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CUSTOMS. EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
CUSTOMS APPEAL BRANCH

Appeal No. - C/421 /2009 - CU[DB]
C/M/552/09, C/S/1904/09

Date 25/08/2009

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S MARGRA INDUSTRIES LTD.
D-1, SECTOR-11,NOIDA-201301.

Appellant

M/S MARGRA INDUSTRIES LTD.

Vs
Respondent

C.C.(PREVENTIVE)

I am directed to transmit herewith a certified copy of Final order No. C/396 2009 CU[DB] dated 21/07/2009 passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Alongwith Stay order No C/233/09
& misc order No. C/95/09

Assistant Registrar
(Customs Appeal Branch)

Copy to :
1. Respondent
C.C.(PREVENTIVE)
NEW CUSTOM HOUSE, NEAR I.G.I. AIRPORT, NEW DELHI 110037.
2. Adv. / Consult
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3 S.D.R
4 J.C.D.R.
5 Bar association. CESTAT. New Delhi
6 Director Publications. Customs. Excise. I.P. Estate. New Delhi
7 M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8 Commercial Laws of India Pvt Ltd. Post Bag No. 1033. No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 Raghuraman's 44-B. Regal Flat.Shipra Suncity. Indirapuram - 201010.Ghaziabad. DT. U.P.
10 M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1. Noida - 201301. Gautam Budh Nagar, (UP)
11 M/s. Deeparchie Publications. M-93. Marg. 46. Saket. New Delhi 110017
12 Taxindiaonline.com Pvt.Ltd. B-XI/8183.Vasant Kunj. New Delhi - 110070
13 Taxmann Allied Service Pvt Ltd.. 21/35. West Punjabi Bagh. New Delhi - 110026
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A.Iscon Mall.Above Star India Bazar.Satellite Road.Ahmedabad-15
15 LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
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Assistant Registrar
(Customs Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO.II

C/Misc 552/09, C/S 1904/09, C/Appeal No.421/09-Cus(Br)

[Arising out of order in appeal No. CC(A)Cus/Prev/130/09 dated 18.5.2009 passed by the Commissioner of Customs (Appeals), New Delhi]

M/s. Margra Industries Ltd — Appellant

Vs

CC, New Delhi — Respondent

Appeared for the Appellant : Shri Priyadarshi Manish, Advocate
Appeared for the Respondent : Shri Vijay Kumar, SDR

Coram: **Hon'ble Mr.D.N. Panda, Judicial Member**
Hon'ble Mr. Rakesh Kumar, Technical Member

Date of Hearing: 21.7.09

Final Order No. C/396/09. /2009
Stay Order No C/233/09 Misc Order No C/95/09
Per D.N. Panda:

Learned Counsel Shri Manish submits that without considering merits of the case by the authority below, there was duty demand of Rs.78,50,751/- raised discarding claim of the appellant as to their entitlement under EPCG license when they have fulfilled the export obligation. Shri Manish further submits that although materials were produced before the lower Appellate Authority, stating that bank guarantee for Rs.31,66,464/- has already been encashed by Revenue in terms of page 53-54 of appeal folder against above demand, appellant was denied justice. Had this aspect been considered, learned Commissioner (Appeals) would not have passed an order against the appellant. But the learned Commissioner (Appeals) directed pre-deposit of Rs.50 lakhs by order dated 18.5.2009 within 30 days of receipt of the order. The order was received on 25.5.2009 and 30 days period has already been expired making the appeal liable to be dismissed since the appellant has not deposited that amount within 25.5.2009. This is arbitrary.

2 Learned Counsel has also raised a grievance that the learned Adjudicating Authority confirmed the demand of Rs.78,50,751/- which is more than the duty i.e. Rs. 63,18,898/- forgone. This aspect was also not looked into by learned Commissioner (Appeals). Financial condition of the appellant is very bad due to recession and sales have gone down day by day resulting accumulated losses. Rs.100.26 lakhs was the loss as on 31.3.2008.

3 Shri Manish, learned Counsel further submitted as under:

(1) The appellants imported Capital goods under 10% concessional EPCG Scheme on which it took the benefit of duty forgone amounting to Rs. 64,08,576/- and not Rs.78,50,751/- as alleged by the department. For this duty forgone, the appellants were under obligation to export goods manufactured from the use of the capital goods imported and that export shall be 4 times of the CIF value of the imports. In addition to such obligation, the appellant was also required to maintain past export performance equivalent to average of export made during preceding 3 years. However, due to change in fashion and also price factor the demand forces compelled the appellants to shift their production

primarily from marble to slate and other building stones. The imported machinery was capable to process all types of building stones like Slate, Kota Stone, Lime Stone etc. including marble. Though appellant's past export was of marble items, but export under the EPCG scheme was of all of Slate items. Hence in accordance with the policy provisions, the appellants were not required to maintain past performance. The appellants have a strong case for deletion of the past performance as per the policy provision and request for the same is pending before the DGFT. It would be unfair to adjudicate upon the matter till the concerned authority has come to a conclusion.

(2) The appellants have fulfilled EO to the extent of 43.30% imposed under the licence and hence customs can now ask for payment of proportionate duty forgone which comes to Rs.36,52,888/- i.e. 57% of Rs.64,08,576/-. However, the department has already invoked 3 bank guaranties amounting to Rs.31,66,464/- towards the remaining duty forgone amount.

(3) The appellants have not failed to comply with the export obligation as per the license issued to them. Due to shifting in demand, from Marble to Slate, the appellants could not achieve the export obligation and the appellants have no wilful intention to default upon the obligation undertaken by them. Therefore, it becomes clear that the appellants have a prima facie case in their favour and any order directing them to deposit the demand or the penalty or its part would cause undue hardship to them.

(4) Being aggrieved by order dated 18.5.2005, passed by the learned Commissioner (Appeals), the appellant approached the

Hon'ble High Court of Delhi in Writ Petition (C) No. 9660 of 2009 and CM No.7734 of 2009. But that writ petition was dismissed as withdrawn because the appellant was directed by Honble High Court to challenge the impugned order before the CESTAT within one week. Till that time, the order passed by the learned Commissioner (Appeals) was made inoperative. Therefore, this appellant is before the Tribunal carrying the same grievance what was before the Hon'ble High Court of Delhi.

4. Shri Manish earnestly prays that the appellant may be rendered justice without being thrown since Hon'ble High Court required statutory remedy be availed by this appellant. He therefore, advances his argument submitting that unless the Tribunal comes to the rescue of the litigant, it shall be remediless. This is a very peculiar circumstance where the litigant shall suffer unless the learned Commissioner (Appeals) is directed to reconsider the matter on the basis of merits without insisting for pre-deposit to remove undue hardship to the assessee.

5. Learned DR objects to the submissions of the appellant. He brings to our notice that when the appellant has failed to avail the successive chances given by the authorities below, adjudication order was passed. That has pressed to call for pre-deposit of Rs.50 lakhs by the learned Appellate authority. Therefore, when there is no remedy against the order under Section 129-E of Customs Act, 1962 available to the appellant, it should suffer for its own negligence. Learned DR relies on the decision in the case of CCE, Calcutta Vs Alnoori Tobacco Products reportedin 2004 (170) ELT 135 (SC).

6. Heard both sides in length and examined the entire sequence of facts.

7. Learned Commissioner (Appeals) by order dated 18.5.2009 directed the appellant to make pre-deposit of Rs.50,00,000/- (Rupees fifty lakhs) only within 30 days of receipt of that order. The appellant received the order on 25.5.2009 as per column 3 of the appeal memo. The appellant has submitted that it has not made any deposit as ordered by the ~~elarned~~ learned Commissioner (Apepals) except the submission that bank guarantee of Rs.31,66,464/- has already been enchased as per averment of the appellant. In the meantime, 30 day time has expired on 25.6.2009. Before this date, the appellant was before the Hon'ble High Court of Delhi as aforesaid. Upon direction of Hon'ble High Court on 19.6.2009 and dismissal of writ peititon as withdrawn, the appellant came to Tribunal on 25.6.2009 against the order dated 18.5.2009 passed by the learned Commissioner (Appeals).

8. When we look into the pitiable condition of appellant, we find that law although does not expressly provide to intervene against an interim order passed by an appellate authority below, this is a peculiar case where the litigant shall suffer when it was thrown from the process of justice when it pleads that its bank guarantee has already been encashed and revenue's interest has not been prejudiced and appeal might have been dismissed in the mean time. We find from the order passed by the learned Commissioner (Appeals) that he has not taken into consideration about the encashment of bank guarantee. So also the evidence relied by the learned Counsel in the course of hearing as appearing at page 175 of appeal folder in reply to show cause notice had not

received his consideration. When the learned Counsel brings out that materials are available to satisfy the authorities below, it would be proper to remit back the matter to the learned Commissioner to reconsider the entire issue dispensing with pre-deposit since the appellant has suffered running from pillar to post. Appreciating that the Writ Petition has protected the appellant, we direct the appellant to appear before the learned Commissioner (Appeals) within two weeks from the date of receipt of this order and file an application before that Authority for fixation of date of hearing. Once application is filed, learned Commissioner (Appeals) shall fix the date of hearing and pass appropriate order.

9. We have reached to the above conclusion considering that ~~grant of~~ express Grant of Statutory power to do justice has taken within its fold all incidental and ancillary power to make the grant effective so as to do justice to the litigants and being guided by the decision of the Tribunal in the case of Bhagawati Gases Ltd Vs CCE Jaipur-I reported in 2008 (206) ELT 468. Tribunal has held in para 8 of the order as under:-

"It would thus appear that the question as to whether particular letter or communication amounts to order or decision so as to make the appeal maintainable would depend on facts of each case. If on consideration of the facts and circumstances, it is found that the pointed question to the learned Departmental Representative that if the appeal is held to be not maintainable, what would be the remedy of the appellant. The law does not countenance a situation where the person is rendered remediless. In the circumstances of the case, the only option available to the appellant was to approach the Commissioner and the Commissioner was obliged to decide the matter on merit. The order of the Commissioner holding the appeal to be not maintainable cannot, therefore, be sustained. Accordingly, we set aside the order of the Commissioner and remit the matter back to him to pass a

fresh order on merit in accordance with law as early as possible preferably within two months of receipt of a copy of this order."

10. We make it very clear that this order shall not create a precedence in view of peculiar circumstance and suffering of the appellant that has received our consideration. With the aforesaid observations, we remand the matter to the learned Commissioner (Appeals) for passing appropriate order as indicated above. As a result, both the stay application and appeal are disposed of.

11. Learned DR prays that a copy of this may be sent to the learned Commissioner (appeals) to do justice to both sides. We direct so.

(Order dictated and pronounced in the open Court).

(D.N. Panda)
Judicial Member

(Rakesh Kumar)
Technical Member

MPS*