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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **W.P.(C) 6117/2019 & CM Appl. 26347/2019 (interim relief)**

M/S. SHUBH IMPEX

..... Petitioner

Through: Mr. Anjali J. Manish, Mr. Priyadarshi
Manish, Ms. Nidhi Saini, Advocates.

versus

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
& ORS.

..... Respondent

Through: Mr. Harpreet Singh, Sr. Standing
Counsel for the Respondents No. 2 &
3.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE ASHA MENON

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ORDER
28.05.2019

1. Notice. Notice is accepted by learned counsel for the Respondents.
2. The Petitioner is before this Court on a limited issue of the requirement of making a pre-deposit in terms of Section 129-E of the Customs Act, 1962 for consideration of its appeal by the Custom Excise & Service Tax Appellate Tribunal (CESTAT).
3. There is a history to the present petition. Earlier when the appeal of the Petitioner was pending before the Appellate Authority, W.P. (C) No. 138/2018 was filed in this Court by the Petitioner. In a judgment delivered

on 27th April, 2018 in the said writ petition by a Division Bench (DB), it was noted that the Petitioner had already deposited Rs.3,70,008/-. The DB took into account the financial condition of the Petitioner, and the fact that if the case of the department prevailed, the duty payable by the Petitioner would work out to Rs.16,82,38,370/-. On that basis, the Petitioner would have to pay Rs.1.27 crores as pre-deposit calculated at 7.5% of the duty. Accordingly, by the aforementioned judgment dated 27th April 2018, the DB of this Court permitted the Petitioner to make a further pre-deposit of Rs.5 lakhs subject to which its appeal would be entertained by the first Appellate Authority.

4. In para 12 of the said judgment dated 27th April 2018, the DB noted the apprehension of the petitioner that it may have to file a second appeal before the CESTAT if it failed before the first Appellate Authority. Terming the said apprehension at that stage to be ‘hypothetical’, the DB did not pass any order but left it open to the Petitioner to file an appropriate application or fresh writ petition, “if required”.

5. The Petitioner having failed before the first Appellate Authority has already filed an appeal before the CESTAT under Diary No. 50957 of 2019 and pursuant to the leave granted by this Court in the order dated 27th April, 2018 has filed this petition. It may be noted here that the Registry of the CESTAT has issued a ‘Defect Matter Hearing Notice’ dated 29th April 2019 to the Petitioner stating *inter alia*:

“In the instant case, as per the statutory provisions as envisaged u/s 129(E) of customs Act 1962/35(F) of Central Excise Act

1944 you have to submit an evidence of pre-deposit of Rs. 1,68,23,837/- i.e. 10% of the duty demanded/penalty imposed, but you have submitted evidence of pre-deposit only Rs 5,00,000/-. Hence you are here by directed to submit a challan of Rs 1,63,23,837/- more as evidence of pre-deposit for admitting the appeal.”

6. Mr. Harpreet Singh, learned counsel for the Respondent, pointed out that the issue that arises in the appeal before the CESTAT is one of classification. The goods imported by the Petitioner are ‘Hooks & Eyes Fastening Strips Polyester’ The issue is whether it should be classified under CTH 83081010 (as contended by the Petitioner) or CTH 6212 (as contended by the Department)? Mr. Singh submits in an identical case of import of the above goods, the CESTAT has upheld the view of the Department and rejected the appeal of M/s. Gosai Trading Company. It is accordingly contended that on merits the Petitioner does not have even a *prima facie* case.

7. In reply to the above submissions, it is pointed out by Ms. Anjali J. Manish, learned counsel for the Petitioner, that in a subsequent order dated 12th October, 2018 in Appeal No. C/53153/2018-(DB), another Bench of the CESTAT has doubted the correctness of its decision in the case of M/s. Gosai Trading Company and held that identical goods imported by that Appellant were classifiable under CTH 83081010.

8. This Court does not consider it appropriate to deal with the merits of the case of the Petitioner except note that on an earlier occasion of this Court had permitted the Petitioner’s appeal to be considered by the first Appellate

Authority subject to the Petitioner depositing a sum of Rs.5 lakhs in addition to the Rs.3,70, 008 already deposited by it. Since the financial condition of the Petitioner has not undergone any significant change, and the above deposit of Rs. 5 lakhs has already been made, it is directed that without requiring the Petitioner to make any further deposit, its appeal (filed under Diary No. 50957 of 2019) be considered by the CESTAT on merits in accordance with law as expeditiously as possible.

9. In that view of the matter, the Defect Matter Hearing Notice dated 29th April 2019 issued by the Registry of the CESTAT is hereby quashed.

10. The writ petition and application are disposed of in the above terms.

11. Copy of this order be given *Dasti* under signatures of the Court Master to the parties.

S. MURALIDHAR, J.

ASHA MENON, J.

MAY 28, 2019

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