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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 4960/2020, CM No.17905 to 17907 of 2020 (*exemptions*)

DISH TV INDIA LIMITED ..... Petitioner

Through: Mr.A.R. Madhav Rao, Mr.Tushar Joshi, Mr. Vinayak Kohli, Advocates

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Mr.Abhay Prakash Sahay, CGSC with Ms.Indira Goswami, Ms. Mannu Singh, Advs. and Mr.Syed Hussain Adil Taqvi, GP for UOI

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE PRATEEK JALAN

JUDGMENT

: **JUSTICE D.N. PATEL, Chief Justice (Oral)**

1. Proceedings of the matter have been conducted through video conferencing.

2. This writ petition has been preferred with the following prayers:

"*1) Issue a writ and/or order and/or a direction including a writ in the nature of Mandamus directing the Respondent No.2 to entertain the appeals filed by the Petitioner by dispensing with the Petitioner requiring to deposit a further amount of INR 3,23,53,823/- being the balance of 7.5% of the assessed duty under Section 129 A of the Customs Act, 1962, in regard to the appeal against Order-in-Original No. No. 02/VKP(02) ADG (Adj.)/DRI/N.Delhi/2020-21 dated 28.04.2020, passed by Respondent No. 3*

And/or

2) Issue a writ and/or order and/or a direction including a writ in the nature of Mandamus directing that the amount totaling To INR 16,00,00,000/- deposited by the Petitioner during the course of investigation be applied as pre-deposit for appeals against Order-in-Original No. 02/VKP (02) ADG (Adj.)/DRIN.Delhi/2020-21 dated 28.04.2020 And Order-In-Original No. 01/VKP(01) ADG (Adj.)/DRI/N.Delhi/2020-21 dated 27.04.2020

And/or

3) Issue such other writ/order/direction and further orders as the Hon'ble Court may deem just and proper in the facts and circumstances of the case."

3. Having heard the learned counsel for both sides and looking to the facts and circumstances of the case, it appears that the petitioner is an importer of satellite/viewing cards and others parts of set up boxes. A show cause notice was issued on 18.07.2018, based upon the allegation by the department that there was a mis-classification by the petitioner. The classification claimed by the petitioner is CH85235290 whereas the say of the department is that this is not the correct classification. As per the department, the correct classification is CH85299090.

4. On the basis of the aforesaid aspects of the matter, the show cause notice was issued on 18.07.2018. The said show cause notice was adjudicated upon by the competent authorities under the Customs Act, 1962. Order-in-original was passed by the respondents on 28.04.2020 which is annexed as Annexure P-1 to the memo of this writ petition.

5. Similarly for another show cause notice dated 10.01.2019, which was also adjudicated upon, the Order-in-Original was passed on 27.04.2020.

6. Both the aforesaid Orders-in-Originals are appealable orders under Section 129A of the Customs Act, 1962.

7. Previously, prior to amendments of the statute, applications for waiver of the pre-deposit were being preferred. Several litigations have travelled up to the Hon'ble Supreme Court upon such applications for waiver of pre-deposit.

8. With a view to avoid multiplicity of proceedings repeatedly in the Courts, Section 129E of the Act was amended by the Finance Act No.2 of 2014, with effect from 6th August 2014, to provide for mandatory pre-deposit of a fixed percentage of the duty demanded as a pre-condition to the CESTAT entertaining an appeal. For an appeal against the order passed by an officer of the rank of the Commissioner of Customs and below, the deposit amount has been fixed at 7.5% and for an appeal against the order of the Commissioner (Appeals), it is 10%. The first proviso to Section 129E states that the pre-deposit made thereunder would not exceed Rs.10 crores. The second proviso to Section 129E of the Act clarifies that the said provision would not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No. 2) Act, 2014.

9. For ready reference, Section 129E of the Customs Act, 1962 is reproduced hereunder:-

*"**Section 129E**. The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal,-*

(i) under sub-section (1) of section 128 unless the appellant has deposited seven and a half per cent of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed by an officer of customs lower in rank than the Principal Commissioner of Customs or Commissioner of Customs;

(ii) against the decision or order referred to in clause (a) of sub-section (1) of section 129A, unless the appellant has deposited seven and a half per cent of the duty, in case where duty or duty and penalty are in dispute, or penalty where such penalty is in dispute, in pursuance of the decision or order appealed against;

(iii) against the decision or order referred to in clause (b) of sub-section (1) of section 129A, unless the appellant has deposited ten per cent of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against:

Provided that the amount required to be deposited under this section shall not exceed rupees ten crores:

Provided further that the provisions of this section shall not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No. 2) Act, 2014."

(emphasis supplied)

10. In view of the aforesaid statutory provisions of the Act, it appears that the statue has now effected waiver of pre-deposit to the extent of 90% or 92.5% of the duty amount and has made it mandatory to deposit 7.5% or

10% of the duty amount, as the case may be. It ought to be kept in mind that the relief is granted by the law itself. Courts cannot be more charitable than the law. When the provisions of the law are explicitly clear or where the provisions of law are absolutely unambiguous, such type of pre-deposits cannot be waived by the courts.

11. Constitutional validity of the aforesaid provisions has also been upheld by the High Court of Allahabad in ***Ganesh Yadav v. Union of India***, reported in **(2015) 320 ELT 711 (All)** and also by the Bombay High Court in ***Haresh Nagindas Vora v. Union of India***, reported in **(2017) 353 ELT 154 (Bom)**.

12. Previously also, similar issues have arisen before this Court and other courts, especially under Section 129E of the Act, even after the amendment of the Customs Act, 1962 has been brought into force. Referring to the earlier judgment in ***Anjani Technoplast Ltd. v. Commissioner of Customs,* 2015 (326) ELT 472 (Del.)**, it has been held by this Court in ***M/s Diamond Entertainment Technologies Pvt. Ltd. v. Commissioner, Central Goods and Service Tax Commissionerate Dehradun & Anr***. reported in **2019 (368) ELT 579 (Del)** at Paras 6 and 7:

> *"6. This Court noted that the amended Section 35F of the Act, and Section 129E of the Customs Act, 1962, had come in for incisive examination, by the High Court of Allahabad, speaking through Dr. D.Y. Chandrachud, Chief Justice, (as his Lordship then was), in Ganesh Yadav v U.O.I., 2015 (320) ELT 711 (All), in respect of which para 9 of the judgment of this Court observes as under:*

"9. Dealing with the specific question as to whether the amended Section 35F of the CE Act would apply to the case of the Assessee, the Allahabad High Court held that the words in the amended Section 35F indicated that on and after the date of its enforcement an Assessee in appeal was required to deposit the stipulated percentage of duty and if it failed to do so, the CESTAT shall not entertain the appeal. The amended Section 35F would, therefore, apply to all appeals filed on and from the date of the enforcement of the amended Section 35F of the CE Act……."

(Emphasis supplied)

7. Taking stock of similar pronouncements in other cases, this Court proceeded to hold, on the question of applicability of the amended provisions of Section 35F of the Central Excise Act, 1944 or Section 129E of the Customs Act, 1962, to cases in which the periods of dispute – and the date of issuance of show cause notice – were anterior to the amendment of the said provisions, thus (in paras 11 and 12 of the judgment):

"11. The decision of the learned Single Judge of the Madras High Court in Fifth Avenue Sourcing (P) Ltd. V. Commissioner of Service Tax (supra) also proceeds on the basis that the date of issuance of an SCN by itself creates a vested right in the noticee as regards the appeal that may be filed against the adjudication order pursuant to such SCN. As already observed, it is possible that pursuant to an SCN, the adjudication proceedings may be dropped if the adjudication authority comes to the conclusion that no demand requires to be created. Consequently, the relevant date if at all would be the date of creation of the demand which does not get crystallised till the adjudication order confirming the demand is

passed. In any event, as far as the amended Section 129E of the Act is concerned, its wording is unambiguous. It opens with the words "The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal.... unless the appellant deposits the percentage of the demanded duty as stipulated in clauses (i), (ii) or (iii) thereunder." The wording of the second proviso to the amended Section 129E is also unambiguous. It makes it clear that the amended provision would not apply to appeals and stay applications already "pending" before the appellate authority "prior to the commencement of the Finance (No. 2) Act, 2014", i.e. 6th August 2014. In other words, it would apply to all appeals filed on or after the said date. Therefore, what is to be seen is the date of filing of the appeal. If the appeal is filed on or after 6th August 2014 then the condition stipulated in the amended Section 129E of the Act has to be fulfilled for the appeal to be entertained.

12. The Court notes that as far as the present case is concerned, the CESTAT had to apply the second proviso to the amended Section 129E of the Act since the appeal before it was filed after 6th August, 2014. Before this Court there is no challenge in these proceedings to the validity of the amended Section 129E of the Act. As regards the interpretation of the amended Section 129E of the Act, the Court concurs with the decision of the Allahabad High Court in Ganesh Yadav v. Union of India (supra) in the context of the identically worded Section 35F of the CE Act and holds that the amended Section 129E of the Act will apply to all appeals filed under Section 130 of the Act on or after 6th August, 2014."

The challenge to the above said order of this Court was rejected by the Hon'ble Apex Court vide order dated 02.12.2019 passed in SLP(C) No.27771/2019.

13. In view of the amendment in the Act, especially Section 129E thereof, there is no question whatsoever of the waiver of pre-deposit. As stated hereinabove, the statute itself has waived 90% or 92.5% of the duty amount, as the case may be, assessed by the authorities under the Customs Act, 1962. The petitioner-assessee has to deposit only 7.5% or 10% (as the case may be) of the duty assessed. Thus, there is no question of further waiver of the amount which is required to be deposited under Section 129E of the Customs Act, 1962.

14. This petitioner has already preferred two separate appeals against two different Orders-in-Original dated 28.02.2020 (Annexure-P1) and 27.04.2020 (Annexure-P2). These appeals have been preferred under Section 129A of the Customs Act, 1962 before CESTAT, Delhi and the said appeals are pending.

15. When we enquired from the learned counsel of the petitioner about the annual turnover of the petitioner, they were initially unable to respond. However, as nowadays, various types of data are available on the internet, since the petitioner could not respond, the search engine Google was used from where we found out that the annual turnover of the petitioner for the Financial Year 2018-19 was approximately Rs.6000 Crores. This figure is now confirmed by the counsel for the petitioner.

16. In view of these facts, the amount to be deposited by the petitioner before CESTAT, New Delhi in their statutory appeal under the Customs Act, 1962 comes to Rs.4.23 Crores for one appeal, which is 0.0705% of the total turnover. Hence, we see no reason to entertain this writ petition looking to the total turnover of the petitioner as well.

17. Learned counsel for the petitioner has also argued on the merits of the case. As the appeals preferred by the petitioner under Section 129A of the Customs Act, 1962 are pending before CESTAT, we are not at all inclined to observe anything on the merits of the case. Suffice it to say that the statutory appeals preferred by the petitioner shall be decided on their own merits, in accordance with law, rules, and regulations and on the basis of the evidence on record. The decision shall be taken by CESTAT only after deposit of the pre-deposit as required under Section 129E of the Customs Act, 1962 within the timeframe given by the law.

18. With these observations and in view of the aforesaid provisions of the law and the judicial pronouncements, we see no reason to entertain this writ petition. The same is accordingly dismissed.

19. All pending applications also stand disposed of accordingly.

CHIEF JUSTICE

PRATEEK JALAN, J

AUGUST 06, 2020
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