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

CENTRAL EXCISE APPEAL NO. 188 OF 2015

1. Santogen Exports Ltd.
A Company registered under the Companies Act, 1956 having its office at Tex Centre, N. 402 / 403, 4th Floor, 26-A, Chandivali, Saki Vihar Road, Andheri (E), Mumbai – 400 072. **…Petitioner**

Versus

1. The Commissioner of Central Excise, **Raigad** having his office at 4th Floor, Utpad Shuil Bhavan, Plot No.1, Sector-17, Khandeshwar, Navi Mumbai 400 206. **…Respondent**

Mr. Prakash Shah, with Mr. Jas Sanghvi, i/b PDS Legal for Appellant.

CORAM: A.S. OKA &
RIYAZ I. CHAGLA, JJ.
DATE : 21ST AUGUST 2017.

O R A L J U D G M E N T :- (Per Riyaz I. Chagla J.)

1. The Appellant by the present Appeal is challenging order dated 15th June 2015 passed by the Customs, Excise

& Service Tax Appellate Tribunal, West Zonal Bench at Mumbai (in short “**Appellate Tribunal**”) by which the Appeal filed by the Appellant was held to be not maintainable as the Appellant had not deposited 7.5% as required under Section 35F of the Central Excise Act, 1944 (in short “**the Act**”) and the Appeal was dismissed.

2. The Appellant is a 100% Export Oriented Unit (“**EOU**”) having its factory at village Tambati, Tal. Khalapur, Dist. Raigad, *inter alia* engaged in the manufacturing Terry Towels. The Appellant had been issued licenses under Section 58 of the Customs Act, 1962 for operating bonded warehouse and permission under Section 65 of the Customs Act 1962 for carrying out “in bond manufacturing” in the said warehouse. The Central Government vide Notification No. 8/97-C.E. Dated 1st March 1997, as amended, exempted the finished products, rejects and waste or scrap specified in the schedule to the Central Excise Tariff Act, 1985 (5 of 1986) and produced or manufactured, in a 100% EOU wholly from the raw materials produced or manufactured in India and allowed to be sold in India as specified in the said Notification. The

Appellant filed declaration claiming benefit of the said Notification dated 1st March 1997 as amended. The Appellant submitted requisite details of Terry Towels to the Superintendent of Central Excise, Range – Khopoli – II. Show Cause-cum-Demand notices were issued to the Appellant for recovery of alleged deferential Excise Duty. The Appellant by letter dated 5th January 1998 submitted a detailed reply to Show Cause-cum-Demand Notice dated 4th September 1997. The Assistant Commissioner of Central Excise, Khopoli adjudicated the show cause notices and vide orders dated 24th March 1999 decided the case and held that the invoice price was available and the invoice value was acceptable for DTA sale by 100% EOU. The order held that the Notification did not debar the use of imported consumables provided the other conditions of the said notification was satisfied and the benefit under the said Notification was allowed. The demands of differential Central Excise Duty were accordingly dropped. The department preferred an Appeal before the Commissioner (Appeals) against the order-in-original. The Commissioner (Appeals) by order dated 19th June 2000 dismissed the department's

Appeal and upheld adjudicating authority's orders-in-original dated 24th March 1999. The department preferred one Appeal before the Appellate Tribunal (although two Appeals had been disposed off by the Commissioner (Appeals)) and the Appellate Tribunal by order dated 5th August 2008 set aside the finding of the authorities below and held that the product is a consumable and not a raw material and remitted the case to the adjudicating authority for fresh decision. Since the Appellate Tribunal had remanded the proceedings, without indicating that the remanded proceedings will be restricted in relation to only one order-in-original, the Appellant filed an application for rectification of mistake in the said order. The Appellate Tribunal dismissed the application for rectification of mistake. The Appellant was unable to appear at the personal hearing fixed before the adjudicating authority on account of a lock out and requested for adjournment. On the date when the Commissioner of Central Excise granted a personal hearing, the notice of the hearing dated 22nd February 2010 had not been received by the Appellant. The Commissioner of Central Excise, Raigad, by exparte order-in-original dated 31st March 2010 confirmed the total demand of Rs. 2,57,55,014/- in respect of 11 show cause notices issued for the period between February 1997 to November 2000 against the Appellant along with interest. Further penalty was imposed of an equal amount of Rs.2,57,55,014/- under the Central Excise Rules, 1944. The ICICI bank, JVPD, Vile Parle Branch, Mumbai transferred an amount of Rs.36,57,904.50 from the Appellants account to the Commissioner Account, Central Excise towards recovery. The Appellant upon coming to know of the order-in-original requested the Commissioner to send the copy of the said order-in-original.

3. Being aggrieved by the said order-in-original passed by the Respondent, the Appellant preferred an Appeal before the Appellate Tribunal along with an application for waiver of pre-deposit. A show cause notice was issued by the Appellate Tribunal to the Appellant informing the Appellant that the transferred amount of Rs.36,57,904.50 to be treated as the pre-deposit amount for the purpose of the Appeal preferred by the Appellant was insufficient. The Appellant submitted that the transfer which was appropriated towards the dues of

151.87 lakhs was in excess of the amount required to be deposited i.e. 7.5% of the amount recoverable under Section 35F of the Act. The Appellate Tribunal after hearing the Appellant dismissed the Appeal holding that the Appellant had not deposited 7.5% amount as required under Section 35F of the Act and that the Appeal is not maintainable.

4. The learned counsel appearing for the Appellant has submitted that the deposit of 7.5% amount under Section 35F of the Central Excise Act had been complied with as the amount of Rs.36,57,904.50 had been transferred by ICICI bank towards the recovery and which amount was sufficient to meet the requirement of pre-deposit. The learned counsel appearing for the Appellant has therefore, submitted that the impugned order has erroneously disregarded the said amount which had been transferred towards the recovery and held that no deposit amount of 7.5% is required under Section 35F of the Act.

5. We have considered the submissions of the learned counsel appearing for the Appellant. We observe that the

total amount recoverable by the Respondent is a sum of Rs.6,65,65,049/- and the amount recoverable for which the present Appeal had been filed comes to a sum of Rs.5,15,10,018/-. The Deputy Commissioner of Central Excise had appropriated the amount of Rs.36,57,904.50 towards the recoverable dues of Rs.151.87 lakhs which is apparent from the internal letter issued in May 2015 (Exhibit R to the Appeal). We are of the view that the Respondent always has discretion to appropriate the amount recovered against particular dues. We find that the Appellate Tribunal has justifiably considered that for the amount of Rs.5,15,10,018/- is recoverable for which the concerned Appeal had been filed by the Appellant before the Appellate Tribunal, no amounts had been appropriated. We are also of the view that from the total amount recoverable of Rs.6,65,65,049/- for the period 2005 till 2010, only a sum of Rs.36.58 lakhs had been recovered. We find no infirmity in the impugned order which has held that since the amount of 7.5% has not been deposited as mandated under Section 35F of the Central Excise Act, the Appeal is not maintainable and accordingly dismissed.

6. We accordingly dismiss the present Appeal with no order as to costs.

(RIYAZ I. CHAGLA J.) **(A.S. OKA, J.)**