

(2016) 03 AP CK 0014

In the Andhra Pradesh High Court

Case No : C.E.A. Nos. 45, 47, 48, 50, 51, 52, 53, 54, 55, 56, 57, 62, 63, 64, 65, 66, 67 and 72 of 2015

B. Hima Bindu

APPELLANT

Vs

Commissioner, Customs, CE and Service Tax

RESPONDENT

Date of Decision : 10-03-2016

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35B, Section 35C, Section 35-C, Section 35-C (2A), Section 35-C (2-A), Section 35C(2A), Section 35-C(2A), Section 35F, Section 35-F, Section 35G, Section 35-G
Constitution of India, 1950 — Article 1

Citation : (2016) 03 AP CK 0014

Hon'ble Judges : Ramesh Ranganathan and M. Satyanarayana Murthy, JJ.

Bench : Division Bench

Advocate : S. Ravi, Learned Senior Counsel for Ch. Pushyam Kiran, Learned Counsel, for the Appellant; V. Gopalakrishna Gokhale, for the Respondent

Final Decision : Dismissed

Judgement

Ramesh Ranganathan, J.—1. These appeals, under Section 130 of the Customs Act, 1952, are preferred against the miscellaneous orders passed by the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench at Bangalore (CESTAT for short) in Miscellaneous Order Nos. 27769-27781/2013 dated 3.7.2014 and 27.10.2014.

2. The dispute, in the appeals filed before the CESTAT, related to the validity of the adjudication orders levying customs duty, interest and penalty on the import of dense wavelength division multiplex equipment (DWDM), and certain imported CDs allegedly used for its functioning. All the appellants are connected with these imports. While some of them are importers, some others are foreign suppliers. The principal importers were M/s. Prithvi Information Solutions Ltd. (PISL for short) and M/s. VMC Systems Ltd. (VMCL for short).

3. In cases where the software is embedded in the equipment itself, and not

supplied separately, the value of such embedded software is included in determining the assessable value of the equipment and it is only if the software is not embedded, and is supplied separately, can it not be included in the value of the equipment. On the ground that embedded software was shown separately as customised software only to evade customs duty, the adjudicating authorities, besides demanding differential duty on the value attributable to the so called embedded software, and interest thereon, had also imposed penalties on PISL and VMCL as well as the overseas suppliers M/s. Huawei Technologies Co. Ltd. (HTCL), M/s. Sojitz Corporation (SC) their financial partner based in Japan, several individuals working for these organizations, and Punjab Communications Limited (PCL), a public sector undertaking, which had participated in the auction and had entrusted supplies to VMCL. BSNL was also visited with penalty. In the appeals, filed against the orders passed by the adjudicating authorities, the CESTAT was mainly called upon to examine whether PISL and VMCL had deliberately shown the software, embedded in the system imported by them and supplied to BSNL, as separately imported customised software only to evade payment of customs duty on the software portion of the imported equipment.

4. In the applications filed by the appellants herein, seeking waiver of pre-deposit of duty, interest and penalty pending disposal of their appeals by CESTAT, the technical member of CESTAT directed that both PISL and VMCL should deposit the entire amount of the differential duty not covered by bank guarantees, and the interest payable thereon, within 12 weeks. The obligation of PCL, to make pre-deposit, was waived. Pre-deposit of penalty by PISL and VMCL was waived and, while some of the individuals and companies were directed to deposit 10% of the penalty, some other individuals were directed to deposit 5% thereof, and SC was directed to deposit 1% of the penalty. The Judicial Member, however, differed with the opinion of the technical member only with regards partial waiver of pre-deposit of penalty. He was of the, *prima facie*, view that there was material available to show the alleged evasion of duty by the companies which would be examined at length at the time of hearing of the appeal; and, in such circumstances, the predeposit of 10%, 5% and 1% of the aggregate penalty should be replaced by 50%, 25% and 25% respectively. He also held that PCL should be directed to deposit 50% of the aggregate penalty.

5. The matter was, thereafter, referred to a third member who agreed with the view of the technical member. In view of the majority order, both VMCL and PISL were required to deposit the entire amount of differential duty, not covered by the bank guarantees, within twelve weeks from the date of receipt of the order, and report compliance on 27.10.2014; they were directed to pay the principal, ascertain the interest payable from the department, and pay the same; the department was permitted to encash the bank guarantees; the other appellants were directed to pre-deposit 10%, 5% and 1% of the penalty imposed by the adjudicating authorities; and, in so far as PCL was concerned, pre-deposit of penalty was waived. In its subsequent order dated 27.10.2014 the CESTAT, after taking note of the submission urged on behalf of the appellants, extended the

time limit for payment of the dues by 8 weeks from the date of receipt of the order; and directed that a compliance report be submitted by 28.1.2015.

6. Sri S. Ravi, Learned Senior Counsel appearing on behalf of the appellants, would submit that the specific plea, regarding the financial hardship faced by the appellants, was not considered by the CESTAT; this gave rise to a substantial question of law; the appellants were ready to deposit a further sum of Rs.10 crores; this Court should direct waiver of pre-deposit for the balance amount, pending disposal of the appeals by the CESTAT; and, even otherwise, failure to deposit the amount, as directed by the CESTAT, would not result in dismissal of the appeals. Learned Senior Counsel, while referring to the judgment of the Calcutta High Court in *Promising Exports Ltd. v. Union of India*, (2009) 243 ELT 3 in this regard, would fairly state that the said judgment has been overruled by a Division bench of the Calcutta High Court in *Commissioner of Central Excise v. Shree Gobinddeo Glass Works*, (2011) 263 ELT 178.

7. On the other hand Sri Gopalakrishna Gokhale, Learned Standing Counsel for Central Excise, would submit that the CESTAT has passed an elaborate and well considered order; in the orders under appeal, the CESTAT had considered the question of financial hardship also; refusal by CESTAT to waive pre-deposit of customs duty, interest thereon, and a part of the penalty is on a detailed analysis of the evidence on record; failure of the appellants to deposit the amount, as directed by the CESTAT, would result in dismissal of the appeals; it is only on compliance with the condition of deposit of customs duty, interest and penalty, is the CESTAT empowered to hear the appeal filed by the desiring assessee; the appeals, preferred by the appellants, are not maintainable as no substantial question of law arises for consideration; and, as the CESTAT is the final Court of fact, the factual findings recorded, in the orders under appeal, do not necessitate interference. Learned Standing Counsel would rely on *Commissioner of Customs & Central Excise, Ahmedabad v. Kumar Cotton Mills Pvt. Ltd.*, 2005 (180) E.L.T. 434 (SC); *Moon Light Exim Pvt. Ltd. v. Commissioner* 2013 (297) ELT A101 (SC); *Everest Rolling Mills Pvt. Ltd. v. Union of India* 2015 (320) ELT A103 (SC); *Reliance Cellulose Products Ltd. v. Commissioner* 2015 (320) ELT A289 (AP); and *Swamsar Industrial Services v. CESTAT, Bangalore*, 2014 (33) STR 486 (AP)).

8. Before examining the rival submissions, it is useful to note the facts, and the prima facie findings, recorded by the CESTAT in the miscellaneous orders under appeal. Dense Wavelength Division Multiplexing Equipment (DWDM) is the core technology in an optical transport network. The source, a solid-state laser, is required to provide stable light within a specific narrow bandwidth that carries the digital data modulated as an analog signal. The DWDM systems employ multiplexers to combine the signals. The inherent loss, associated with multiplexing and demultiplexing, is dependent upon the number of channels, but can be mitigated with optical amplifiers which boost all wavelengths at once without electrical conversion. The essential components of DWDM can be classified, by their place in the system, as (i) on the transmit side, lasers with

precise, stable wavelengths; (ii) on the link side, optical fiber that exhibits low loss and transmission performance in the relevant wavelength spectra, in addition to flat-gain optical amplifiers to boost the signal on longer spans; and (iii) on the receiver side, photo detectors and optical de-multiplexers using thin film filters or diffractive elements. This equipment is used by all major communication service providers all over the world, and HTCL is one of the leading manufacturers of DWDM equipment. BSNL called for tenders in the years 2006 and 2007 for supply of DWDM equipment of two types, namely 2.5G, 32 channel and 10G, 40 channel, to be sourced only from domestic manufacturers. The bidders were all domestic manufacturers, including PISL and VMCL who, in turn, entered into an agreement with HTCL for import of the equipment. PISL and VMCL entered into agreements with SC which acted as their financial partner to make payment, through letters of credit, to HTCL after the equipments were dispatched.

9. In the orders under appeal, the CESTAT noted that, when the software is embedded in the equipment itself and not supplied separately, the value of such embedded software is required to be included in determining the assessable value of the equipment; the General Manager of VMCL had admitted that the software received by them was embedded in the equipment, they had imported blank CDs mis-declaring them as customized software only to reduce their customs duty liability, and they were forced to resort to this modus operandi because of stiff competition in the tendering process of BSNL; the Senior Manager of VMCL had admitted that the software in the system was already loaded by the suppliers; the Senior Purchase Executive of VMCL had stated that he was advised, by the Managing Director of VMCL, to declare the CDs as software CDs to the Customs authorities, the packing lists of blank CDs contained fictitious part numbers, and he had taken part in seeking modification, of the invoices/packing list for imported goods, to suit their needs; the Senior General Manager had admitted that the 5780 blank CDs did not contain the software claimed to have been imported by VMCL and PISL, VMCL and PISL used to receive useless blank CDs/CDs with 70 KB data describing them as customized software on CD for DWDM, around 19,000 CDs containing useless data were burnt by them just to show that they were supplying software in the CDs, whatever software was required to run the DWDM equipment was already loaded in the hardware, and blank CDs were imported only to facilitate splitting up the equipment; the Director of VMCL had also admitted that the software, allegedly imported by VMCL, was already embedded in the hardware cards of the equipment; the Chairman of VMCL also admitted that they were importing finished systems from HTCL; the employees of SC had also admitted that they had manipulated the invoice at the request of the importers; the General Manager of HTICPL (Indian subsidiary of the exporter) had also admitted that they had not transferred any technology to PISL and VMCL, and HTCL was not supplying software through internet/e-mail to any customer; the Sales Manager of HTCL had stated that the software, supplied with the equipment, was not

customised software but was embedded in the equipment and, because of the specific request made to them, they had issued separate invoices; the Chief Executive Officer of HTICPL had admitted that what was supplied was embedded software; the Senior Product Manager of HTICPL had admitted that the equipment supplied by them was in a ready to use condition, and there was no need to load any software; the Chairperson of PISL had admitted that, according to the agreement, they had to supply embedded software only; and some of the employees of BSNL had admitted that what they received was fully functional equipment, and software was not required to be supplied separately.

10. The CESTAT observed that the e-mails clearly showed that a specific request was made of the manner in which the invoice should be worded, and the CDs should be labelled; the e-mails also showed that the CDs did not contain any software; this was corroborated by the statement that more than 16,000 CDs were burnt by the appellants; under the agreement between HTCL and the importer, the software was defined only as embedded software; the software was imported through one port, and the hardware through another; and the appellants had planned and conspired to avoid customs duty.

11. After extracting the contents of the test report, the CESTAT further observed that the hardware equipment contained embedded software; the software in the CDs was not required for the equipment to function; the departments case was not only based on statements, but also on the CDs which contained 70 KB text data unconnected to the software; scrutiny of the records showed that the appellants had deliberately imported hardware and software separately, and the imported CDs were totally useless and unconnected with the equipment; there was enough evidence to show that the labels on the CDs were manipulated, and the CDs supplied were never used by the BSNL staff; and no software could have been recorded into the equipment since the equipment did not have any such system.

I. THE SCOPE OF SECTION 129-E OF THE CUSTOMS ACT AND ITS PROVISIO:

"In considering the appellants claim that they should be permitted to deposit an additional sum of Rs.10 Crores and the balance disputed customs duty, interest thereon and part of the penalty, not waived by the CESTAT, should be waived, it is necessary to examine the scope of Section 129-E of the Customs Act and the circumstances under which duty, interest and penalty can be waived either in whole or in part. Section 129-E of the Customs Act (as it stood during the relevant period) is similar to Section 129(1) of the Customs Act, 1952 (prior to substitution of Chapter XV by Finance Act, 1980) and Section 35-F of the Central Excise Act (prior to its substitution by Act 25 of 2014 w.e.f. 06.08.2014). As the scope and ambit of these provisions have been considered by the Supreme Court and this Court, it is useful to read these provisions in juxta-position with each other.

Section 129 of the Customs Act 1952 prior to substitution of Chapter XV by the

Finance Act, 1980 Section 129E of the Customs Act, 1952 after substitution of Chapter XV by the Finance Act, 1980 Section 35F of the Central Excise Act prior to its substitution by Act 25 of 2014 with effect from 6.8.2014

129 (1) Where the decision or order appealed against related to any duty demanded in respect of goods which are not under the control of customs authorities or any penalty levied under this Act, any person desirous of appealing against such decision or order shall, pending the appeal, deposit with the proper officer the duty demanded or the penalty levied;

Provided that where in any particular case the appellate authority is of opinion that the deposit of duty demanded or penalty levied will cause undue hardship to the appellant, it may in its discretion dispense with such deposit, either unconditionally or subject to such conditions as it may deem fit.

Where in any appeal under this Chapter, the decision or order appealed against relates to any duty 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 demanded or the penalty levied:

Provided that where in any particular case, the Collector (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the Collector (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."

Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of Central Excise 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 adjudicating authority the duty 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 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."

12. The right of appeal is a creature of a statute, and there is no reason why the legislature, while granting the right, cannot impose conditions for the exercise of such right so long as the conditions are not so onerous as to amount to unreasonable restrictions rendering the right almost illusory. (*Shyamkishore v. Municipal Corporation of Delhi* , AIR 1992 SC 2279; *Seth Nand Lal v. State of Haryana* , AIR 1980 SC 2097). The 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 can be circumscribed by the conditions in the grant. (Vijay Prakash D. Mehta v. Collector of Customs (Preventive) Bombay , AIR 1988 SC 2010).

13. Section 129(1) of the Customs Act, 1952, prior to the substitution of Chapter XV by the Finance Act, 1980, (similar to Section 129-E of the Customs Act as applicable during the relevant period) related to making of deposit pending the appeal. Though sub-section (1) of Section 129 appeared to make it necessary that an appellant should deposit the duty or penalty before his appeal could be heard on merits, the proviso whittled down the rigour of sub-section (1). Earlier, under Section 189 of the Sea Customs Act, 1878, it was obligatory on the part of an appellant to deposit the duty or penalty pending the appeal. There was no provision therein by which the appellate authority could waive the requirement regarding deposit of the entire amount of duty or penalty. But, by the proviso to sub-section (1) of Section 129, discretion was given to the appellate authority to either waive deposit of the entire amount of penalty or duty, or reduce the quantum to be so deposited if the appellate authority was of the opinion that the requirement, regarding deposit of the full amount of penalty or duty would cause undue hardship to an appellant. (Navinchandra Chotelal v. Central Board of Excise and Customs , AIR 1971 SC 2280).

14. The right conferred under Section 129A of the Customs Act, 1952 is controlled by Section 129E thereof. That right is hedged with a condition, and is thus a conditional right. The appellant has no absolute right of stay. He can obtain stay of realisation of the duty levied, or the penalty imposed, in an appeal subject to the limitations of Section 129E. If the Statute gives a right to appeal upon certain conditions, it is upon fulfilment of these conditions that the right becomes vested in, and exercisable by, the appellant. The proviso gives a discretion to the authority to dispense with the obligation to deposit in case of "undue hardship". It is a discretion vested in an obligation to act judicially and properly. That discretion must be exercised on relevant material, honestly, bonafide and objectively. Once that position is established it cannot be contended that there was any improper exercise of the jurisdiction. (Vijay Prakash D. Mehta , AIR 1988 SC 2010).

15. The main section (Section 35-F of the Central Excise Act and Section 129-E of the Customs Act) makes pre-deposit mandatory in order to avail the remedy of an appeal before the CESTAT. The first proviso, an exception to the general rule, confers power on the CESTAT to dispense with such deposit "subject to such conditions as may be imposed so as to safeguard the interests of revenue" if the demand "would cause undue hardship". The question of dispensing with pre-deposit would arise only when the duty demanded, or the penalty levied, would cause undue hardship to the appellants, and not otherwise. Any order to dispense with pre-deposit must, necessarily, be subject to certain conditions which should be imposed to safeguard the interests of revenue. The interests of revenue must be kept in mind while exercising the power to dispense with the condition of pre-deposit for an appeal to be entertained. (The Commissioner of

Central Excise, Guntur Commissionerate, Guntur v. M/s. Sri Chaitanya Educational Committee, Poranki, Vijayawada, represented by its Managing Director1).

16. Petitions for stay should not be disposed of as a matter of routine, unmindful of the consequences flowing from the order requiring the appellant to deposit the full or a part of the demand. (Indu Nissan Oxo Chemicals Industries Limited v. Union of India , (2007) 13 SCC 487; M/s. Sri Chaitanya Educational Committee, Poranki, Vijayawada1. A mere prima facie case does not justify an interim order of protection being passed. But if, on a cursory glance, it appears that the demand raised has no legs to stand, it would be undesirable to require the appellant to pay the full or a substantial part of the demand. There can be no rule of universal application in such matters, and the order should be passed keeping in view the factual aspects involved in the case. The Tribunal does not have the license to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest. Where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizens faith in the impartiality of public administration, interim relief can be granted. (Benara Valves Ltd. v. Commissioner of Central Excise , [2009] 20 VST 297 (SC) : (2006) 13 SCC 347; M/s. Sri Chaitanya Educational Committee, Poranki, Vijayawada1).

17. Besides focusing on the aspects of a prima facie case, balance of convenience and irreparable loss, the Tribunal should also consider the necessity to safeguard the interests of revenue, and should impose such conditions as may be required in this regard, while passing an order on the application to waive the pre-deposit for preferring an appeal. (Union of India v. Adani Exports Ltd. , [2007] 13 SCC 207; M/s. Sri Chaitanya Educational Committee, Poranki, Vijayawada1).

18. Two significant expressions, used both in Section 35-F of the Central Excise Act and Section 129-E of the Customs Act, are undue hardship to such person and safeguard the interests of the Revenue. While considering the application, seeking waiver of pre-deposit, these twin requirements should be kept in view. Use of the word undue would mean something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant. Undue means something which is not merited by the conduct of the claimant, or is disproportionate to it. For a hardship to be undue it must be shown that the burden to observe or to perform is out of proportion to the nature of the requirement, and the benefit which the applicant would derive from its compliance. Undue hardship is a matter within the special knowledge of the applicant, and must be established by him. A mere assertion of undue hardship would not suffice. The expression undue hardship is, ordinarily, related to economic hardship. The Tribunal is required to consider the question whether or not a direction to deposit the amount would cause undue hardship. Without considering the said question, it cannot go into the merits of the appeal itself. (Bhavya Apparels (P) Ltd. v. Union of India , [2007] 10 SCC 129; M/s. Sri Chaitanya Educational Committee, Poranki, Vijayawada1).

19. The other aspect, which relates to safeguarding the interests of Revenue, is a matter which the Tribunal should focus upon, while considering whether pre-deposit should be waived either wholly or partially. It is for the Tribunal to impose such conditions as it deems proper to safeguard the interests of Revenue. While dealing with the application, the Tribunal should consider the material placed by the appellant in support of the plea of undue hardship, and also stipulate such conditions as are required to safeguard the interests of the Revenue. (Benara Valves Ltd. v. Commissioner of Central Excise , [2009] 20 VST 297 (SC) : [2006] 13 SCC 347; S. Vasudeva v. State of Karnataka , [1993] 3 SCC 467; Monotosh Saha v. Special Director, Enforcement Directorate , [2008] 12 SCC 359; M/s. Sri Chaitanya Educational Committee, Poranki, Vijayawada¹).

20. The following principles should be borne in mind while considering applications for stay, or for dispensing with the requirement of pre-deposit, under Section 35F of the Central Excise Act or under Section 129E of the Customs Act, or other similar provisions: (1) the applications for stay should not be disposed of in a routine manner unmindful of the consequences flowing from the order requiring the appellant to deposit the full or a part of the demand; (2) three aspects to be focused upon, while dealing with the applications for dispensing with pre-deposit, are (a) prima facie case, (b) balance of convenience, and (c) irreparable loss; (3) interim orders ought not to be granted merely because a prima facie case has been shown; (4) the balance of convenience must be clearly in favour of making an interim order, and there should not be the slightest indication of a likelihood of prejudice to the interest of public revenue; (5) while dealing with such applications, the twin considerations are the undue hardship which the applicant would suffer if his request for waiver (either wholly or partially) of pre-deposit of duty, interest and penalty is not acceded to, and the need to safeguard the interests of revenue (6) when the Tribunal decides to grant full or partial stay, it is imperative that it imposes such conditions as may be necessary to safeguard the interests of revenue; and (7) an appellate Tribunal, being a creature of the Statute, should be guided by the conditions stipulated in the statutory provision while exercising powers expressly conferred or those incidental thereto. (M/s. Sri Chaitanya Educational Committee, Poranki, Vijayawada¹).

21. As noted hereinabove, both VMCL and PISL were required to deposit the entire amount of differential duty, not covered by the bank guarantees, within twelve weeks from the date of receipt of the order, and report compliance by 27.10.2014; they were directed to pay the principal, ascertain the interest payable from the department, and pay the same; the department was permitted to encash the bank guarantees; the other appellants were directed to pre-deposit 10%, 5% and 1% of the penalty imposed by the adjudicating authorities; and, in so far as PCL was concerned, pre-deposit of penalty was waived. As the prima facie findings recorded by the CESTAT, in the order under appeal, disclose a systematic fraud having been committed by several companies and individuals, both within the country and abroad, to evade customs duty; the elaborate steps

taken to disguise the software embedded in the imported equipment as customised software; and the conscious and deliberate efforts at misrepresentation only to deprive the Government of its legitimate revenues in the form of customs duty, can it be said that the order of CESTAT suffers from such an illegality as to necessitate interference in appeal by this Court?

II. INTERFERENCE BY THE HIGH COURT, IN THE EXERCISE OF ITS APPELLATE JURISDICTION UNDER SECTION 129-B OF THE CUSTOMS ACT, IS PERMISSIBLE ONLY IF THE ORDER OF THE CESTAT GIVE RISE TO A SUBSTANTIAL QUESTION OF LAW?

22. An appeal is a proceeding undertaken to have a decision reconsidered by bringing it to a higher authority. An appeal, strictly so called, is one in which the question is whether the order of the Court/Tribunal, from which the appeal is brought, was right on the material which the court had before it. An appeal is removal of the cause from an inferior to one of superior jurisdiction. (State of Gujarat v. Salimbhai Abdulgaffar Shaikh , (2003) 8 SCC 50). In this context it is necessary to consider the scope of Section 129-B of the Customs Act and Section 35-G of the Central Excise Act which provide for an appeal to the High Court against the order of CESTAT. It is useful to read these two provisions in juxtaposition with each other:--

"Section 35G of the Central Excise Act Section 130 of the Customs Act Appeal to High Court:

(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law.

Appeal to High Court:

An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law."

23. The right of appeal to the High Court against the order of the CESTAT, under Section 130 of the Customs Act, 1952, is available only if a substantial question of law arises for consideration. The word substantial, as qualifying a question of law, means of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contra-distinction with technical, of no substance or consequence. In enacting Section 130 of the Customs Act, 1952 Parliament has chosen not to qualify the scope of a

substantial question of law by suffixing the words of general importance thereto, as has been done in Article 133(1)(a) of the Constitution. The substantial question of law need not, therefore, necessarily be a substantial question of law of general importance, but a substantial question of law involved in the case. (Guran Ditta v. T. Ram Ditta , AIR 1928 PC 172; Boodireddy Chandraiah v. Arigela Laxmi , (2007) 8 SCC 155). To be substantial, a question of law must be debatable, not previously settled by the law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. It will depend on the facts and circumstance of each case whether a question of law is a substantial one, the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and the impelling necessity of avoiding prolonging the life of any lis. (Boodireddy Chandraiah , (2007) 8 SCC 155; Santosh Hazari v. Purushottam Tiwari , 2001(3) SCC 179).

24. A substantial question of law arises where (i) the Court/Tribunal has ignored material evidence or has acted on no evidence; (ii) the Court/Tribunal has drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the Court/Tribunal has wrongly cast the burden of proof. A decision based on no evidence, not only refers to cases where there is total dearth of evidence, but also refers to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding. (Boodireddy Chandraiah , (2007) 8 SCC 155). The proper test to determine whether a question of law raised in the case is substantial would be whether it directly and substantially affects the rights of the parties and, if so, whether it is either an open question in the sense that it is not finally settled by the Court (High Court or Supreme Court), or is not free from difficulty or calls for discussion of alternative views. (Chunilal V. Mehta v. Century Spinning & Manufacturing Co. Ltd. , AIR 1962 SC 1314; K.V. Swamynathan v. E.V. Padmanabhan , JT 1991(1) SC 83).

25. A question of law, having a material bearing on the decision of the case (that is a question, the answer to which affects the rights of parties to the proceedings), will be a substantial question of law if it is not covered by any specific provision of law or settled legal principles emerging from binding precedents, and involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the Court/Tribunal below has decided the matter, either ignoring or acting contrary to such legal principles. In the second type of cases, the substantial question of law arises not because the law is still debatable but because the decision, rendered on a material question, violates the settled position of law. (Boodireddy Chandraiah , (2007) 8 SCC 155).

26. When a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court has thought it necessary to deal with that

question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand if the question is practically covered by the decision of the highest Court, or if the general principles to be applied in determining the question are well settled and the only question is of applying those principles to the particular facts of the case, it would not be a substantial question of law. (Boodireddy Chandraiah , (2007) 8 SCC 155; Chunilal V. Mehta , AIR 1962 SC 1314; Rimmalapudi Subba Rao v. Noony Veeraju , AIR 1951 Mad 969). Where it is found that the Tribunal has assumed jurisdiction which did not vest in it, the same can be adjudicated treating it as a substantial question of law. Any questions of law affecting the rights of parties would not by itself be a substantial question of law. An important or difficult question would, of course, be a substantial question but even if a question is not important or difficult, if there is room for reasonable doubt or difference of opinion on the question then it is would be a substantial question of law. (Rimmalapudi Subba Rao , AIR 1951 Mad 969; Crane Betel Nut Powder Works, Guntur v. Commissioner of Customs & Central Excise, Tirupati , 2006(2) ALT 523 (DB).

27. It is not even contended before us that the prima facie findings of the CESTAT are perverse or are based on no evidence. The only contention urged by Sri S. Ravi, Learned Senior Counsel, in this regard is that the CESTAT did not consider the appellants plea of financial hardship. This contention does not merit acceptance as, on the appellants claim that they were in serious financial difficulties as BSNL did not pay them their dues of more than Rs.900 crores till date, the CESTAT observed that BSNL was also penalized to the extent of Rs.75,00,000/- by the original adjudicating authority, and were directed in appeal to deposit Rs.10,00,000/-; this showed that a prima facie case was also made out against them; according to the tender documents the duty element was required to be shown separately by the bidders and, if there was any change, BSNL was liable to pay the same; the appellants could have easily recovered the duty paid by them since, according to the tender documents, it could have been shown separately and collected; the appellants had put themselves in a situation where they had committed an offence, to reduce their customs duty liability, in their anxiety to become the lowest bidder; it would not be appropriate to lend them a helping hand waiving the requirement of pre-deposit of duty which, prima facie, they were liable to pay at the time of importation; the suppliers were also under the impression that duty was required to be paid on the embedded software; and for a financial situation created by the appellants own folly, as well as the purchasers decision not to pay, it would be unfair to waive pre-deposit and grant stay.

28. It is evident, therefore, that the appellants plea of financial hardship was considered and rejected by the CESTAT. All that the CESTAT has directed the appellants to pay is the customs duty which they had, prima facie, evaded hoodwinking the authorities concerned into believing that the imported equipment did not contain software, and that customised software for such

equipment was being imported separately. This elaborate ruse, the CESTAT prima facie held, involved several players both within the country and abroad including all the appellants herein. The facts, as noted in the order of the CESTAT, show that, though the software was embedded in the imported equipment, blank and useless CDs were imported in huge quantities to mislead the authorities into believing that these CDs contained customised software to be loaded into the imported equipment later. The invoices, for the imported equipment, were manipulated, and separate invoices for the alleged customised software were created only to evade customs duty. The prima facie findings recorded by the CESTAT are largely based on the admissions of various persons, and the statements recorded in this regard. Mere appreciation, of facts or the documentary evidence cannot be held to give rise to a substantial question of law. Where the Tribunal is shown to have exercised its discretion in a judicial manner, it cannot be termed to be an error either of law or of procedure requiring interference. (*Crane Betel Nut Powder Works, Guntur* , 2006(2) ALT 523 (DB).

29. As the direction to pre-deposit customs duty and interest thereon by the CESTAT represents the amounts due to the Revenue, which the appellants have allegedly evaded payment of, the orders impugned in these appeals cannot be faulted as it only safeguarded the interests of revenue. The entire penalty in some cases, and a substantial part thereof in others, was waived considering the appellants claim of undue hardship. The appellants claim of more than Rs.900 crores being due to them, amounting to undue hardship, has been examined and rejected by CESTAT holding that BSNL was also imposed penalty for their part in the evasion of customs duty. If a fact finding authority comes to a conclusion, within the prescribed parameters, honestly and bonafide, the fact that another authority, be it the Supreme Court or the High Court, may have a different perspective of that question would not give rise to a substantial question of law. (*Crane Betel Nut Powder Works, Guntur* , 2006(2) ALT 523 (DB; *Collector of Customs, Bombay v. Swastic Woolens (P) Ltd.* 1988 Supp. SCC 796). The High Court cannot substitute its opinion, for the opinion of the Tribunal, unless it is found that the conclusions drawn were erroneous being contrary" to the mandatory provisions of law or its settled position on the basis of judicial pronouncements or is based upon inadmissible evidence or is arrived at without evidence. It is not within the domain of this Court to investigate the grounds on which the findings were arrived at by the CESTAT which is the final Tribunal of fact. (*Crane Betel Nut Powder Works, Guntur* , 2006(2) ALT 523 (DB; *Kondiba Dagadu Kadam v. Savitribai Sopan Gujar* , (1999) 3 SCC 722). The discretion exercised by CESTAT, to restrict waiver only to the penalty imposed, that too partially, is on a detailed analysis of the evidence on record, and for just and valid reasons. Whether the Tribunal should have exercised its jurisdiction differently is not a substantial question of law justifying interference. (*Boodireddy Chandraiah* , (2007) 8 SCC 155; *Reserve Bank of India v. Ramkrishna Govind Morey* , 1976(1) SCC 803; *Kondiba Dagadu Kadam* , (1999) 3 SCC 722). While

no substantial question of law would arise even if one of the two possible views appeal to the High Court, we are satisfied that, in the facts and circumstances of the present case, no view, other than that formed by the CESTAT, is possible.

30. It is wholly unnecessary for us to dwell on this aspect any further as Sri S. Ravi, Learned Senior Counsel, has not disputed any of the prima facie findings recorded by the CESTAT. As the CESTAT has only directed that the customs duty, payment of which was evaded to be paid earlier, be paid along with interest, and has waived a substantial part of the penalty for some of the appellants, and in its entirety for a few others, the orders under appeal cannot be said to suffer from a patent illegality giving rise to a substantial question of law necessitating interference in an appeal under Section 130 of the Customs Act.

III. FAILURE BY THE APPELLANT TO COMPLY WITH THE ORDER, PASSED UNDER THE PROVISO TO SECTION 129-E OF THE CUSTOMS ACT, WOULD RESULT IN DISMISSAL OF THE APPEAL FILED BEFORE THE CESTAT:

31. The only other submission urged by Sri S. Ravi, Learned Senior Counsel appearing on behalf of the petitioners, is that, notwithstanding the appellants failure to deposit the duty, interest and penalty, or their failure to comply with the order passed by the CESTAT, the appeal filed by them would remain pending before the CESTAT; and the earlier judgments of the Supreme Court, in Navin Chandra Chottelal , AIR 1971 SC 2280 and Vijay Prakash D. Mehta , AIR 1988 SC 2010, were no longer applicable in view of the insertion of sub-section (2-A) to Section 129-B of the Customs Act, 1952 (similar to Section 35-C (2-A) of the Central Excise Act).

32. It is necessary, in the first instance, to note the legal regime prevalent before sub-section 2-A was inserted to Section 129-B of the Customs Act and Section 35-C of the Central Excise Act. Section 129-E did not expressly provide for rejection of the appeal for non-compliance with the requirement regarding the deposit of penalty or duty but, when Section 129-E made it obligatory on an appellant to deposit the duty or penalty pending the appeal, and if a party did not comply either with the main sub-section or with any order passed under the proviso, the appellate authority was fully competent to reject the appeal for non-compliance with the provisions of Section 129-E of the Customs Act, 1952. Accepting the contention, that Section 129-E of the Customs Act did not give any power to the CESTAT to dismiss the appeal for non-compliance with the requirements regarding deposit of duty, interest or penalty, would have meant that the appeal would have to be kept on file for ever, even when the requirements of Section 129-E was not complied with. Retention of such an appeal on the file would have served no purpose for, unless Section 129-E was complied with, the CESTAT could not have proceeded to hear an appeal on merits. The logical consequence of failure to comply with Section 129-E was rejection of the appeal on that ground. (Navinchandra Chotelal , AIR 1971 SC 2280).

33. Section 129(1) of the Customs Act, 1952 prior to, and Section 129-E of the Customs Act after, the substitution of Chapter XV by the Finance Act, 1980, (and Section 35-F of the Central Excise Act) provided a conditional right of appeal against the duty demanded or penalty levied. Although these Sections did not expressly provide for rejection of the appeal for non-deposit of duty or penalty, yet it made it obligatory on the appellant to deposit the duty or penalty, pending the appeal, failing which the Appellate Tribunal was fully competent to reject the appeal. (Vijay Prakash D. Mehta , AIR 1988 SC 2010).

34. On the question whether the insertion of sub-section (2-A) to Section 129-B of the Customs Act and Section 35-C of the Central Excise Act has brought a change to the law declared by the Supreme Court earlier, in Navin Chandra Chottelal , AIR 1971 SC 2280 and Vijay Prakash D. Mehta , AIR 1988 SC 2010, it is necessary to read Section 35-C (2A) of the Central Excise Act in juxta-position with Section 129-B(2-A) of the Customs Act.

35. Section 35C of the Central Excise Act Orders of Appellate Tribunal Section 129B of the Customs Act (2A) The Appellate Tribunal shall, where it is possible to do so, hear and decide every appeal within a period of three years from the date on which such appeal is filed:

"Provided that where an order of stay is made in any proceeding relating to an appeal filed under sub-Section (1) of Section 35B, the Appellate Tribunal shall dispose of the appeal within a period of one hundred and eighty days from the date of such order:

Provided further that if such appeal is not disposed of within the period specified in the first proviso, the stay order shall, on the expiry of that period, stand vacated. Provided also that where such appeal is not disposed of within the period specified in the first proviso, the Appellate Tribunal may, on an application made in this behalf by a party and on being satisfied that the delay in disposing of the appeal is not attributable to such party, extend the period of stay to such further period, as it thinks fit, not exceeding one hundred and eighty-five days, and in case the appeal is not so disposed of within the total period of three hundred and sixty five days from the date of order referred to in the first proviso, the stay order shall, on the expiry of the said period, stand vacated.

Note: Sub-Section (2A) and the first two provisos were inserted by Act 20 of 2002 with effect from 11.5.2002. The third proviso was inserted by Act 17 of 2013 w.e.f. 10.5.2013.

(2A) The Appellate Tribunal shall, where it is possible to do so, hear and decide every appeal within a period of three years from the date on which such appeal is filed:

Provided that where an order of stay is made in any proceedings relating to an appeal filed under subsection (1) of section 129A, the Appellate Tribunal shall

dispose of the appeal within a period of one hundred and eighty days from the date of such order:

Provided further that if such appeal is not disposed of within the period specified in the first proviso, the stay order shall, on the expiry of that period, stand vacated.

Provided also that where such appeal is not disposed of within the period specified in the first proviso, the Appellate Tribunal may, on an application made in this behalf by a party and on being satisfied that the delay in disposing of the appeal is not attributable to such party, extend the period of stay to such further period, as it thinks fit, not exceeding one hundred and eighty-five days, and in case the appeal is not so disposed of within the total period of three hundred and sixty five days from the date of order referred to in the first proviso, the stay order shall, on the expiry of the said period, stand vacated.

Note: Sub-Section (2A) and the first two provisos were inserted by Act 20 of 2002 with effect from 11.5.2002. The third proviso was inserted w.e.f. 10.05.2013."

36. The scope of Section 35-F of the Central Excise Act (similar to Section 129-E of the Customs Act) in the context of the newly inserted sub-section 2-A of Section 35-C of the Central Excise Act (similar to Section 129-B of the Customs Act, 1952), fell for consideration before the Calcutta High Court in *Promising Exports Limited*, (2009) 243 ELT 3. A learned Single Judge of the Calcutta High Court held that the second proviso to Section 35C(2A) postulated automatic vacation of the order of stay, if the appeal was not disposed of within a period of one hundred and eighty days; there was no question of extension of an order of stay; in a case where the order of stay, passed by the Tribunal, was automatically vacated there were no fetters on the Revenue, in order to safeguard public revenue, from recovering the sum due; after vacation of the order of stay, it was the appeal which remained; in that case the Tribunal should, where it is possible to do so, hear and decide the appeal within a period of three years from the date on which such appeal was filed; the word "Decide" means to "give a judgment concerning a matter or a legal case (Concise Oxford English Dictionary); "decide" would mean a decision or a judgment by the Tribunal on merits on every appeal which is pending; an application, for waiver of pre-deposit, is to be made under Rule 28A of the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982 (for short the "Rules"); if a direction is issued by the Tribunal for pre-deposit of duty or penalty and, if deposit is made, an appeal would be treated to be ready for hearing; the newly introduced sub -section (2A) to Section 35C has a bearing on Section 35F; since the proviso to Section 35F speaks of, in case of "undue hardship", dispensing with the deposit of duty demanded or penalty levied on certain conditions "pending appeal", it is certainly a proceeding in relation to an appeal under SubSection (1) of Section 35B as contemplated in 35C(2A); that an order passed under 35F is a

part of the proceedings in appeal is evident from the words "any appeal under this Chapter"; intention must not be inferred solely from 35F if it militates against the expressed and unambiguous provisions of 35C(2A); Section 35F and its proviso cannot be read independently, and should be read in harmony with Section 35C(2A); otherwise it would render the provisions contained in the newly inserted Sub-section (2A) to Section 35C otiose; in view of the insertion of Sub-Section (2A) to Section 35C of the Central Excise Act, the law laid down, in Navin Chandra Chottelal , AIR 1971 SC 2280 and Vijay Prakash D. Mehta , AIR 1988 SC 2010, stand impliedly diluted; once an application, for dispensing with the pre-deposit, is disposed of what remains on record is the appeal; Rule 19 requires the appellant to be heard on the day fixed for hearing of the appeal; significantly, Rule 20 stipulates that if the appellant does not turn up at the time of hearing on the day fixed for hearing, or another day to which hearing may be adjourned, the Appellate Tribunal has the discretion either to dismiss the appeal for default or hear and decide on merits; that apart Rule 28A(6), which deals with the "Procedure for filing and deposit of stay petitions", provides that a stay application is liable to be summarily rejected if an application does not conform to the requirements under the Rule; and, after applications for stay are disposed of, the Rules postulate either for an appeal to be dismissed for non-appearance of the petitioner, or for it to be decided on merits on the day fixed for hearing of the appeal.

37. The judgment rendered in Promising Exports Ltd. , (2009) 243 ELT 3, by the Learned Single Judge of the Calcutta High Court was overruled by the Division bench of the Calcutta High Court in Shree Gobinddeo Glass Works Ltd. , (2011) 263 ELT 178). The Division bench opined that they were unable to accept the reasoning and conclusion that the ratio of the judgments of the Supreme Court, in Navin Chandra Chottelal , AIR 1971 SC 2280 and Vijay Prakash D. Mehta , AIR 1988 SC 2010, had no binding force or that, with the insertion of Section 35C(2A), the provision of pre-deposit, pending hearing of the appeal, has been rendered otiose; keeping in view the necessity of speedy disposal of revenue matters, the legislature had fixed a time limit under Section 35C(2A) which was not provided earlier; the three year period therein was substituted with 180 days whenever any interim order of stay is granted in an appeal; the second proviso of the said Subsection provides that, if for any reason the appeal is not disposed of where interim order of stay is granted, then the stay order shall, on the expiry of that period, stand vacated; the provision has nothing to do with the provision for pre-deposit pending hearing of the appeal; the provision for pre-deposit is an independent provision, and is attracted in selective cases and situations, and not in all appeals filed under Section 35B of the Act; where duty is demanded or penalty is levied, the provision for pre-deposit has been made mandatory in order to secure the interests of revenue; accepting the logic of the learned Single Judge, that Sub-Section (2A) of Section 35C has diluted the provision of pre deposit, would require Sub-section (2A) to be applied in appeals where pre-deposit is required; the legislature does not apply any provision of law in a

truncated manner; even in the situation, subsequent to the amendment of Section 35C by way of insertion of Sub -section (2A), the decision of the Supreme Court, in the aforesaid two cases, have full force; Section 35F is an independent provision, and its language is mandatory; the rules framed under the Act can neither provide for any additional right, nor can it be read as inconsistent with the provisions of the Act itself; the effect of insertion of Sub -section (2A) in Section 35C, read with the proviso thereunder, is no more than the fixation of a time limit within which the appeal should be disposed of; if it is not possible, the stay order subsisting in the appeal would then stand vacated; and the consequence of vacating the order of stay is that the pre -deposit made earlier can, effectively, be appropriated by the revenue without any fetters.

38. In *Kumar Cotton Mills Pvt. Ltd. , 2005 (180) E.L.T. 434 (SC)* the issue was the construction of sub-section (2A) of Section 35C of the Central Excise Act, 1944. The CEGAT had held that the amendment did not affect the stay orders passed prior to the date of coming into force of the amendment, and the amendment did not curtail the powers of the Tribunal to grant stay exceeding six months. A similar view was taken by a larger bench of the CEGAT in *IPCL v. Commissioner of Central Excise, Vadodara , (2004) 169 ELT 267*. It is in this context that the Supreme Court held that the Sub-Section (i.e., Sub-Section (2A) of Section 35C), which was introduced in *terrorem*, could not be construed as punishing the assessee for matters which may be completely beyond their control; many of the Tribunals are not constituted, and it is not possible for such Tribunals to dispose of matters; occasionally, by reason of other administrative exigencies for which the assessee cannot be held liable, stay applications are not disposed within the time specified; and the reasoning of the Tribunal as expressed by the impugned order, and as expressed in the Larger Bench in *IPCL , (2004) 169 ELT 267*, could not be faulted. The Supreme Court made it clear that they should not be understood as holding that any latitude was being given to the Tribunal to extend the period of stay, except on good cause and only if it is satisfied that the matter could not be heard and disposed of by reason of the fault of the Tribunal for reasons not attributable to the assessee.

39. After the judgment of the Supreme Court, in *Kumar Cotton Mills Pvt. Ltd. , 2005 (180) E.L.T. 434 (SC)*, a third proviso was inserted to Section 35-C (2-A) of the Central Excise Act, and Section 129-B (2-A) of the Customs Act, w.e.f. 10.05.2013, conferring power on the Tribunal to further extend the period of stay. As held by the Division Bench of the Calcutta High Court, in *Shree Gobinddeo Glass Works Ltd. , (2011) 263 ELT 178*, Section 35F of the Central Excise Act (similar to Section 129-E of the Customs Act) is independent of Section 35-C(2A) thereof (similar to Section 129-B (2-A) of the Customs Act). From the tabular statement extracted earlier in this order, it is clear that the provisions of Section 129(1) of the Customs Act, 1952, (the scope of which fell for consideration in the judgment of the Supreme Court in *Navin Chandra Chottelal , AIR 1971 SC 2280*), Section 129-E of the Customs Act, 1952 (the scope of which fell for consideration in *Vijay Prakash D. Mehta , AIR 1988 SC*

2010, and Section 35-F of the Act are more or less similar to each other. Consequently the law declared by the Supreme Court, in the afore-said two judgments, would continue to apply even after Section 35-C of the Central Excise Act and Section 129-B of the Customs Act were amended and Sub-Section (2A) and its provisos were inserted thereto. As a result, failure to deposit the whole of the duty, interest and penalty, or such part thereof, within the time stipulated by CESTAT would result in dismissal of the appeal, and the appellate proceedings before the CESTAT coming to an end.

IV. CONCLUSION:

40. Viewed from any angle the orders under appeal, passed by the CESTAT, do not necessitate interference in proceedings under Section 130 of the Customs Act, 1952. All the appeals fail, and are accordingly dismissed. The miscellaneous petitions, pending if any, shall also stand dismissed. No costs.

1(Judgment of A.P. High Court Division Bench in CEA No.301 of 2010 dated 19.01.2011)