



2024:DHC:2059-DB



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

% **Judgment reserved on :25 January 2024**
Judgment pronounced on: 14 March 2024

+ **CUSAA 4/2010 & CM APPL. 5904/2010**

G & S INTERNATIONAL

..... Appellant

Through: Mr. Navneet Panwar, Advocate

versus

COMMISSIONER OF CUSTOMS

..... Respondent

Through: Mr. Anish Roy, SSC with Mr.
Girish Agarwal, Advocate.

AND

+ **CUSAA 6/2010 & CM APPL. 9970/2010**

RAJ INTERNATIONAL

..... Appellant

Through: Mr. Navneet Panwar, Advocate

versus

COMMISSIONER OF CUSTOMS

..... Respondent

Through: Mr. Anish Roy, SSC with Mr.
Girish Agarwal, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

RAVINDER DUDEJA, J.

1. Challenge in these appeals filed under Section 130 of the Customs Act is to the final order No. C-356-257/2009 CU (DB) dated 10.08.2009 passed by the learned Customs, Excise & Service Tax

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Appellate Tribunal, New Delhi [hereinafter referred to as “CESTAT”] titled AS Raj International Vs. Commissioner of Customs, New Delhi and Customs Appeal No. C/204/2009-CU((DB) titled G & S International Vs. Commissioner of Customs, whereby, the learned CESTAT dismissed the appeals.

FACTUAL BACKGROUND

2. Appellants M/s. G & S International, New Delhi (IEC No. 0502009713) and A's Raj International, New Delhi (IEC No. 0599033983) were engaged in exports. Such exports were made under Duty Entitlement Pass Book Scheme [“DEPB”] and Drawback Scheme. On the basis of an information that the appellants were engaged in fraudulent exports of Shawls and Readymade garments to Commonwealth of Independent States countries (CIS) via UAE, investigation was conducted by the Directorate of Revenue Intelligence. On conclusion of investigation, Show Cause Notices [hereinafter referred to as “SCNs”] were issued to the appellants, calling upon them to explain as to why:-

“a) Amount of Rs. 77.75 lacs in respect of M/s G&S Rs. 1.00 crore respect of M/s A'S Raj and Rs.9.95 lacs in respect of M/s Sherya Overseas, claimed and erroneously sanctioned/ paid to them respectively as duty drawback should not be recovered from them alongwith interest 18% per annum under section 75 (2) of the Customs Act, 1962 read with rule 16 & 16 A of the Customs & Central Excise Duty Drawback Rules 1995.

b) Why the amount of Rs. 2249/- in account no. 017627 of M/s G&S, Rs. 11740/- in account No.013801 of MM/s A'S Raj lying with Punjab National Bank, NCH, New Delhi should not be appropriated towards the drawback amount paid to and recoverable from them.



- c) *An amount of Rs. 2053/- having balance in account No. 4419 in the name of M/s G&S and Rs. 1046/- having balance in account No. 4303 in the name M/s A's Raj being maintained at United Western Bank Ltd., Karol Bagh, New Delhi should not be appropriated alongwith interest accrued, thereon, if any, till the adjudication towards the recovery of the erroneously and fraudulently paid drawback.*
- d) *Why transaction made in the account no. 4419 of M/s G&S & account no. 4303 of M/s A'S Raj and account no. 4334 of M/s Shrey Overseas should not be confiscated in terms of section 121 of Customs Act, 1962.*
- e) *Why penalty should not be imposed on these under section 114 of the Custom Act, 1962.*
- f) *Why goods exported by them and mis declared in terms of description & value should not be confiscated in absentia for violations discussed here in above under the provisions of section 113 (d), (h), (i & ii) and (k) of the Customs Act 1962."*

3. SCNs were adjudicated vide Order-in-Original (OIO) No. JJ/ACE/21/2008 dated 30.09.2008 holding as under:-

- "(a) The Drawback amounting to Rs. 67,56,033/- in the matter of M/s. G & S International(As detailed in Annexure-1) and Drawback amounting to Rs. 1,00,05,250/- in the matter of M/s. A's Raj International (as detailed in Annexure II) are inadmissible to them. The same shall be recovered from them along with interest@ 18% per annum under section75 (2) of the Customs Act, 1962 read with Rule 16 & 16A of the Customs and Central Excise Duty Drawback Rules 1995.*
- (b) The amount of Rs. 2,249/- on account number 017627 of M/s. G & S International, Rs. 11, 740/- in account No. 013801 of M/s. A's Raj International with Punjab National Bank, NCH, New Delhi be appropriated against the drawback amount paid respectively to them and now recoverable.*
- (c) The amount of Rs. 2,053/- having balance in account No. 4419 in the name of M/s. G & S International and Rs. 1, 046/- having balance in account No. 4303 being maintained at United Western Bank Ltd., Karol Bagh, New Delhi be appropriated alongwith interest accrued, thereon, if any,*



towards the recovery of the erroneously and fraudulently paid drawback.

d)The transactions made in the account No. 4419 of M/s. G & S International& account No. 4303 of M/s. A's Raj International are liable for confiscated in terms of Section 121 of Customs Act, 1962 but the same are not available for confiscation.

(e) that the goods exported by M/s. G & S International and M/s. A's Raj International and M/s. Shreya Overseas, and misdeclared in terms of description & value are also liable for confiscated for violations under the provisions of Section 113 of the Customs Act, 1962 but the same are not available for confiscation.

(f) Since M/s. G & S International is a proprietorship firm under proprietorship of Mr. Sita Ram Agarwal, the Adjudicating Authority imposed a penalty of Rs. 30 Lakhs only on Mr. Sita Ram Agarwal under section 114 of the Customs Act, 1962.

(g) Since M/s. A's Raj International is a proprietorship firm under proprietorship of Mr. Rajesh Agarwal, the Adjudicating Authority imposed a penalty of Rs. 50 Lakhs only on Mr. Rajesh Agarwal under section 114 of the Customs Act, 1962.

(h) Since M/s. Sherya Overseas is a proprietorship firm under proprietorship of Mr. Pramod Garg, the Adjudicating Authority imposed penalty of Rs. 3 Lakhs only on Mr. Pramod Garg under section 114 of the Customs Act, 1962.

(i) the Adjudicating Authority imposed a penalty of Rs. 5 Lakhs only on M/s. United Western Bank Ltd. now known as IDBI Bank Ltd. under section 114 of the Customs Act, 1962. OJ the Adjudicating Authority imposed a penalty of Rs. 5 Lakhs only on Mr. Ravinder Rajurkar under section 114 of the Customs Act, 1962.

(k) the Adjudicating Authority imposed a penalty of Rs. 5 Lakhs only on Alr. Pramod Gupta under section 114 of the Customs Act, 1962.”

4. Being aggrieved with the aforesaid OIO dated 30.09.2008, the appellants/exporters preferred an appeal along with application for



waiver of pre-deposit under Section 129-E of the Customs Act, 1962 and stay of operation of the impugned order dated 30.09.2008 before the CESTAT. The CESTAT vide order dated 17.06.2009, dismissed the stay applications, directing the appellant M/s. G.S. International to deposit Rs. 67,56,033/- and appellant M/s. A's Raj International to deposit an amount of Rs. 1,00,05,250/- within a period of four week from the date of the order.

5. Questioning the correctness of the order passed by the learned Tribunal, appellants filed WP (C) No. 10507/2009 and 10509/2009 before the High Court. However, petitions were dismissed by the High Court vide common order dated 29.07.2009.

6. CESTAT vide Final Order No. C/356-357/2009 dated 10.08.2009, recorded the non-compliance of its order No. C-131-132/09-CUS dated 17.06.2009 and dismissed the appeals.

7. Challenging the CESTAT Final Order No. C/356-357/2009 dated 10.08.2009, appellants/exporters have filed the present appeals under Section 130 of the Customs Act, 1962.

8. Both the appeals were admitted and by the order dated 24.05.2020, following question of law was formulated.

“a. Whether the Customs, Excise and Service Tax Appellate Tribunal erred in law in dismissing the appeal for non-compliance of the deposit order dated 17.06.2009 in view of the provisions of Section 129 (2A) read with proviso to Section 129E of the Customs Act, 1962?”

SUBMISSIONS



9. Learned counsel for the appellant argued that right of appeal provided under Section 129E is a statutory right and failure to make pre-deposit provides limited right to the respondents to recover the amount of penalty and drawback from the appellants but the appeals ought to have been heard by the learned CESTAT on merits and could not have been dismissed in a summary manner merely on account of non-deposit of the pre-deposit amount. It is submitted that condition of pre-deposit is bad as it whittled down the appellant's right to appeal. Per contra, the learned counsel appearing on behalf of respondents has argued that Tribunal could not have heard the appeal without pre-deposit, and therefore, the appeals have been rightly rejected.

ANALYSIS AND CONCLUSIONS

10. Section 129 E has been amended by the Finance Act, 2014. However, since the SCNs and Order-in-Original were issued and passed before the amendment came into force, the unamended provision would apply. The unamended Section 129 E provided as under:-

“129-E. Deposit, pending appeal, of [duty and interest] demanded or penalty levied.- Where in any appeal under this Chapter, the decision or order appealed against relates to any [duty and interest] demanded in respect of goods which are not under the control of the customs authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the proper officer the [duty and interest] demanded or the penalty levied:

Provided that where in any particular case, the [Commissioner (Appeals)] or the Appellate Tribunal is of opinion that the deposit of [duty and interest] demanded or penalty levied



would cause undue hardship to such person, the [Commissioner (Appeals)] or, as the case may be, the Appellate Tribunal may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue.]

[Provided further that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty and interest demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so, decide such application within thirty days from the date of its filing.]

11. It is pertinent to note that Section 129E of the Act as it stood prior to its Amendment by Finance Act (No. 2) of 2014, conferred a discretion on the Commissioner (Appeals) as well as CESTAT to dispense with the deposit liable to be made for the purposes of an assessee pursuing an appeal where it was found that the deposit of duty, interest or penalty levied would cause hardship.

12. No doubt, Section 129E does not expressly provides for the rejection of appeal for non-compliance with the requirements regarding the deposit of penalty or duty but the provision makes it obligatory on the appellants to deposit the duty or penalty pending the appeal and if a party does not comply either with the main Section or with any order that may be passed under the proviso, the Appellate Authority is fully competent to reject the appeal for non-compliance with the provisions of Section 129E. Unless Section 129E is complied with, the Appellate Authority cannot proceed to hear the appeal on merits. Therefore, the logical consequence of failure to comply with Section 129E, is the rejection of appeal on that ground. The law on the subject is not *res integra*. The Apex Court in the case of **Vijay**



***Prakash D. Mehta & Anr. vs. Collector of Customs (Preventive),
Bombay [1988 4SCC 402] held as under:-***

“5.The aforesaid Section provides a conditional right of appeal in respect of an appeal against the duty demanded or penalty levied. Although the Section does not expressly provide for rejection of the appeal for non-deposit of duty or penalty, yet it makes it obligatory on the appellant to deposit the duty or penalty, pending the appeal, failing which the Appellate Tribunal is fully competent to reject the appeal. See, in this connection, the observations of this Court in respect of Section 129 prior to substitution of Chapter XV by the Finance Act, 1980 in Navinchandra Chhotelal v. Central Board of Excise & Customs. The proviso, however, gives power to the Appellate Authority to dispense with such deposit unconditionally or subject to such conditions in cases of undue hardships. It is a matter of judicial discretion of the Appellate Authority.

8. Here the right that was granted, was a right held with a condition. There was no question of change of that right. In the instant case the only substantive right is the right of appeal as contemplated under Section 129-A and 129-E of the Act and that right is conditional one and the legislature in its wisdom has imposed that condition. No question of whittling down the right by an alteration of procedure arises in this case.

9. Right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant.

13. If the statute gives a right to appeal upon certain conditions, it is upon fulfillment of those conditions that the right becomes vested and exercisable to the appellant. The proviso to Section 129E of the Act gives a discretion to the Tribunal in cases of undue hardships to dispense the obligation to deposit the duty/interest or penalty.



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14. Admittedly, in this case the application for waiver of pre-deposit was dismissed by the learned Tribunal and the writ petitions challenging the orders passed by learned CESTAT have already been dismissed by the High Court. Admittedly, appellants did not make compliance of pre-deposit order even thereafter and therefore learned Tribunal was constrained to dismiss the appeals.

15. Thus, the question of law is answered holding that there is no error in the orders passed by learned CESTAT, thereby, dismissing the appeal for non-compliance of the deposit order dated 17.06.2009, as per the provisions of Section 129 read with proviso of Section 129-E of the Customs Act, 1962. The appeals are therefore dismissed.

RAVINDER DUDEJA, J.

SANJEEV SACHDEVA, J.

14 March, 2024

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