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

## WRIT PETITION NO. 2871 OF 2023

Ritex Overseas … Petitioner

*Versus*

Union of India & Ors. …Respondents

Mr. Joseph G. Thattil i/b. Thattil & Co. for the petitioner.
Mr. M.P. Sharma a/w. Ms. Mamta Omle for respondent nos. 2 to 4.

**CORAM: G. S. KULKARNI & JITENDRA JAIN, JJ.**
**DATED: 28 November, 2023**

**P.C.**

1. This petition under Article 226 of the Constitution of India is filed assailing an order passed by the Government of India, Ministry of Finance, Department of Revenue whereby the petitioner's Revision Application against an order dated 27 April, 2018 passed by the Appellate Authority, namely, Commissioner of Customs (Appeals), Mumbai Zone-III has been rejected.

2. The petitioner was aggrieved by the Order-in-Original dated 21 March, 2017 passed by the Assistant Commissioner of Customs, the operative order of which reads thus:

**"ORDER**

> 6. I confirm the demand of Drawback amount Rs.46,79,269/- to be recovered from the said Exporter as per the said Demand cum Notice issued to the said exporters with applicable interest under Rule 16(A) Sub-Rule (1) & (2) of the Customs, Central Excise Duties and Service Tax Drawback Rules 1995 read with section 75A(2) Customs Act, 1962.

> 7. As per Rule 16(A) Sub-Rule (1) & (2) of Customs, Central Excise Duties and Service Tax Drawback Rules, 1995, the Exporter is under obligations to produce evidence to show that the sale proceeds (foreign exchange) in respect of the goods exported have been realized within the time limit prescribed under the Foreign Exchange Management Act, 1999. Since the exporter has not submitted the Negative Statements in the prescribed time limit as per public notice no. 32/2016 dated 02.02.2016 and public notice no. 38/2015-16 dated 03.03.2016, I also imposed penalty of Rs.100000/- on the exporter under Section 117 of the Customs Act, 1962."

3. The petitioner filed an appeal against the aforesaid Order-in-Original before the Appellate Authority, which came to be rejected by an order dated 27 April, 2018 passed by the Appellate Authority referring to the provisions of Section 129E of the Customs Act, 1962 on the ground that the petitioner has failed to deposit 7.5% of the amount demanded on account of duty drawback and penalty imposed by the Order-in-Original. The relevant extract of the said order reads thus:

> "6. Before going into the merits of the case, I reproduce Section 129E of the Customs Act, 1962 for clarity, which is as under:
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> > "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 half percent 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 decision or an order passed by an officer of Customs lower in rank than the Principal Commissioner of Customs or Commissioner of Customs.
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> Furthermore, I find that the CBEC vide Circular No. 993/17/2014-Cx dated 05.01.2015 has clarified that drawback, like rebate in Central Excise, is refund of duty suffered on the export goods. Section 129 E stipulates that appellant filing appeal before the Commissioner (Appeals) shall pay 7.5% of the duty demanded where duty and penalty are in dispute. Hence, mandatory pre-deposit would be payable in cases of demand of drawbasck as the new Section 129 E would apply to such cases.

> 7. In view of the position stated above, I find that as the appellant has failed to deposit 7.5% of the amount demanded on account of duty drawback and penalty imposed vide impugned order , the present appeal is liable for rejection. As the impugned appeal is not maintainable on account of non-payment of pre-deposit prescribed for appeal, I have not gone into the merits of the appeals.
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> 8. The appeal is disposed of accordingly by way of rejection."

4. Being aggrieved by the aforesaid order passed by the Appellate Authority, the petitioner approached the Revenue Authority, namely, Additional Secretary to the Government of India by the revision in question. The petitioner, in such revision, clearly raised a contention that the account of the petitioner was freezed in view of the bad financial position and therefore an appropriate view of the matter is required to be taken applying the principles of natural justice. The Revisional authority has recorded the contention as urged on behalf of the petitioner in paragraph 3(d), (e) and (f) of the impugned order, which reads thus:

> "3(d) That their financial position was very bad and they were finding it difficult to meet the day today expenses; that their office premises was sealed by the judicial authorities consequent to the case file against the applicant by the bank; that hence they were not in a position to make payment of the pre-deposit challan along with the appeal filed before the Commissioner of Customs(Appeals); that the Commissioner of Customs (Appeals) did neither consider the merits of the case nor their written request for adjournment and simply rejected their appeal due to non-payment of pre-deposit of 7.5% of the duty drawback and penalty demanded; that if they were allowed one more PH then they would have arranged the payment of pre-deposit and hence the impugned Order-in-Appeal was a blatant violation of the principles of natural justice and hence was required to be set aside;
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> (e) That the right to prefer an appeal is a statutory right touching the substantive right of the parties, while the provisions relating to pre-deposit is procedural in nature and that the procedural law is only a handmaid of justice and not the mistress of justice; that having regard to the huge amount of pre-deposit to be made and also having regard to

their financial hardship the impugned Order-in-Appeal should be set aside; they relied on the case of Venus Electronics and Control Pvt. Ltd. vs. CC. Kandla (2006 (198) ELT 547 (Tri Mum) in support of their case;

(f) That the original authority had erred in arriving at the conclusion of non-realization of export proceeds, when the exports proceeds had already been realized, that the matter was not relating to non-realization of export proceeds, but non-submission of Bank Realization Certificate; that the dispute between the Bank and them on account of non-payment of loans taken from the Bank as due to unforeseen exigencies of business and various other factors they could not repay the loans and therefore the bank had not adjusted the received advance payments against export bills from the foreign buyers and hence they could not submit the BRCs in time; that the issues with the bank have now been resolved, the Bank has started releasing the Bank Realization Certificates and that they had received some Bank Realization Certificates and the balance is to be released shorty; that the delay in release of the balance Bank Realization Certificates was entirely due to the difficulties in tracing out the old records by Bank; they submitted bank statement of payment remittance received from foreign buyers and copies of BRCs; that since there was no question of non-realisation of export proceeds, the imposition of 7.5% of pre-deposit of duty drawback and penalty was illegal and unconstitutional; that if they are still required to pay this amount, they were ready to do so;"

5. However, without any reasons whatsoever in regard to such grounds as raised by the petitioner in the Revision Application, the Revisional Authority merely on the ground that the petitioner has not made pre-deposit of 7.5%, rejected the petitioner's revision application.

6. Learned counsel for the petitioner in supporting the prayers as made in the petition, that is, to set aside the order passed by the Appellate Authority as also by the Revisional Authority and to enable the petitioner to argue the appeal on merits, has contended that the petitioner has already made the pre-deposit of an amount of Rs.3,58,445/-. It is his contention that the petitioner has bona fide pointed out the financial difficulties and specific ground in that regard has been urged, which has not been taken into consideration by the

orders passed by the Revisional Authority. It is his contention that the petitioner ought not to get into on more technical ground of pre-deposit, which no more exists.

7. On the other hand, Mr. Sharma, learned counsel for respondent nos. 2 to 4 submits that an amount, which is deposited post the impugned order, ought not to be taken into consideration. It is his submission that the order passed by the Appellate Authority as also the Revisional Authority would not require any interference.

8. Having heard the learned counsel for the parties and having perused the record as also the impugned order, in our opinion, the view taken by the Additional Secretary to the Government of India is too technical to say least. The petitioner has urged specific ground in regard to financial difficulty, which ought to have been considered. We find that the issue on merits of such contention has not at all been touched and what has weighed with the authority is that the Revisional and Appellate authority will have to follow the provisions of Section 129-E of the Customs Act, which is in regard to the pre-deposit of 7.5% of the amount demanded.

9. In the peculiar facts and circumstances of the case, we are of the opinion that the interest of justice imminently would require that the impugned order passed by the Appellate Authority as confirmed by the Revisional Authority are quashed and set aside and the petitioner be granted an opportunity of its

appeal being adjudicated on merits. We, accordingly, allow this petition by the following order:

## ORDER

(i) The order passed by the Appellate Authority as confirmed by the impugned order passed by the Revisional Authority is quashed and set aside. The appeal before the Appellate Authority is restored to the file of the Appellate Authority – Commissioner of Customs (Appeals), Mumbai Zone-III to be heard on merits.

(ii) The deposit of Rs.3,58,445/- made by the petitioner on 4 May, 2023 be considered as a valid deposit for the purpose of appeal.

(iii) The Appellate Authority is directed to decide the appeal as expeditiously as possible and in any event within a period of four months from today.

10. The petition is allowed in the aforesaid terms. No costs.

**(JITENDRA JAIN, J.)** **(G. S. KULKARNI , J.)**