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IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION

**CUSTOMS APPEAL LODG.NO. 61 OF 2014**

M/s Advance Netways Marketing Pvt. Ltd.

..Appellant.

Vs.

Commissioner of Customs, Nhava Sheva

..Respondent

**WITH  
CUSTOMS APPEAL ST.NO. 62 OF 2014  
WITH  
NOTICE OF MOTION NO.1364 OF 2014**

**WITH  
CUSTOMS APPEAL ST.NO. 63 OF 2014  
WITH  
NOTICE OF MOTION NO.859 OF 2014**

**WITH  
CUSTOMS APPEAL ST.NO. 64 OF 2014  
WITH  
NOTICE OF MOTION NO.1305 OF 2014**

**WITH  
CUSTOMS APPEAL ST.NO. 65 OF 2014  
WITH  
NOTICE OF MOTION NO.1303 OF 2014  
WITH**

**CUSTOMS APPEAL ST.NO. 66 OF 2014  
WITH  
NOTICE OF MOTION NO.1304 OF 2014**

**WITH**  
**CUSTOMS APPEAL ST.NO. 67 OF 2014**  
**WITH**  
**NOTICE OF MOTION NO.1306 OF 2014**

**WITH**  
**CUSTOMS APPEAL ST.NO. 68 OF 2014**  
**WITH**  
**NOTICE OF MOTION NO.1365 OF 2014**

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Mr. E.P. Bharucha, Senior Counsel a/w Mr. D.B. Shroff, Senior Counsel a/w Bomi Patel i/b Bharucha And Partners for Appellant.  
 Senior Counsel Mr. Bharucha a/w Counsel Mr. Bomi Patel a/w Vivek Vashi a/w Krishnendu Sayta i/b Bharucha & Partners in Appeal (L) No.62/2014.  
 Senior Counsel Mr. D.B. Shroff a/w Mr. Bomi Patel a/w Vivek Vashi a/w Krishnendu Sayta i/b Bharucha & Partners in Appeal (L) No.66/2014.  
 Mr. Bomi Patel a/w Vivek Vashi a/w Krishnendu Sayta i/b Bharucha & Partners in Appeal (L) Nos.61,63,64,65,67,68 of 2014.

Mr. Pradeep S. Jetly, for Respondents in all Appeals.

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**CORAM: B.R. GAVAI &  
 A.S. GADKARI, JJ.**

**DATE : 13<sup>th</sup> April 2015.**

**ORAL JUDGMENT (PER B.R. GAVAI, J.):**-

Heard

2           The facts in brief giving rise to the present appeals are as under :

(a)           It is the case of the Revenue that the Appellant-firm

(hereinafter referred to as 'Exporters') had made export of certain goods declaring the same as automobile parts such as door bidding, fuel pump fitting, front suspension bush, oil seal etc. and availed export benefit by way of Duty Entitlement Pass Book (DEPB) Scheme. It is further the case of the Revenue that the Exporters-appellants against the DEPB credit obtained DEPB Script from the Director General of Foreign Trade which were sold in open market. As per the said Scheme, the bearer of DEPB Script is entitled to import the goods without payment of duty. The Customs Authorities started investigation in respect of exports made by Delhi based firms namely M/s S.S. Enterprises, M/s Neel Impex and M/s Agarwal Traders and found that the exported goods were overvalued to get undue DEPB benefit.

**(b)** Since the Revenue found that the said applicants-firms were also exporting similar goods, investigation started and it was found that there are many transactions between the present appellants and M/s S.S. Enterprises, M/s Neel Impex and M/s Agarwal Traders. The appellants denied their relationship with the aforesaid three firms. However, since the Revenue had a material to establish that there were transactions between the appellants and the said three firms, the samples were taken from the consignments of these three firms and market enquiry was conducted and it

was found that the Exporters declared inflated value of motor vehicle parts and availed undue DEPB credit and on the basis of the said DEPB credit, obtained DEPB Script which were sold in the open market.

**(c)** During investigation, summons were issued to Mr. R.K. Goyal who was the Director of all the Exporter-firms. In the statement recorded under Section 108 of the Customs Act, 1962 in respect of procurement of exported goods, Mr. Goyal stated that all the records were destroyed in a fire which took place in their godown. Mr. Goyal has denied their relationship with M/s S.S. Enterprises, M/s Neel Impex and M/s Agarwal Traders. Mr. Goyal disclosed that the exported goods were procured from the open market from the traders and the procurement was looked after by one Mr. Sanjay who thereafter left the job. During investigation, the Exporter firms failed to produce any documentary evidence regarding procurement of the large quantity of parts which were exported.

**(d)** Accordingly, show cause notices were issued to the Exporters' firms for recovery of DEPB credit obtained by them and for confiscation of the goods which were exported by declaring higher value and for imposition of penalties. The Commissioner of Customs (Exports) vide order dated 30<sup>th</sup> July 2012 directed the recovery of DEPB credit obtained by the appellants by invoking the extended period of limitation and also

imposed penalties on the Exporters as well as other applicants.

(e) Being aggrieved thereby, appeals came to be preferred before the learned CESTAT. Along with the appeals, an application for exemption for pre-deposit came to be filed. The said applications were partly allowed. The learned CESTAT directed the appellants to deposit 50% of the duty and 10% of the penalty in each case levied as a pre-condition for hearing the appeals. Being aggrieved thereby, the present appeals.

3 Mr. Bharucha, the learned Senior Counsel appearing for the appellants submit that the learned Tribunal has grossly erred in directing the pre-deposit as aforesaid. The learned Senior Counsel submits that in the facts of the present case the learned Tribunal ought to have waived the entire duty and penalties and heard the appeals on merits without insisting on any pre-deposit. The learned Senior Counsel submits that the procedure as adopted by the Original Authority is dehorse the provisions of statute. He submits that the Customs Authorities did not have jurisdiction under Section 28 of the Customs Act. The learned Senior Counsel submits that the Authorities are seeking to recover the duty payable by the importers from the appellants which is not permissible in law. The learned Senior Counsel submits that the Division Bench of this Court in the case of

***Commissioner of Customs (EP) Vs. Jupiter Exports [2007 (213) 614 (Bom.)]*** has held that in view of the provisions of Section 28 it is not permissible to recover the duty from an Exporter. The learned Senior Counsel states that as a matter of fact in the said case the Importer was identified, however, it was held by the Commissioner of Customs in the order that the importer who had imported the goods bonafide was not liable for payment of duty. It is further submitted that in the present case, even the Authorities have not identified the importer. It is, therefore, submitted that in the facts of the present case, the duty which is basically a duty on importer is sought to be recovered from the appellants which is not permissible in law. The learned Senior Counsel further submits that the learned Tribunal has relied on the judgment in the case of ***Hindustan Lever Limited Vs. Commissioner of Customs (EP), Mumbai [2012 (281) ELT 241 (Tri-Mum)]*** and has taken contrary view than the view taken in the present case. He submits that, whereas the learned Tribunal has relied on the judgment of the Division Bench of this Court in the case of ***Commissioner of Customs (EP) Vs. Jupiter Exports (supra)***, in the aforesaid case, it has relied on the judgment of Division Bench of the Andhra Pradesh High Court in the case of ***Sravani Impex Private Limited Vs. Additional Director-General, DRI, Chennai [2010 (252) E.L.T. 19***

*(AP)].*

4           Mr. Bharucha, the learned Senior Counsel further submits that the authorities have not even followed the procedure prescribed in the Circular issued by the Government of India dated 8<sup>th</sup> December 1997. It is further stated that no show cause notice as is required under the said Circular, is issued to the appellants. It is further stated that an enquiry ought to have been completed within a period of 30 days or at the most within 90 days. It is further submitted that in the present case the matter is sought to be re-opened almost after four-to-five years and as such is not permissible in law. The learned Senior Counsel submits that perusal of the material on record would reveal that various documents which are sought by the present appellants were not supplied to them. It is, therefore, submitted that the order which is passed is in breach of principles of natural justice. The learned Senior Counsel therefore submitted that this Court should either allow the appeals in entirety and direct the Tribunal to decide the appeals on its own merits without insisting of pre-deposit or in the alternative remand the matter back for consideration afresh.

5           As against this, Mr. Jetly, the learned Counsel appearing for the Revenue submits that the present appeals arise only out of the order directing pre-deposit. He submits that while considering an application for pre-deposit, the learned Tribunal is required to take into consideration only three factors namely prima facie case, undue hardship and interest of the Revenue. He submits that the learned Tribunal has rightly taken into consideration all these factors while passing the impugned order. He submits that taking into consideration all the factors, the learned Tribunal has directed to deposit only 50% of the duty and only 10% of the penalties as pre-deposit. The learned Counsel therefore submits that the present appeals are without merits and as such are liable to be dismissed.

6           The question of law as raised in the grounds (a) to (g) and (i), all relate to the merits of the main matter. We find that the said questions of law can be considered only after final adjudication by the learned Tribunal.

We find that only following question of law arises for our determination:

“(h) Whether the Tribunal ought to have waived the pre-deposit of duty and penalty under Section 129E of the Act as calling upon the Appellant to deposit the same or part of the same would cause undue hardship to the Appellant in view of financial difficulty of the Appellant ?”

7 Admit on the aforesaid substantial question of law. We proceed to hear and decide the same finally by consent of the parties.

8 All these appeals arise out of the order passed by the learned CESTAT dated 4<sup>th</sup> December 2013 thereby partly allowing the applications filed by the appellants and directing them to deposit 50% amount of duty and 10% amount of penalty in each case, as a pre-condition of hearing the appeals.

9 The factors which are required to be taken into consideration by the Tribunal at the stage of pre-deposit have been laid down by the Apex Court in the case of ***Benara Valves Ltd Vs. Commissioner of Central Excise, reported in 2006(204) E.L.T. 513 (S.C.)***, which has been subsequently considered by the Hon'ble Apex Court in the case of ***Indu Nissan Oxo Chemicals Industries Vs. Union of India, reported in 2008 (221) ELT 7 (SC)***. The Apex Court in the case of ***Indu Nissan Oxo Chemicals (supra)*** interpreted the provisions of Section 129E of the Customs Act. Paragraphs 14,15 and 16 of the said judgment thus read as under:

14. Two significant expressions used in the provisions are

"undue hardship to such person" and "safeguard the interests of revenue". Therefore, while dealing with the application twin requirements of considerations i.e. consideration of undue hardship aspect and imposition of conditions to safeguard the interest of Revenue have to be kept in view.

15. As noted above there are two important expressions in Section 129-E. One is undue hardship. This is a matter within the special knowledge of the applicant for waiver and has to be established by him. A mere assertion about undue hardship would not be sufficient. It was noted by this Court in *S. Vasudeva v. State of Karnataka and Ors.* (AIR 1994 SC 923) that under Indian conditions expression "Undue hardship" is normally related to economic hardship. "Undue" which means something which is not merited by the conduct of the claimant, or is very much disproportionate to it. Undue hardship is caused when the hardship is not warranted by the circumstances.

16. For a hardship to be 'undue' it must be shown that the particular burden to have to observe or perform the requirement is out of proportion to the nature of the requirement itself, and the benefit which the applicant would derive from compliance with it."

**10** Perusal of the material placed on record would reveal that the case of the Revenue in nutshell is that the appellants have inflated the value of the products which were exported for obtaining a higher export value so that they can get an inflated DEPB credit which can be sold in the market. The material on record would reveal that while authorities were considering the cases of similar units namely M/s S.S. Enterprises, M/s

Neel Impex and M/s Agarwal Traders, it was found that the exported goods were overvalued to get undue DEPB benefit. It was further found that the appellants-firms were having transactions with the aforesaid three firms. Though the appellants had specifically denied the relationship with the said three firms, it was found from the material on record that there were various bank transactions between the appellants and/or their subsidiaries and the said three firms. From the samples taken from the consignments of the said three firms and the market enquiry, it was found that the Exporter had declared inflated value of motor parts and availed undue DEPB credit and on the said basis DEPB Scripts were obtained and were sold in the open market.

**11** Insofar as the contention of Shri Bharucha that the procedure adopted by the Original Authority being in violation of the Circular dated 8<sup>th</sup> December 1997 issued by the Government of India is concerned, at least prima facie, we are of the view that the said contention is not supported by material on record. The material placed on record would reveal that not only the show cause notices were issued to the appellants, but also the summons were issued to Shri R.K. Goyal under the provisions of Section 108 of the Customs Act, 1962. However, the said Mr. Goyal stated that all

the records were destroyed in a fire which occurred in their godown. Mr. Goyal also denied to have relationship with M/s S.S. Enterprises, M/s Neel Impex and M/s Agarwal Traders. He made a statement that the products were obtained from open market and that the procurement was looked after by one Shri Sanjay who thereafter left the job.

**12** We may state that, at this stage since we are only considering the appeals arising out of an order directing pre-deposit, it will not be appropriate to observe anything on the merits of the matters. Any view, either way would unnecessarily prejudice either of the parties. In that view of the matter, we refrain ourselves from considering the rival contentions on merits. We will restrict ourselves only to find out as to whether the view taken by the learned Tribunal is in consonance with law laid down by the Apex Court and as to whether the learned Tribunal has rightly applied the aforesaid three factors while deciding the application for pre-deposit.

**13** Insofar as the contention regarding the enquiry to be conducted within a period of 30 days or 90 days is concerned, we may refer to sub-section 4 of Section 28 of the Customs Act, which reads thus:

“ Where any duty has not been levied or has been short-levied

or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of-

- (a) collusion; or
- (b) any wilful mis-statement; or
- (c) suppression of facts,

by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.”

**14** Perusal of the said provisions would reveal that in case of collusion or any willful mis-statement or suppression of facts, the show cause notice should be issued to the assessee within a period of 5 years and as such we find that there is no merits in the said contention.

**15** Insofar as the Circular dated 8<sup>th</sup> December 1997 issued by the Government of India is concerned, at least prima facie, we do not find that the said Circular, can restrict the power of the Authority to invoke the provisions under Section 28 of the Customs Act within a period of five-years. Undoubtedly, a show cause notice is issued to the Appellant before the impugned order has been passed by the Original Authority.

16           Insofar as the judgment of the Division Bench of this Court in the case of ***Commissioner of Customs (EP) Vs. Jupiter Exports (supra)***, is concerned, it is relevant to refer to paragraph-23 of the said judgment in which the Division Bench has held that the duty under Section 28 could only be recovered from "a person chargeable to duty" and that such a person would be the importer in the case of import and the exporter in the case of exports. The Division Bench held that the import duty cannot be recovered from the person who has not caused the import of the goods and who does not hold himself to be the importer or the owner of the imported goods. It was therefore held that the assessee therein were not the importers and therefore cannot be made chargeable to the duty as the demand for duty has to be based on law and not on equity or moral considerations. However, the Division Bench itself has upheld that the observations made by the learned Tribunal that it was open to the department to proceed against a person who had obtained a license by fraud or misdeclaration in accordance with law.

17           Perusal of the material on record would reveal that it is the case of the Revenue that the DEPB credit was obtained by the appellants

by fraud so as to avail DEPB credit on the inflated rates so that resultantly DEPB Scripts are available at inflated rates, which can be sold in the open market. In that view of the matter, in our view, the aforesaid judgments would rather support the case of the Revenue than that of the appellants.

**18**           Insofar as the judgment in the case of Hindustan Lever Limited by the learned Tribunal is concerned, firstly the said judgment is on merits of the appeal and not arising out of the order regarding pre-deposit. However, upon perusal of the paragraph-9 of the said judgment, it would reveal that in the said case though it was the case of the Revenue that the mis-declaration made under DEPB claim, an action can be taken only for denial under DEPB Scheme and action cannot be taken for the aforesaid violation of DEPB Scheme under the DEEC Scheme. In the present case, from the material placed on record, it would clearly be seen that the action is being taken by the authorities under the DEPB Scheme for the violation of the Scheme itself. In that view of the matter, the said judgment, in our view, at least prima facie would not support the case of the appellants.

**19** After perusal of the order passed by the CESTAT, it appears to us that the learned Tribunal has taken into consideration all the three factors i.e. prima facie case, undue hardship and interest of the Revenue. The learned Tribunal has not rejected the application in toto, but out of total duty payable only 50% has been directed to be deposited, so also out of penalty payable only 10% penalty has been directed to be deposited. As such it cannot be said that the discretion exercised by the CESTAT is exercised in a perverse or impossible manner. In that view of the matter, we find no error could be found in the view taken by the learned Tribunal.

**20** In the result, all appeals stand dismissed. In view of dismissal of the appeals, the Notices of Motion do not survive and the same are also disposed of.

**(A.S. GADKARI, J.)**

**(B.R. GAVAI, J.)**