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IN THE HIGH COURT OF DELHI AT NEW DELHI

CUSAA 21/2015

CIS EXPORTS PVT. LTD. ..... Appellant

Through: Dr. G.K. Sarkar with Ms. Malabika Sarkar and Mr. Prashant Srivastava, Advocate.

versus

COMMISSIONER OF CUSTOMS AIR CARGO ..... Respondent

Through: Mr. Satish Kumar, Senior Standing counsel.

AND

21.

CUSAA 23/2015

CIS EXPORTS PVT. LTD. ..... Appellant

Through: Dr. G.K. Sarkar with Ms. Malabika Sarkar and Mr. Prashant Srivastava, Advocate.

versus

COMMISSIONER OF CUSTOMS AIR CARGO ..... Respondent

Through: Mr. Satish Kumar, Senior Standing counsel.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE VIBHU BAKHRU

ORDER

% **3.11.2015**

CM No. 25809/2015 (for exemption) in CUSAA 23/2015

1. Exemption allowed subject to all just exceptions.

2. The application is disposed of.

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CM No. 25274/2015 (for condonation of delay in filing the appeal) in CUSAA 21/2015
CM No. 25807/2015 (for condonation of delay in filing the appeal) in CUSAA 23/2015

3. For the reasons stated in the applications, the delay in filing the respective appeals is condoned.

4. The applications are disposed of.

CUSAA 21/2015 & CM No. 25275/2015 (for interim relief)
CUSAA 23/2015& CM No. 25808/2015 (for interim relief)

5. Notice. Mr. Satish Kumar, learned Senior Standing counsel for the Respondent accepts notice.

6. Both these appeals are directed against orders passed by the Customs, Excise & Service Tax Appellate Tribunal ('CESTAT'). The first impugned order of the CESTAT is dated 24th November 2014 requiring the Appellant CIS Exports Pvt. Ltd. ('CISEPL') to make a pre-deposit of Rs.27 lakhs along with proportionate interest, with a further direction to report compliance by 15th January 2015. The second impugned order of the CESTAT is dated 2nd March 2015 whereby it dismissed the appeal of the Appellant upon failure to comply with the pre-deposit order dated 24th November 2014.

7. The appeal filed by the Appellant before the CESTAT was against an order-in-original dated 6th April 2009 of the adjudicating authority i.e. the

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Commissioner of Customs ('Commissioner'). The case against the Appellant by the Department was that the Appellant had made a fraudulent claim of duty drawback by giving a false declaration regarding the manufacture/supporting-manufacture work by M/s. Braun Textiles Processor ('BTP'), a partnership firm, of which Mr. Rakesh Kumar Goyal, a Director of the Appellant, was the Managing Partner.

8. A perusal of the order-in-original dated 6th April 2009 of the Commissioner shows that the said Mr. Rakesh Kumar Goyal despite several notices he neither appeared during the investigation nor provided any document for the purpose of verification of the genuineness of the annexures to the application for claiming drawback. The said annexures included a declaration purportedly issued by BTP in support of having manufactured the goods in question which were sought to be exported under shipping bills against which the duty drawback was claimed by the Appellant.

9. While written replies were given by the Appellant, the order-in-original noted that none of the relevant documents was submitted. It also appears that the Appellant did not appear before the adjudicating authority despite various dates having been fixed for that purpose. The Appellant claimed that the relevant documents were with the Auditor for re-auditing and, therefore, could not be produced. By the order-in-original, the Commissioner proceeded to decide the show cause notice in the absence of the Appellant

and concluded that duty drawback had been claimed by the Appellant by providing wrong and incorrect information. It was found that all the declarations given by BTP were signed by employee of the Appellant. It showed that Mr. Rakesh Kumar Goyal was controlling both the Appellant as well as the supporting manufacturer i.e. BTP and had created documents to falsely claim the duty drawback. A demand of Rs.67,42,724 along with corresponding interest, penalty of Rs.60 lakhs each on the Appellant, the supporting manufacturer BTPas well as Mr. Rakesh Kumar Goyal under Section 114 of the Customs Act, 1962 ('Act') and a penalty of Rs.1 crore, Rs.75 lakhs and Rs.1 crore respectively on each of them under Section 114AA of the Act was confirmed by the Commissioner.

10. The case of the Appellant is that it has a strong *prima facie* case for complete waiver of the pre-deposit amount. While no case of financial hardship has been pleaded or argued before the Court, Dr. G.K. Sarkar, learned counsel for the Appellant, relies on the judgment in ***Sri Krishna v. Union of India 1998 (104) ELT 325 (Del)*** to urge that the CESTAT was obliged to decide whether the Appellant had a *prima facie* case and that by insisting that the Appellant should make the pre-deposit, the CESTAT had subjected the Appellant to undue hardship. Reliance was also placed also on the decisions in ***ITC Ltd. v. Commissioner (184) ELT 347 (All.)*** and ***Shukla & Brothers v. CESTAT 2015 (37) STR 916 (All.)***.

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11. Dr. Sarkar further submitted that the supporting manufacturer was eligible for exemption from paying excise duty and in any event was not manufacturing any dutiable goods. It was, therefore, not required to file any returns regarding the manufacture of dutiable goods. Secondly, even if the supporting manufacturer did not manufacture the goods exported by the Appellant and the goods were assumed to have been procured from the local market, the Appellant was eligible to avail the duty drawback in view of Circular No. 16/2009-Cus-dated 25th May 2009 and the judgments in ***Commissioner of Customs (Export) v. Kultar Export 2013 (288) ELT 187, AKS Apparels v. UOI 2013 (298) ELT 649 (Del)*** and ***Maalvika Impex (India)v. Commissioner of Customs 2014 (310) ELT 868 (Del.)***. Lastly, it is submitted that the Department has already apportioned a drawback amount of Rs.14,24,565 lying in the bank account of the Appellant against the aforementioned demand. Although no financial hardship as such has been pleaded, it is submitted that since the Appellant has in any event made out a *prima facie* case, the proportionate interest on the sum of Rs.27 lakhs should be waived and some time should be given to the Appellant to make the deposit of Rs.27 lakhs.

12. The Court finds that the Appellant did not submit any of the documents during the course of adjudication proceedings. Consequently, there was no occasion for the Commissioner to render a finding on the documents.

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Admittedly, it is only before the CESTAT for the first time that the Appellant sought to submit documents. As observed by the CESTAT in the impugned order, the claim of the Appellant that it would be entitled to duty drawback notwithstanding that the supporting manufacturer had no manufacturing facility or even where it was not manufacturing any dutiable goods, was required to be examined in some detail by the CESTAT with reference to the documents produced before it for the first time. The explanation offered by the Appellant for not appearing before the adjudicating authority and not producing the documents *prima facie* does not appear to be convincing to the Court at this stage. In any event, this too was required to be examined by the CESTAT.

13. Having perused the impugned order, the Court finds that the CESTAT has discussed the issue whether the Appellant had made out a *prima facie* case. The view taken by the CESTAT, in the facts and circumstances, appears to be a plausible one. On the quantum of the pre-deposit, considering the demand and the penalties raised, the requirement that the Appellant should deposit Rs.27 lakhs does not appear to this Court to be disproportionate or even harsh. In any event, no case of financial hardship has been pleaded by the Appellant.

14. As regards the plea that there must be a waiver of the proportionate interest, it requires to be noticed that against the order-in-original dated 6th

April 2009 of the Commissioner, the Appellant first filed a revision petition followed by a writ petition in the High Court of Punjab & Haryana which was dismissed as withdrawn on 6th November 2012. It is only thereafter that the Appellant approached the CESTAT by way of the statutory appeal. It is nearly two years thereafter that the pre-deposit order was made on 24th November 2014. By that time, more than five years had elapsed since the order-in-original had been passed. With further delays in filing and re-filing the present appeals, the Appellant has avoided the prospect of having to make the pre-deposit for over six years. In these circumstances, the Court does not see any reason why the Appellant should be excused from having to pay the proportionate interest on the pre-deposit amount of Rs.27 lakhs.

15. Consequently, the Court is not inclined to interfere with the impugned order dated 24th November 2014 of the CESTAT either as regards the quantum of the pre-deposit or the requirement of payment of the proportionate interest thereon. No substantial question of law arises as far as the appeal against the pre-deposit order dated 24th November 2014 is concerned.

16. However, considering that the Appellant has filed appeals before this Court, the Appellant is granted time till 30th November 2015 to comply with the order dated 24th November 2014 of the CESTAT failing which the appeal before the CESTAT will stand dismissed in accordance with the

order dated 2nd March 2015 of the CESTAT.

17. In the result, the appeal against the impugned order dated 24th November 2014 of the CESTAT is dismissed. The appeal against the order dated 2nd March 2015 is allowed subject to the Appellant making the pre-deposit as ordered by the CESTAT by its order dated 24th November 2014 on or before 30th November 2015. In that event, the appeal before the CESTAT and the pending applications, if any, will be heard on merits. However, it is made clear that the said order dated 2nd March 2015 of dismissal of the Appellant appeal before the CESTAT will revive if the Appellant fails to comply with the order dated 24th November 2014 of the CESTAT on or before 30th November 2015.

S. MURALIDHAR, J

VIBHU BAKHRU, J

NOVEMBER 3, 2015
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