

S C Sharma & Shailendra Shukla, JJ

Dated: December 02, 2019

Cus - This Court in the identical matter has held that there is a remedy of appeal under Section 129A of Customs Act and the appeal has to be preferred before CESTAT - It has been dismissed on account of non-compliance of the order passed by Tribunal - In light of the order passed in an identical case by this Bench only, this Court does not find any reason to interfere with the present writ petition - The admission is declined: HC

Admission declined

#### JUDGEMENT

Parties through their counsel.

Shri Prasanna Prasad, learned counsel has at the outset has drawn attention of this Court towards the order passed earlier in an identical matter.

This Court in the identical matter has held that there is a remedy of appeal under Section 129A of the Customs Act and the appeal has to be preferred before CESTAT. It has been dismissed on account of non-compliance of the order passed by the Tribunal. In similar circumstances, this Court while deciding OTA No.4 of 2019 (Rahul Rajvaidhya vs. Customs Central Excise and Service Tax) has passed an order on 30.09.2019 and the same reads as under:-

"The present appeal is arising out of the order dated 08-03-2019 passed by the Customs and Service Tax Excise Appellate Tribunal in Appeal No. 5281/2018 (Rahul Rajvaidhya Vs. Customs Central Excise).

02. The facts of the case reveal that the present appellant has preferred an appeal u/s 129-A of the Customs Act, 1962 and the same has been dismissed vide order dated 08-03- 2019 on account of non-compliance of the mandatory required as contained u/s129 (e) of the Customs Act, 1962.

03. Learned counsel for the appellant has placed reliance upon an order dated 12-11-2018 passed in Appeal No. C/52173-52177 and other connected matters and his contention is that the similar appeal has been allowed in the matter by the Tribunal and therefore the question of predeposit in the present case does not arise.

04. This court has carefully gone through the aforesaid order dated 12-11-2018 brought on record and the same reveals that it was an appeal filed by the departmental officer holding the post of Commissioner of Customs. This issue involved in the aforesaid appeal was whether the benefits u/s 114 (1) and 114 (iii) of the Customs Act, 1962 is imposeable upon the Departmental officer or not. The appellant is certainly not an officer and no benefit can be granted based upon the order passed by the Tribunal. On the contrary in a case arising out of the same issue which is involved in the present case, this court has dismissed writ petition by an order dated 19-03-2019 Ankit Mehta Vs. Commissioner CGST, Indore. The order passed in WP No. 4557/2019 dated 19-03-2019 reads as under :-

"Heard.

The petitioner before this Court has filed this present writ petition being aggrieved by the order dated 10/1/2019 passed by the Customs Excise & Service Tax Appellate Tribunal, New Delhi in Case No. A.No.C/50115/2019-CV (DB).

The contention of the petitioner is that the petitioner has filed an appeal against the order dated 24/5/2018 passed by the Office of the Commissioner, CGST & Central Excise, before the Customs Excise & Service Tax Appellate Tribunal and the appeal of the petitioner has been dismissed on account of pre-deposit clause. The contention of the petitioner is that the petitioner is not in a position to make a pre-deposit due to financial constraint. The order passed by the Tribunal reads as under :

Section 129E of the Customs Act, 1962 provides that the Tribunal shall not entertain any appeal unless the appellant has deposited 7.5% of the duty. This appeal was filed in the Registry on 27 August, 2018 without complying with the aforesaid provision. A communication dated 14 September, 2018 was sent by the Tribunal to the appellant for providing evidence of mandatory deposit and the matter was directed to be listed on 5 October, 2018. The appellant by a letter dated 5 October, 2018 intimated the Tribunal that the appellant is not in a position to make the pre-deposit due to financial constraint. When the matter was listed before the Tribunal on 26 November, 2018, it was adjourned to 24 December, 2018 on a request made by the appellant.

Today, when the matter is listed, all that has been stated is that the appellant is not in a position to deposit the amount because of financial constraints. About 4 1/2 months have already lapsed and no steps have been taken by the appellant. It is, therefore, clear that the appellant is not interested in pursuing the appeal as he has not even sought time to make the pre-deposit.

We accordingly, dismiss the appeal.

Section 129E of the Customs Act, 1962 reads as under:

129E. Deposit of certain percentage of duty demanded or penalty imposed before filing appeal-

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 demanded or penalty imposed or both, in pursuance of a decision or an order passed by an officer of customs lower in rank than the 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 demanded or penalty imposed or both, 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 demanded or penalty imposed or both, 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.”

The aforesaid statutory provision of law makes it very clear that it is mandatory for an appellant to deposit seven and a half percent of the duty demanded or penalty imposed or both. The petitioner has not deposited a single rupee and in those circumstances, keeping in view the provision of Sec. 129E, the appeal itself has been dismissed.

Learned counsel for the petitioner has placed reliance upon the judgment delivered by the Andhra Pradesh High Court in the case of Indian School of Business, Hyderabad Vs. The Commissioner of Customs & Central Excise, Hyderabad-IV reported in 2014 SCC Online AP 160 = 2014-TIOL-374-HC-AP-ST. The aforesaid case was a case under the Central Excise Act, 1944 and u/S. 35F, the Commissioner appeals and the appellate Tribunal are empowered to waive the pre-deposit keeping in view the undue hardship to the appellant.

In the present case, the Customs Act, 1962 does not empower the appellate Tribunal to waive the pre-deposit and, therefore, the aforesaid case is distinguishable on facts. Reliance has also been placed upon the judgment delivered by the Allahabad High Court in the case of I.T.C. Ltd., Vs. Commissioner (Appeals) Customs & Central Excise, Meerut – I reported in 2003 SCC Online All 2224 = 2004-TIOL-53-HC-ALL-CX. It was again a case relating to the Central Excise Act, 1944, hence again distinguishable on facts.

Reliance has also been placed upon the judgment delivered by the Delhi High Court in the case of Shubh Impex Vs. Union of India reported in 2018 SCC Online Del 8793 = 2018-TIOL-968-HC-DEL-CUS. It was certainly a case under the Customs Act, 1962 and the Division Bench of Delhi High Court has reduced the pre-deposit amount. Once there is no power conferred upon the appellate Tribunal, nor upon the High Court, this Court is of the considered opinion that the judgment is not binding upon this Court and this Court will certainly not pass an order contrary to the statutory provisions.

Reliance has also been placed upon the judgment delivered by the Madras High Court in the case of M/s. Venus Rubbers Vs. The Addl. Commissioner of Central Excise reported in 2014 SCC Online Mad 4667 = 2014-TIOL-1393-HC-MAD-ST. It was again a case under the Central Excise Act, 1944 and, therefore, distinguishable on facts. Even otherwise also the statutory provisions does not permit for waiver of predeposit. Reliance has also been placed upon the judgment delivered by the Allahabad High Court in the case of Shukla Brothers Vs. Customs, Excise & Service Tax Appellate Tribunal reported in 2015 (1) ADJ 48 = MANU/UP/2822/2014. Again it was a case under the Central Excise Act, 1944 and therefore, distinguishable on facts.

Lastly reliance has also been placed upon the judgment delivered by the Delhi High Court in the case of Narendra Yadav Vs. Joint Commissioner of Customs (Exports) (W.P. (c) No. 195/2019, decided on 11/1/2019) and again the condition of pre-deposit has been waived.

This Court after careful consideration of the aforesaid judgments is of the opinion that Section 129E does not empower the Tribunal or the Commissioner (Appeals) to waive the pre-deposit or to reduce

the pre-deposit, this Court is also not inclined, keeping in view the aforesaid statutory provision of law to waive or reduce the pre-deposit and, therefore, no case for interference is made out in the matter.

Accordingly, the Writ Petition is dismissed."

05. In another case arising out of the same incident i.e WP No. 18996/2017 (M/s Shree Marwal Sewashram Vs. Customs Excise and Service Tax Appellate Tribunal), this court by an order dated 22-03-2018 has dismissed the writ petition. Paragraphs- 8 and 9 of the aforesaid judgment reads as under :-

"8. In the matter of Suvidha Signs Studios Pvt. Ltd. v. Union of India [2016 (336) E.L.T. 274 (Del.)] = 2016-TIOL-843-HC-DEL-CX the petitioner therein failed to comply with the statutory mandatory requirement of depositing the 7.5% of the demand of duty and penalty and therefore, the appeal of the petitioner therein was dismissed. The Delhi High Court after appreciating the fact that petitioner is in great financial difficulty and needs some more time to pay the pre-deposit amount has held that the Court is unable to accede the request and therefore considering the question of financial difficulty dismissed the writ petition.

9. Similar is the view taken in the matter of Pioneer Corporation v. Union of India [2016 (340) E.L.T. 63 (Del.)] = 2016-TIOL-1116-HC-DEL-CX. Para 10 and 11 of the judgment are relevant which reads as under :-

"10. Under section 35F of the CE Act as it stood prior to 6th August, 2014, a discretion was available to the CESTAT to consider the financial hardship and accordingly determine the per-deposit amount.

That discretion has been consciously sought to be curtailed and thus an amendment was made to Section 35F of CE Act requiring making of a per-deposit of 7.5% in all cases subject to an upper cap of Rs.10 crores. A direction, therefore, to the CESTAT that it should waive the per-deposit would be contrary to the express legislative intent expressed in the amended Section 35F with effect from 6th August, 2014.

11. While, the jurisdiction of the High Court under Article 226 of the Constitution to grant relief notwithstanding the amended Section 35F cannot possibly be taken away, the Court is of the view that the said power should be used in rare and deserving cases where a clear justification is made out for such interference. Having heard the submissions of Mr. Datta and having perused the adjudication order, the Court is not persuaded to exercise its powers under Article 226 to direct that there should be a complete waiver of the per-deposit as far as the petitioner's appeal before the CESTAT is concerned."

06. There is one more case i.e WP No. 24164/2018 (Kirit Shrimankar Vs. The Commissioner of CGST & Central Excise), which has also been dismissed by this court by order dated 27-03-2019. Thus, in short large number of writ petitions have been filed in respect of alleged fraudulent export/over invoicing for claiming undue benefits. The Hon'ble Supreme court in the case of Commissioner of Customs, Mumbai Vs. Tex-age and others reported in 2017 (11) SCC 380 = 2016-TIOL-188-SC-CUS has declined to interfere in the matter in respect of finding of fact specially when there was a fraudulent export/over invoicing for claiming undue benefits. The impugned order passed by the Tribunal reads as under :-

"This appeal has been filed before the Tribunal under section 129 A of the Customs Act, 1962 (hereinafter referred to as the Act on 27 August, 2018 without ensuring compliance of the provisions of Section 129-E of the Act.

2. A communication dated 12 September, 2018 was, accordingly, sent to the appellant by Speed Post requiring the appellant to submit proof of mandatory deposit before the Registrar on 4 October, 2018. The records indicate that on 4 October, 2018 the appellant submitted a letter for dispensing of pre-deposit stating therein the appellant is a Custom House Agent only and not the claimant of drawback and, therefore, the condition of pre-deposit would be very onerous and beyond the reach of the appellant. As the amount was not deposited, the matter was directed to be placed before the Bench for further directions. A communication dated 12 October, 2018 was, thereafter sent to the appellant by speed post on 15th October, 2018 requiring the appellant to submit proof of deposit by 26th October, 2018, on which date the appeal was also directed to be listed before the Bench. The matter was adjourned on 20 December, 2018. However, when the matter was taken up by the Tribunal on 20 December, 2018, no one appeared on behalf of the appellant. The matter was directed to be listed on 5 February, 2019. A notice was then sent by the Register to the appellant by Speed Post on 27 December, 2018 informing the appellant that the matter would be listed on 5 February, 2019. This letter was received by the appellant on 2 January, 2019 as is clear from the Track Consignment report placed in the file. On 5 February, 2019 the matter was directed to be listed on 8 March, 2019.

3. Today, when the matter has been called out, no one has appeared to press the application. It, therefore, clearly transpires that the appellant is no longer interested in pursuing the appeal. The appeal, therefore, stands dismissed for non-compliance of the mandatory requirement of Section 129-E of the Act."

In light of the aforesaid order passed by the Tribunal as the mandatory requirement of per-deposit as provided u/s 129 (e) has not been fulfilled, the Tribunal was justified in dismissing the appeal.

This court does not find any reason to interfere with the order passed by the Tribunal.

The appeal stands dismissed."

In light of the order passed in an identical case by this Bench only, this Court does not find any reason to interfere with the present writ petition. The admission is declined.