2023:DHC:8867-DB

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

% Judgment delivered on:12.12.2023

\+ **CUSAA 1/2022 & CM APPLs. 6297/2022, 6298/2022**

**COMMISSIONER OF CUSTOMS, AIR-CARGO EXPORT** ..... Petitioner

versus

**M/S SANS FRONTIERS** ..... Respondent

**+ W.P.(C) 7962/2021 & CM APPL. 24751/2021**

**SANS FRONTIERS** ..... Petitioner

versus

**THE COMMISSIONER OF CUSTOMS(EXPORTS)** ..... Respondent

**Advocates who appeared in this case:**

Mr. Harpreet Singh, Senior Standing Counsel for The Commissioner of Customs (Exports)
Ms. Raminder Kaur and Mr. Rajiv Jaipal, Advocates for M/s Sans Frontiers

**CORAM**
**HON'BLE MR JUSTICE VIBHU BAKHRU**
**HON'BLE MR JUSTICE AMIT MAHAJAN**

**JUDGMENT**

**AMIT MAHAJAN, J**

## INTRODUCTION

1. M/s Sans Frontiers, a partnership firm (hereafter '**the Firm**'), has filed the present petition [W.P.(C) 7962/2021], *inter alia,* praying as under:

> "*1. To issue a Writ, Order or Direction in the nature of a writ of mandamus or any other appropriate writ or order or direction under Article 226 of the Constitution of India setting aside/quash the Notice U/S 128a(3) of the Customs Act, 1962 dated 06/07/2021 (Annexure – P-3) and Demand cum Show Cause Notice dated 15/07/2020 (Annexure – P-1) issued by the respondent.*"

2. The Firm impugns a Demand cum Show Cause Notice dated 15.07.2020 (hereafter '**the impugned SCN**') issued by the respondent [Commissioner of Customs (Exports)] demanding recovery of Duty Drawback amounting to ₹54,72,204/-, which according to the respondent was erroneously sanctioned and paid to the Firm.

3. The Firm also impugns the notice dated 06.07.2021 (hereafter '**the impugned notice**') issued under Section 128A(3) of the Customs Act, 1962 (hereafter '**the Customs Act**') calling upon the Firm to show cause why the refund order dated 10.02.2020 passed by the Deputy Commissioner (Drawback), ACC Export Commissionerate, not be annulled or any other order as deemed fit be passed by the Appellate Authority.

4. The refund of the Duty Drawback was sanctioned pursuant to the order dated 02.11.2018 passed by the learned Customs Excise and Service Tax Appellate Tribunal (hereafter '**the learned CESTAT**'). The Revenue has preferred the above captioned appeal (CUSSA No.1/2022) impugning the said order along with applications seeking condonation of delay in filing and re-filing the said appeal.

5. The controversy in the above-captioned matters relates to the refund of a sum of ₹54,80,710/- comprising of ₹26,15,942/- being the duty drawback availed by the Firm plus ₹28,64,768/- as interest, which was deposited by the Firm pursuant to a communication dated 12.03.2014. The Firm had prevailed before the learned CESTAT and accordingly, the refund was sanctioned. The Revenue claims that the same was done erroneously as the learned CESTAT had no jurisdiction to entertain any appeal relating to Duty Drawback. According to the Revenue, the order passed by the learned CESTAT is *non est* and therefore, the sums refunded to the Firm are required to be recovered.

**FACTUAL CONTEXT**

6. The Firm is engaged in the business of exporting imitation jewelry, handicrafts, etc. It operates a 100% Export Oriented Unit (hereafter '**EOU**').

7. The controversy in the present matters relates to the Drawback of Rs. 26,15,942 claimed by the Firm, during the period from 2007-08 to 2013-14, on the basis of various shipping bills.

**1st Demand regarding the Drawback**

8. A letter dated 12.03.2014 was sent by the Deputy Commissioner (Export) to the Firm stating that they had come to know that the Firm had been availing Drawback, which was not permissible in terms of Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 (hereafter '**the Drawback Rules**'). The Firm was called upon to intimate the total Drawback availed by it, and to deposit the same along with the applicable interest.

9. Thereafter, the representative of the Firm had a personal meeting with the Deputy Commissioner. Thereafter, the Firm deposited a sum of ₹54,80,710/- (₹26,15,942/- Drawback plus ₹28,64,768/- as interest).

10. The Firm then filed an appeal before the Commissioner (Appeals) challenging the issuance of letter dated 12.03.2014. The Commissioner (Appeals), by order dated 19.06.2014, set aside the letter dated 12.03.2014 and held that the said letter did not refer to any allegations as to how the drawback was wrongly claimed, or disclosed any material about the contravention of the specific provisions of the Customs Act, which rendered the Drawback recoverable from the Firm. It also held that there was no confirmation of the demand against the Firm and no adjudication to that effect was done.

**2nd Demand regarding the Drawback**

11. Subsequently, a Demand-cum-Show Cause Notice ('**SCN**') dated 24.08.2015 was issued to the Firm under Rule 16 of the Drawback

Rules read with Section 75A(2) of the Customs Act. The said SCN was issued regarding the same issue of the Drawback availed by the Firm. It was alleged that the drawback was inadmissible under the regulations relating to All Industry Drawback and the Drawback Rules, which prohibit Drawback on export of goods manufactured or exported by a unit licensed as 100% EOU in terms of the relevant Export and Import Policy and Foreign Trade Policy. The said SCN further called upon the Firm to show cause as to why the goods of the declared FOB should not be confiscated under Section 113(h)(ii) of the Customs Act (which provides for confiscation of goods attempted to be improperly exported) read with Section 11 of the Foreign Trade (Development & Regulation) Act, 1992, and Rules 11 and 14(2) of the Foreign Trade (Regulation) Rules, 1993 (which provides for confiscation of goods in case of contravention of the Foreign Trade Policy). The SCN also called upon the Firm to show cause as to why a penalty should not be imposed under Section 114(iii) of the Customs Act (which prescribes the penalty for attempt to improperly export goods making them liable for confiscation under Section 113 of the Customs Act).

12. The learned Joint Commissioner of Customs, Air Cargo Export Commissionerate rejected the Firm's claim for Drawback and confirmed the demand in the SCN dated 24.08.2015 vide an order dated 31.01.2017. The learned Commissioner directed appropriation of the amount of Rs.54,80,710/- that had been voluntarily deposited by the Firm along with interest. Finding that the goods in question were liable for confiscation as they were exported by the Firm under the Duty

Drawback Scheme, which was not available to them, the learned Commissioner also ordered confiscation of the goods of the declared FOB Value of Rs.14,95,39,702/- under Section 113(h)(ii) of the Customs Act read with Section 11 of the Foreign Trade (Development & Regulation) Act, 1992 and Rules 11 and 14(2) of the Foreign Trade (Regulation) Rules, 1993. Penalty of Rs.15,00,000/- was also imposed upon the Firm under Section 114(iii) of the Customs Act. The Firm was also given an option to redeem the confiscated goods on payment of a Redemption Fine of Rs.50,00,000/-.

13. On appeal by the Firm, the Commissioner (Appeals), vide order dated 14.05.2018, set aside the order in relation to release of goods on payment of Redemption Fine of Rs. 50,00,000/- noting that while the goods were liable for confiscation as the Firm being a 100% EOU was ineligible to claim Drawback, confiscation couldn't be ordered as the said goods were not available. The learned Commissioner also reduced the penalty from Rs. 15,00,000/- to Rs. 5,00,000/- on account of the conduct of the Firm noting that it had voluntarily deposited the wrongly availed Duty Drawback along with interest, in full, more so before any notice/demand by the Revenue.

14. The learned Commissioner (Appeals) observed that Duty Drawback was not admissible on the goods exported by the Firm, being 100% EOU, by virtue of proviso 2 to Rule 3 of the Drawback Rules. The said Authority also noted that the letter dated 12.03.2014 was merely in the nature of an inquiry. Additionally, the learned

Commissioner (Appeals) observed that Rule 16 of the Drawback Rules did not provide a time limit for issue of demand notice for recovery of Drawback paid erroneously or in excess. Therefore, the issuance of the SCN dated 24.08.2015, was not barred by limitation.

15. The Firm challenged the order dated 14.05.2018 passed by the Commissioner (Appeals) before the learned CESTAT to the limited extent that the penalty imposed had been upheld. The Firm claimed that the Commissioner (Appeals) had noted that the Firm had voluntarily deposited the wrongly availed Duty Drawback and had, therefore, reduced the amount of penalty from ₹15,00,000/- to ₹5,00,000/-. It was submitted that there was no suppression of any fact, and hence, no penalty should have been imposed.

16. The Firm also raised an issue that the SCN dated 24.08.2015 was beyond the period of limitation. The learned CESTAT, by the order dated 02.11.2018, set aside the order passed by the Commissioner (Appeals), holding that the extended period of limitation was not available to the Revenue as the Firm had deposited, on being pointed out, the amount of Duty Drawback.

17. Pursuant to the order dated 02.11.2018, passed by the learned CESTAT, the Firm filed an application dated 12.07.2019, seeking refund of the amount, which it had deposited with the Revenue. The concerned Authority, thereafter, issued a refund order dated 10.02.2020.

**3rd Demand regarding the Drawback**

18. On 15.07.2020, the impugned SCN was issued to the Firm regarding the availed Drawback stating that the learned CESTAT had no jurisdiction to decide any appeal in respect of any order passed by Commissioner (Appeals) relating to payment of Drawback, and the Drawback was erroneously refunded to the Firm and was required to be paid.

19. On 14.07.2020, the Commissioner (Customs), exercising power under Section 129D(2) of the Customs Act directed the Deputy Commissioner (Drawback) to appeal the refund order dated 10.02.2020 before the Commissioner (Appeals) on the ground that the learned CESTAT had no jurisdiction to pass an order, which had led to issuance of the said refund order.

20. Subsequently, on 06.07.2021, the impugned notice, was issued to the Firm, under Section 128A(3) of the Customs Act. By the said impugned notice, the Firm was called upon to show cause as to why the refund order dated 10.02.2020 should not be reviewed.

21. This Court, by order dated 06.08.2021, had granted an interim stay of the impugned SCN and the impugned notice, noting that the refund order dated 10.02.2020 arose out of CESTAT order dated 02.11.2018 and the Revenue had not filed any appeal against the said order, passed by the learned CESTAT.

22. Thereafter, the Revenue filed CUSAA No.1/2022 challenging the impugned order along with applications seeking condonation of delay of 571 days in filing the appeal and 376 days in re-filing the appeal.

23. It is contended on behalf of the Revenue that the learned CESTAT had passed the order dated 02.11.2018 without any jurisdiction.

24. The Revenue has projected three questions for consideration of this Court. However, the only question that is required to be considered is whether the learned CESTAT can pass a judgment in respect of a case falling under proviso (c) of Section 129A(1)(b) of the Customs Act. This, of course, subject to the delay in filing the appeal being condoned.

25. Since the issues involved in both the matters are connected, they were heard together, and it is considered apposite to pass a common judgment.

**THE FIRM'S SUBMISSIONS**

**Impugned notice and impugned SCN**

26. The learned counsel appearing for the Firm contended that the Firm was registered as 100% EOU with the Central Excise Department and the Revenue had never objected to the claim of Drawback availed by the Firm.

27. The learned counsel also submitted that it is a well settled principle that a second show cause notice cannot be issued on the same

subject matter. Prior to issuance of the impugned SCN, the concerned Authority had issued a Demand-cum-Recovery letter dated 12.03.2014 on the same issue, which had been set aside by the learned Commissioner (Appeals) by order dated 19.06.2014. He contended that since the order dated 19.06.2014 had not been appealed by the Revenue, the same had attained finality.

28. The learned counsel further contended that in violation of judicial discipline, the concerned Authority had issued the SCN dated 24.08.2015 on the same subject.

29. The learned counsel also contended that subsequent proceedings on the same issue were barred by the doctrine of *res judicata* under the relevant provisions of Section 11, Code of Civil Procedure, 1908.

30. The learned counsel submitted that the SCN dated 24.08.2015 was barred by limitation, since the same was issued more than a year after 19.06.2014. It was submitted that since the said SCN itself was barred by time, subsequent adjudication orders dated 31.07.2017 and 14.05.2018 leveling penalty and interest were also null and void. It was submitted that thus no amount could have been appropriated suo motu as the demand itself was time barred.

31. The learned counsel submitted that the decision of learned CESTAT was accepted as mentioned in the impugned notice, and the Revenue had sanctioned the refund amount of Rs.54,72,2014/- along

with issuing a refund order on 10.02.2020 in compliance of the order dated 02.11.2018.

32. The learned counsel objected to any leniency being shown to the Revenue as its challenge to the order passed by CESTAT is hopelessly time barred and the reasons given by the Revenue did not show "sufficient cause" as required under Section 130(2)(A) of the Customs Act.

33. He submitted that despite allegedly misplacing the files, the Revenue kept on harassing the Firm by issuing the impugned SCN and the impugned notice under Section 128A(3) of the Customs Act.

34. The learned counsel contended that the learned CESTAT had jurisdiction to entertain the matter as a competent appellate authority and pass the order dated 02.11.2018 since the Firm had filed an appeal (against order dated 14.05.2018) mainly on the question of the penalty imposed and limitation.

35. The learned counsel also argued that even if the learned CESTAT had no jurisdiction to entertain the matter in view of the proviso (c) to Section 129A of the Customs Act, the Revenue had waived its right to object to the same by not contesting the same before the learned CESTAT or appealing the impugned order.

36. The learned counsel further submitted that since the Revenue had no power to review the impugned order, it could not circumvent the

obstacle by reviewing the refund order dated 10.02.2020, which was only a consequence of the said impugned order passed by CESTAT.

**THE REVENUE'S SUBMISSIONS**

**Impugned notice and impugned SCN**

37. The learned counsel for the Revenue vehemently countered the submissions made by the Firm. He submitted that CBEC instructions vide F. No. DGEP EOU/01/2014, dated 01.05.2014 clarifies that an EOU having been issued a Letter of Permission, is not entitled to Duty Drawback whether or not such units have obtained bonding licensing under Section 58 and 65 of the Customs Act. He further submitted that the proviso to Rule 3 of the Drawback Rules prohibits the availment of Drawback on export of the goods if such goods are produced or manufactured using imported materials or excisable materials or taxable services in respect of which duties or taxes have not been paid.

38. The learned counsel argued that the refund order dated 10.02.2020 was reviewed by the competent authority and an appeal was preferred before the Commissioner of Customs (Appeals) for setting aside the said refund order. Pursuant to this, the impugned SCN was issued against the sanctioned refund on the ground that the learned CESTAT did not have the jurisdiction to adjudicate on a matter relating to payment of Drawback in terms of proviso (c) under Section 129A(1) of the Customs Act.

39. The learned counsel contended that there was no breach of limitation or judicial discipline as the impugned SCN was issued for recovery of the Drawback amount sanctioned vide an order dated 10.02.2020.

40. The learned counsel submitted that the doctrine of waiver does not apply in cases where there is an explicit bar in the Customs Act itself. He stated that it is trite that there cannot be any concession in law.

41. The learned counsel submitted that the Commissioner of Customs (Appeal) reviewed the refund order dated 10.02.2020 and granted concurrence for filing an appeal before this Court on 11.08.2020.

42. The learned counsel contested the contention that the learned CESTAT committed a grave jurisdictional error in deciding the appeal of the Firm as even though the appeal had been filed for annulment of penalty, etc., but the matter predominantly pertained to Drawback. He submitted that thus the impugned order is *non est* in the eyes of law.

43. He submitted that even though the Revenue did not object to the jurisdiction of learned CESTAT, it ought not to have exercised its jurisdiction over the present matter especially in view of the bar contained in Section 129A(1) of the Customs Act.

44. The learned counsel submitted that the impugned order appears to have been passed in haste as the same has been passed without taking into account all the facts and circumstances of the case.

## ANALYSIS

45. The present writ petition essentially challenges the impugned notices issued by the Revenue, demanding the drawback and interest, which had been released to it pursuant to the order dated 02.11.2018 passed by the learned CESTAT.

46. Since it is contended by the Revenue that the appeal before the learned CESTAT was not maintainable, and the amount was wrongly refunded to the Firm, the first and foremost issue to be decided in the present petition is whether the appeal filed by the Firm before the learned CESTAT, challenging the order dated 14.05.2018 passed by the Commissioner (Appeals) was maintainable, and if it was not maintainable, the consequences thereof.

47. The appeal before the learned CESTAT is filed under Section 129A of the Customs Act. The relevant part of the said Section is set out below:

> "***129A. Appeals to the Appellate Tribunal***
>
> *(1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order—*
>
> *(a) a decision or order passed by the Principal Commissioner of Customs or Commissioner of Customs as an adjudicating authority;*
>
> *(b) an order passed by the Commissioner (Appeals) under section 128A;*
>
> *(c) an order passed by the Board or the Appellate Commissioner of Customs or Commissioner of Customs, either*

*before or after the appointed day under section 130, as it stood immediately before that day:*

*PROVIDED that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to,—*

*(a) any goods imported or exported as baggage;*

*(b) any goods loaded in a conveyance for importation into India, but which are not unloaded at their place of destination in India, or so much of the quantity of such goods as has not been unloaded at any such destination if goods unloaded at such destination are short of the quantity required to be unloaded at that destination;*

*(c) payment of drawback as provided in Chapter X, and the rules made thereunder"*

48. It is contended on behalf of the Revenue that in terms of proviso (c) of Section 129A(1) of the Customs Act, the learned CESTAT did not have the jurisdiction to decide any appeal in respect of any order relating to payment of Drawback, as provided in Chapter X of the Customs Act. Chapter X of the Customs Act comprises Section 74 to 76 of the Customs Act, which are the provisions that provide for drawback being available on the goods exported out of India.

49. The Firm, however, contended that the appeal was filed in relation to the penalty imposed, and not in relation to any claim for the Drawback. Therefore, the same was maintainable under Section 129A of the Customs Act.

50. The learned counsel for the Firm submitted that the jurisdiction of the learned CESTAT is not excluded if the appeal is in relation to recovery of Drawback that has already been sanctioned. He further submitted that the jurisdiction of the learned CESTAT is excluded only if the dispute relates to payment of drawback.

51. He relies upon the judgment passed by the CESTAT, West Zonal Bench, Ahmedabad, in the case of ***Ravi Technoforge Pvt. Ltd. and Ors. v. C.C.-Kandla and Ors*****: 2022 SCC OnLine CESTAT 794**. In the said case, the learned CESTAT had held that 'payment' and 'recovery' are two separate funds and what has been barred by Section 129A, is the issue relating to the payment of drawback. It is thus contended that since the issue, in the present case, relates to recovery of the Drawback already sanctioned, the appeal would be maintainable.

52. We are not persuaded by the contentions advanced on behalf of the Firm. We also do not agree with the view taken by the learned CESTAT, West Zonal Bench, Ahmedabad in ***Ravi Technoforge Pvt. Ltd. and Ors. v. C.C.-Kandla and Ors.*** (*supra*).

53. Chapter X of the Customs Act not only deals with the eligibility as to Drawback but also contains the provision for its recovery in case the Drawback has been paid erroneously. In our view, even though proviso (c) of Section 129A(1) of the Customs Act mentions the word "payment", the same would also include the recovery of the Drawback. This is because whether it is the claim for payment or the claim of the Revenue for recovery, both would include an adjudication on merits,

that is, the eligibility and entitlement of the assessee for the Duty Drawback on the exports made by it.

54. It would be erroneous to accept that the entitlement of the Firm claiming payment of Drawback cannot be considered by the learned CESTAT, but the Revenue's demand for recovery of the erroneously paid Duty Drawback, can be considered by learned CESTAT. This would lead to a situation where if the Drawback is not fully sanctioned by the Revenue, and the Revenue later claims the refund of the partly paid Drawback, the assessee resisting the Revenue's claim for recovery of the part Drawback would have to appeal before the learned CESTAT, but claim payment of the remaining part of the Drawback before another authority.

55. The West Zonal Bench, Mumbai of the learned CESTAT, in ***Essar Overseas Co. v. Commissioner of Customs, Mumbai-III*: 2016 SCC OnLine CESTAT 9568**, taking note of the proviso (c) to Section 129A of the Customs Act, had held that the payment of Drawback also includes recovery of Drawback. We concur with the said view of the learned CESTAT, Mumbai.

56. It is important to note that the Drawback was deposited by the Firm voluntarily after the letter dated 12.03.2014. Therefore, the issue before the learned CESTAT, to that extent, was not the recovery of the Drawback, but the payment of Drawback recovered by the Revenue. Thus, proviso (c) to Section 129A of the Customs Act, which excludes the jurisdiction of the learned CESTAT in regard to any claim

mentioned in Chapter X of the Customs Act, acts as a bar against the learned CESTAT to adjudicate the said issue in the present case.

57. Another aspect, which cannot be ignored is that the appeal filed by the petitioner only relates to the imposition of penalty. The prayer sought for before the learned CESTAT is reproduced as under:

> *"The appellants respectfully pray that the penalty may be set aside with consequential relief. Any such relief(s) as may be considered appropriate by Hon'ble Tribunal, be also granted."*

58. The learned CESTAT by its order dated 02.11.2018 has held the SCN dated 24.08.2015 to be time barred, even though, in our opinion, the only relief being claimed was in regard to the imposition of penalty. The entire SCN dated 24.08.2015 could not have been set aside.

59. It is also contended by the learned counsel for the Firm that no objection as to the jurisdiction of the Tribunal, was ever taken by the Revenue before the learned CESTAT.

60. He submitted that the Revenue had agreed to the jurisdiction of the learned CESTAT to entertain the appeal and in fact, had sanctioned refund of the amount of Drawback pursuant to the order passed by the learned CESTAT. He further submitted that the appeal challenging the order of the learned CESTAT has been filed belatedly only to overcome the argument that the Revenue, by its consent, had agreed to the jurisdiction of the learned CESTAT.

61. We do not agree with the said contention advanced on behalf of the Firm. It is settled law that competence of the Court to try a case goes to the very root of the jurisdiction. The inherent lack of jurisdiction makes the order passed by the Court void in law. There is also no inherent right to file an appeal and the same is granted by the statute. In the absence of any such right, the learned CESTAT being a creature of statute, did not have any jurisdiction to entertain the same. No Court or Tribunal is empowered to usurp jurisdiction, which it does not have. Any order passed by a Tribunal that does not have the jurisdiction to pass such an order, is *non est.* The invalidity of such orders can be set up whenever they are sought to be enforced.

62. It is well-settled that the order passed by a Court, which does not have the subject matter jurisdiction to adjudicate the issue, would be a nullity. No consent, waiver or acquiescence can confer jurisdiction upon a Court, which is otherwise barred by the statute. The order, passed by a Court having no jurisdiction, is *non est* and its invalidity can be set up at any stage and in any proceedings.

63. The Hon'ble Apex Court, in ***Harshad Chiman Lal Modi v. DLF Universal Ltd.* : (2005) 7 SCC 791**, held as under:

> *"30. We are unable to uphold the contention. The jurisdiction of a court may be classified into several categories. The important categories are (i) territorial or local jurisdiction; (ii) pecuniary jurisdiction; and (iii) jurisdiction over the subject-matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of*

*issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject-matter, however, is totally distinct and stands on a different footing. Where a court has no jurisdiction over the subject-matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is a nullity.*

*31. In Halsbury's Laws of England, (4th Edn.), Reissue, Vol. 10, para 317, it is stated:*

> *317. Consent and waiver.—Where, by reason of any limitation imposed by a statute, charter or commission, a court is without jurisdiction to entertain any particular claim or matter, neither the acquiescence nor the express consent of the parties can confer jurisdiction upon the court, nor can consent give a court jurisdiction if a condition which goes to the root of the jurisdiction has not been performed or fulfilled. Where the court has jurisdiction over the particular subject-matter of the claim or the particular parties and the only objection is whether, in the circumstances of the case, the court ought to exercise jurisdiction, the parties may agree to give jurisdiction in their particular case; or a defendant by entering an appearance without protest, or by taking steps in the proceedings, may waive his right to object to the court taking cognizance of the proceedings. No appearance or answer, however, can give jurisdiction to a limited court, nor can a private individual impose on a judge the jurisdiction or duty to adjudicate on a matter. A statute limiting the jurisdiction of a court may contain provisions enabling the parties to extend the jurisdiction by consent."*

*32. In Bahrein Petroleum Co. [(1966) 1 SCR 461 : AIR 1966 SC 634] this Court also held that neither consent nor waiver nor acquiescence can confer jurisdiction upon a court, otherwise incompetent to try the suit. It is well settled and needs no authority that "where a court takes upon itself to exercise a jurisdiction it does not possess, its decision amounts to nothing". A decree passed by a court having no jurisdiction is non est and its invalidity can be set up whenever it is sought to be enforced as a*

*foundation for a right, even at the stage of execution or in collateral proceedings. A decree passed by a court without jurisdiction is a coram non judice."*

64. Therefore, even if it is to be assumed that the Revenue had consented to the learned CESTAT hearing the appeal, the defect of lack of jurisdiction cannot be cured.

65. Having arrived at the conclusion that the order passed by the learned CESTAT was without jurisdiction, the Revenue, thus, was right in observing that the refund order sanctioned in favour of the Firm pursuant to the order of the learned CESTAT, was required to be reviewed.

66. The non-maintainability of the appeal before the learned CESTAT also does not mean that the party is remediless. Section 129DD(1) states as under:

*"**129DD. Revision by Central Government***

*(1) The Central Government may, on the application of any person aggrieved by any order passed under section 128A, where the order is of the nature referred to in the first proviso to sub-section (1) of section 129A, annul or modify such order:*

*PROVIDED that the Central Government may in its discretion, refuse to admit an application in respect of an order where the amount of duty or fine or penalty, determined by such order does not exceed five thousand rupees.*

*Explanation : For the purposes of this sub-section, "order passed under section 128A" includes an order passed under that section before the commencement of section 40 of the Finance Act, 1984, against which an appeal has not been preferred before such commencement and could have been, if the said section had not*

*come into force, preferred after such commencement, to the Appellate Tribunal."*

67. It specifically provides that such orders of the Commissioner (Appeals), which are not appealable before the Appellate Tribunal, can be subject matter of revision by the Central Government. Any person aggrieved by such order can file an application with the Central Government. The Central Government has the power to annul or modify the order passed by the Commissioner (Appeals).

68. There is merit in the contention that the Revenue's appeal is grossly delayed. However, the principal controversy sought to be raised is regarding the jurisdiction of the learned CESTAT to entertain the Firm's appeal. Although, Revenue had not filed an appeal against the order dated 02.11.2018 within the stipulated time, the concerned authority has taken the steps for reviewing the consequential steps taken pursuant to the said order which is impugned in the said appeal. The issue whether the said order is valid is also sought to be raised in defence to the relief sought by the Firm in the present writ petition. In view of above, this Court considers it apposite to condone the delay in filing the appeal.

69. We are of the opinion that the appeal preferred by the Firm before the learned CESTAT was not maintainable and the order passed by the Tribunal is thus *void ab initio.*

70. Coming back to the prayers sought in the writ petition, that is, challenge to the impugned SCN and the impugned notice issued under

Section 128A(3), the impugned SCN was issued noting that the refund order dated 10.02.2020 was issued erroneously since the same was issued consequent to the order passed by the learned CESTAT, which had no jurisdiction to entertain the appeal.

71. Having observed above that the order passed by the learned CESTAT is void and *non est,* any refund granted pursuant to such *non est* order, in our opinion, was rightly demanded by the Revenue.

72. Even though it is not mentioned as to under which provisions the said SCN was issued, the Revenue, in terms of Section 75A(2) is entitled to claim any amount of Drawback which had been paid erroneously. Section 75A(2) reads as under:

> *"75A.* ***Interest on drawback.—***
>
> *(2) Where any drawback has been paid to the claimant erroneously or it becomes otherwise recoverable under this Act or the rules made thereunder, the claimant shall, within a period of two months from the date of demand, pay in addition to the said amount of drawback, interest at the rate fixed under section 28AA and the amount of interest shall be calculated for the period beginning from the date of payment of such drawback to the claimant till the date of recovery of such drawback."*

73. It is also important to consider the import of the order dated 02.11.2018 passed by the learned CESTAT. The refund has been sanctioned on the premise that the learned CESTAT has directed such consequential relief. However, a plain reading of the said order does not support this assumption. On the contrary, the learned CESTAT had

reasoned that the extended period of limitation for issuing the SCN dated 24.08.2015 was not available to the Revenue as the Firm has deposited the duty drawback along with interest on the same being pointed out. The learned CESTAT had viewed the issue from the standpoint of the Firm having deposited the Duty Drawback along with interest which was alleged to have been wrongly availed by it. The learned CESTAT did not decide the Firm's entitlement to duty drawback.

74. It is important to note the Firm's case that it had deposited the Duty Drawback along with interest immediately on receipt of the letter dated 12.03.2014. The Firm had thereafter appealed the said letter dated 12.03.2014 before the Commissioner of Customs (Appeals). The said Commissioner of Customs (Appeals) had allowed the said appeal by an order dated 19.06.2014. It is material to note that the Revenue had contested the said appeal on the ground that the written communication dated 12.03.2014 was not an appealable order. The learned Commissioner of Customs (Appeals) had rejected the said contention on the ground that the Firm had made payments pursuant to the written communication dated 12.03.2014, and hence, the same was appealable under Section 128(1) of the Customs Act. The learned Commissioner of Customs (Appeals) had also granted the consequential relief to the Firm.

75. The order of learned CESTAT did not direct issuance of any refund but merely set aside the SCN dated 24.08.2015 which was issued invoking the extended period of limitation which was not available.

76. The other issue, which is raised by the Firm, is that the initial SCN dated 24.08.2015, which held the Firm ineligible for the Drawback, was issued belatedly, and was thus time barred.

77. The learned counsel for the Firm contended that the Drawback in the present case relates to the years 2008 to 2014, and therefore, any demand in the year 2015, would be hit by limitation.

78. He relies upon the following judgments: ***Pratibha Syntex v. Union of India*****: 2012 SCC OnLine Guj 6147**; ***Padmini Exports v. Union of India*****: 2012 SCC OnLine Guj 6191**; ***State of Punjab & Ors v. Bhatinda District Coop. Milk P. Union Ltd.*****: 2007 SCC Online SC 1254**; ***Collector of Central Excise, Jaipur v. Raghuvar (India) Ltd.*****: (2000) 5 SCC 299**; and ***Govt. of India v. Citadel Fine Pharmaceuticals*****: (1989) 3 (SCC) 483**.

79. On the other hand, the learned counsel for the Revenue contended that no period of limitation is prescribed under Rule 16 of the Drawback Rules, and the demand was made within a reasonable period from when the Revenue came to know of the fact that the Firm had wrongly availed the Drawback.

80. We do not consider it apposite to decide in the facts of the present case as to whether that the SCN dated 24.08.2015 was issued belatedly

or not since the said issue had been decided in favour of the Revenue by the order passed by the Commissioner (Appeals), and has not been adjudicated upon by the revision authority having jurisdiction under Section 129DD of the Customs Act.

81. In the peculiar facts of this case where the Revenue originally had not taken any objection on the appeal being heard by the learned CESTAT, and had also, following the order of the learned CESTAT, sanctioned refund of the Drawback, the Firm should not be left remediless.

82. We, therefore, grant an opportunity to the Firm to prefer a revision, under Section 129DD of the Customs Act, against the order dated 14.05.2018 passed by the Commissioner (Appeals).

83. We direct that if such a revision is preferred within a period of two months, the same shall not be dismissed on the ground of limitation and be entertained on merits by the Central Government.

84. It is open for the Firm to raise all grounds, including the issue as to whether the SCN dated 24.08.2015 was barred by limitation. Needless to state that if so raised, the same shall be considered by the Central Government, and a speaking order shall be passed after affording an opportunity of being heard to the Firm.

85. The writ petition is disposed of in the aforesaid terms.

86. The question whether the learned CESTAT can pass the judgment in respect of a case falling under proviso (c) of Section 129A(1)(b) of the Customs Act is answered in the negative. Accordingly, the impugned order dated 02.11.2018 passed by the learned CESTAT is set aside.

**AMIT MAHAJAN, J**

**VIBHU BAKHRU, J**

**DECEMBER 12, 2023**
*SS/KDK*