

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
ALLAHABAD**

REGIONAL BENCH - COURT NO.I

**Service Tax Miscellaneous Application No.70146 of 2024**

(on behalf of Appellant)

**in**

**Service Tax Appeal No.70197 of 2024**

(Arising out of Order-in-Appeal No.GZB-EXCUS-000-APPL-MRT-44-23-24 dated 30.05.2023 passed by Commissioner (Appeals) CGST, Meerut)

**M/s Shri Krishna Road Carrier,**

(Proprietor Vijay Kumar Gupta)

(J-130/A, Sector-9, Vijay Nagar, Ghaziabad-201009)

**.....Appellant**

*VERSUS*

**Commissioner of Central Excise &**

**CGST, Meerut**

(CGO Complex-II, Kamla Nehru Nagar, Ghaziabad-201002)

**....Respondent**

**APPEARANCE:**

Shri Shubham Agarwal, Advocate for the Appellant

Shri Sandeep Pandey, Authorized Representative for the Respondent

**CORAM: HON'BLE MR. P. K. CHOUDHARY, MEMBER (JUDICIAL)**

**HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**

**MISCELLANEOUS ORDER NO.- 70173/2024**

**FINAL ORDER NO.- 70286/2024**

DATE OF HEARING : 03 June, 2024

DATE OF DECISION : 03 June, 2024

**P.K. CHOUDHARY:**

In view of the submissions as made by the learned Advocate, Miscellaneous Application for early hearing is allowed. With the consent of both sides, the appeal itself is taken up for hearing.

2. We find that the learned Commissioner (Appeals) has not decided the appeal on merits but has rejected the appeal before him for failure to make mandatory pre-deposit in terms of Section 35F of the Central Excise Act, 1944, as made applicable to service tax cases vide Section 83 of Finance Act, 1994. We further find that the Appellant deposited Rs.4,30,100/- and submitted copy of DRC-03 bearing ARN AD090522034173D dated 27.05.2022.

3. Further learned Commissioner (Appeals) in the impugned Order-in-Appeal at paragraph 4.3 and 4.3.1 has recorded as under:-

*"4.3 I further find that as per the provisions of Section 35F of the Central Excise Act, 1944, as made applicable to service tax matters vide Section 83 of the Finance Act, 1994, proof of mandatory pre-deposit of seven and a half percent of the duty, in case where duty or duty and penalty are in dispute, has to be submitted while filing the appeal under the provisions of Section 85 of the Finance Act, 1994. In this regard I find that together with the subject appeal the appellant has submitted copy of DRC-03 bearing ARN AD090522034173D dated 27.05.2022 for Rs.4,30,100/-. In the matter, I further find that the Board has vide its Instruction bearing No. CBIC-240137/14/2022-SERVICE TAX SECTION-CBEC dated 28.10.2022 has inter alia clarified as under:*

*5. Attention is invited to Miscellaneous transitional provisions sub-section (6)(b), sub-section (7)(a) and sub-section (8)(a) of Section 142 of the CGST Act, 2017, which, inter alia, provides that any credit, tax, interest, fine or penalty recoverable from the person before, on or after 1<sup>st</sup> July, 2017 under the existing law (Central Excise Act and Chapter-V of Finance Act, 1994) shall be recovered as an arrear of tax under CGST Act. It is, however, settled that pre-deposit as a requirement for exercising the right to appeal neither is in the nature of duty nor can be treated as arrears under the existing law and hence cannot be said to be covered under transitional provisions of CGST Act.*

*6. In view of above, it is clarified that payments through DRC-03 under CGST regime is not a valid mode of payment for making pre-deposits under section 35F of the Central Excise Act, 1944 and Section 83 of Finance Act, 1994 read with section 35F of the CEA. There exists a dedicated CBIC-GST Integrated portal, <https://cbic-gst.gov.in> {Board's Circular No.1070/3/2019-CX dated 24<sup>th</sup> June, 2019 refers in this regard}, which should only be utilized for making deposits under the Central Act, 1944 and the Finance Act, 1994.*

*4.3.1 From the cited text of the said Instruction dated 28.10.2022 it is explicitly and unambiguously clear that the same is essentially clarificatory in nature and, as is*

*legally established, the same is retrospective in nature as it only clarifies the existing provisions of the statute. I find that the retrospective nature of clarificatory provisions has been established vide plethora of judgments of courts and tribunals, and herein for referential ease following judgements of the Hon'ble Supreme Court are being cited:*

*(i) Union of India Vs. V.V.F. Ltd. [2020 (372) E.L.T. 495 (S.C.)]: Held: Modification/variation when clarificatory and retrospective in operation - Doctrine of promissory estoppel - Clarificatory in nature issued in larger public interest and in Revenue's interest - Can be made applicable retrospectively to prevent frustration of object and purpose and intention of Government;*

*(ii) Surinder Singh Vs. Union of India [2016 (340) E.L.T. 97 (S.C.)]: Held: Drawback-Exports proceeds not realized-Recovery of Drawback-Customs portion - Retrospective effect of Rule 16A of Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 - Impugned Rule only clarificatory in nature and hence applicable retrospectively;*

*(iii) W.P.I.L. Ltd. CCE, Meerut [2005 (181) E.L.T. 359 (S.C.)]: Held: Interpretation of statutes - Clarificatory notification - Merely clarifies position and makes explicit what was implicit - It takes effect retrospectively; and*

*(iv) CCE, Shillong Vs. Wood Craft Products Ltd. [1995 (77) E.L.T. 23 (S.C.)] Held : Central Excise Tariff - Amendment thereto whereas of clarificatory in nature to be effective right from the beginning."*

4. We find that Hon'ble High Court in the case of Sodexo India Services Pvt. Ltd. vs. Union of India in Writ Petition No.6220/2022 decided on 03.10.2022 reported as 2022 (66) G.S.T.L. 257 (Bom.) held thus :-

**"6.** We find that this is a matter that requires to be resolved by the Central Board of Indirect Taxes and Customs (CBI & C). From the affidavit filed by Mr. Lal, it appears that many appellants/assesseees were paying the pre-deposit under Section 35F of the Central Excise Act, 1944 through service tax challans, whereas few appellants/assesseees were using DRC-03 mode under CGST Act, 2017. This, in our view, could be for various reasons. It appears that this problem has been taken up by the CBI & C with the Principal Chief Commissioner, Mumbai CGST & CE Zone by a letter dated 3rd June 2022. The subject itself states "Non-acceptance of pre-deposit paid through Form GST DRC-03 for appeal under Service Tax law-Request for issuance of instructions to accept such payment as no other option available for making the pre-

*deposit before filing of appeals-reg.” Paragraph 2 of the said letter also reads as under :*

*2.Vide said representation, the party has mentioned in their letter that the numerous appeals have been rejected on the ground that the payment made for pre-deposit mandatory under Section 35F of the Central Excise Act, 1944 through CGST cannot be accepted and hence, the appellants have failed to comply with the provisions of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994.*

*7. Ms. Masurkar also informed the Court, on instructions from Mr. Lal, who is present in Court, that Mr. Lal himself as Commissioner (Appeals) has raised this issue with the Principal Chief Commissioner, CGST and Central Excise by a letter dated 10th February, 2022. Ms. Masurkar states that the impugned order passed by Mr. Lal, therefore, should not be viewed as something which has been done without applying his mind. We accept Ms. Masurkar’s explanation having considered the letter dated 10th February 2022 that is placed on record.*

*8. Therefore, it does appear that the confusion seems to be due to there being no proper legal provision to accept payment of pre-deposit under Section 35F of the Central Excise Act, 1944 through DRC-03. Some appellants are filing appeals after making pre-deposit payments through DRC-30/GSTR-3B. In our view, this has very wide ramifications and certainly requires the CBI & C to step in and issue suitable clarifications/guidelines/ answers to the FAQs. We would expect CBI & C to take immediate action since the issue has been escalated by Mr. Lal over eight months ago.*

*9. In the circumstances, we hereby quash and set aside the impugned orders dated 13<sup>th</sup> April, 2022 and direct respondent No.3 to hear petitioner de novo and pass such orders as he deems fit on merits in accordance with law.”*

5. We find that the learned Commissioner (Appeals) could have granted the refund of amount of pre-deposit wrongly made by DRC-03 to the Appellant and given an opportunity to deposit the said amount on its Integrated Portal instead of dismissing the appeal in limine. Because dismissing the appeal filed by the Appellant, even after making the pre-deposit, merely on the ground that it has not been deposited in the prescribed manner

or by the prescribed Form, amounts to denial of substantial justice and the Commissioner (Appeals) has erred in shirking from its responsibility of deciding the appeal on merits. CBIC has issued another Circular/Instruction dated 18.04.2023, by which it has clarified the earlier Instruction dated 28.10.2022. It has been provided that DRC-03 is a prescribed mode for payment of pre-deposit under the GST Act. From perusal of paragraph 3 of the Instruction dated 28.10.22, it is evident that the tax under the existing law (Service Tax) shall be recovered as an arrear of tax under the CGST Act and the pre-deposit is neither in the nature of duty nor can be treated as arrears under the Service Tax law. Thus, when the service tax could be recovered as an arrear of Service Tax under CGST Act, after commencement of the CGST Act, then pre-deposit made through DRC-03 prior to 28.10.22 has to be treated as sufficient compliance, in view of the subsequent Instruction dated 18.4.23.

6. In view of the above discussion and by respectfully following the decision of the Hon'ble High Court, we find it appropriate to remand the matter to the learned Commissioner (Appeals) to decide the appeal on merits without further visiting the aspect of pre-deposit. Needless to mention all issues are kept open. Appellant would not seek refund of the pre-deposit till the appeal is finally decided by the learned Commissioner (Appeals). The appeal filed by the Appellant is allowed by way of remand to the Commissioner (Appeals).

(Dictated and pronounced in open court)

**(P.K. CHOUDHARY)**  
**MEMBER (JUDICIAL)**

**(SANJIV SRIVASTAVA)**  
**MEMBER (TECHNICAL)**

LKS