-deposit.

3. Learned counsel for the petitioner has submitted that new password has not been issued to the petitioner despite an application for the same having been filed. As soon as the password was issued, the petitioner made the payment in respect of pre-deposit on 14.12.2023 and ignoring the said pre-deposit, the Appeal filed by the petitioner has been dismissed vide the impugned order.

4. Learned counsel for the respondents submits that the password originally issued to the petitioner has become inoperative and request of reissue of password was only made on 29.03.2023. A show cause notice has been issued by the adjudicating authority on 28.12.2022, however, the letter for personal hearing was received back with a remark "no such person".

5. It is further submitted by the learned counsel for the respondents that the Appeal preferred by the petitioner was without mandatory pre-deposit and therefore, the same could not be considered on merits in terms of Section 35-F of the Central Excise Act, 1944 which provides that the deposit of a certain percentage of duty demanded or penalty imposed before filing an appeal is a pre-requirement and the order dated 23.12.2023 passed by the appellate authority, therefore, does not warrant any interference.

6. We have considered the submissions of learned counsel for the parties.

> ***Section 35F. Deposit of certain percentage of duty demanded or penalty imposed before filing appeal. -***
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> *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 [2] [Principal Commissioner of Central Excise or Commissioner of Central Excise];*
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> *(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 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;

(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 Cenvat credit taken;

(iii) amount payable under rule 6 of the Cenvat Credit Rules, 2001 or the Cenvat Credit Rules, 2002 or the Cenvat Credit Rules, 2004."

7. We find that factually, the payment of pre-deposit was made on 14.12.2023 and an e-mail was also sent to the appellate authority of the fact payment of pre-deposit, however, the order impugned does not take into consideration the said aspect of pre-deposit having already been made and the Appeal has been rejected.

8. We find that there is a basic error crept in the order impugned. Once the pre-deposit has been made and the same is already accepted, the Appeal could not have been rejected. Merely because the pre-deposit had not been submitted at the time of filing the Appeal, it cannot be said that the pre-deposit cannot be made after filing of the Appeal. The same has been deposited before adjudication and therefore, the appeal is required to be examined on merits.

9. The condition of pre-deposit is to be understood as a pre-requisite for the purpose of adjudication of an appeal. Section 35-F of the Act which requires deposit of certain percentage of duty demanded or penalty imposed before filing of an appeal. Since the pre-deposit has been made in the present case, the appellate authority having knowledge of the pre-deposit already made could not or ought not have dismissed the appeal solely on the ground that at the time of filing of appeal, pre-deposit has not been made. The same has been deposited before adjudication of the appeal. Therefore, the appeal is required to be examined on merits.

10. We, therefore, ***allow*** this Writ Petition and set aside the impugned order dated 23.12.2023 with directions to the appellant authority to decide the Appeal of the petitioner afresh on merits.

11. All pending application stands disposed of accordingly.

[SANJEEV PRAKASH SHARMA]
JUDGE

April 23, 2024
Ess Kay

[SUDEEPTI SINGH]
JUDGE

Whether speaking / reasoned	:	*Yes*	/	*No*
Whether Reportable	:	*Yes*	/	*No*