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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 10th November, 2010

+ CEAC 21/2010

CHEMICAL CORPORATION Appellant
Through Mr. Vinay Garg & Ms. Jyoti Sharma,
Advocate

versus

COMMISSIONER CENTRAL EXCISE NOIDA Respondent
Through Mr. Mukesh Anand & Mr. S. Tiwari,
Advocate

CORAM:

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE SURESH KAIT

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

A.K. SIKRI, J. (Oral)

+ **CM No. 19827/2010 (Exemption).**

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Exemption is allowed subject to just exceptions.

The application stands disposed of.

CEAC No. 21/2010 & CM No. 19826/2010 (Stay)

Since short question of law is raised in this appeal, with the consent of learned counsel for the parties we have heard the matter finally today itself.

The question involved in this appeal is as following:

"Whether, on the facts and circumstances of the case, the ~~ITAT's~~ ^{CESTAT's} direction to the appellant to deposit 25% of the excise duty is justified in law?

The appellant herein is given the status of Small Scale Industries and is thus enjoying the benefit of this status under the law. A show cause notice dated 01.02.2008 was issued to the appellant alleging therein that there were three separate Small Scale Units which had to be clubbed together. ^{Admittedly} ~~Admittedly~~, if these units are clubbed together, the appellant ^{may be} ~~forfeits~~ the status of being a Small Scale Unit and consequently it will no longer be qualified for the exemption under the Central Excise Act, 1944. On receipt of this show cause notice, the appellant requested for supply of copies of the documents relied upon as well as return of the documents which has not been relied upon and were resumed during seizure to enable the appellant to furnish its defence to the said show cause notice. It is the case of the appellant that in spite of repeated demand no such documents were supplied to the appellant. On the contrary, the Commissioner passed an ex parte order dated 30.03.2009 thereby confirming the demand of ₹ 93,21,747/- made in the show cause notice and imposing equal amount of penalty. The penalty was also imposed individually on the partners of the appellant company. Aggrieved by this order, the appellant preferred an appeal before the Customs, Excise and Service Tax Appellate Tribunal

(CESTAT). The main ground to challenge the order has been that the appellant was neither supplied with the copies of the documents nor given an opportunity of being heard by the Commissioner and, therefore, the impugned order was in violation of principles of Natural Justice. This contention of the appellant has been accepted by the Tribunal in the impugned order dated 29.09.2010. The Tribunal thus set aside the order passed by the Commissioner and remanded the case back to the Adjudicating Authority to pass fresh orders after giving proper opportunity to the appellant herein and hearing its point of view. However, at the same time, the Tribunal has also directed the appellant to deposit 25% of the excise duty demand of ₹ 9321747/-. It is this direction given by the Tribunal which is agitated, by the appellant by filing the instant appeal.

It is the submission of learned counsel for the appellant that when the plea of the appellant was accepted, namely, the order passed by the Adjudicating Authority was without giving any opportunity of being heard to the appellant and was in violation of principles of Natural Justice and when that order has been set aside by the Tribunal, it was not appropriate or proper on the part of the Tribunal to direct the appellant to deposit 25% of the excise duty in hand. It is further argued that the Tribunal relied upon the judgment of the Punjab & Haryana High Court in the case of *Shiv Sewa*

Sadan v. CESTAT, New Delhi reported in 254 E.L.T. 249 (P&H). The Tribunal had failed to appreciate that the said judgment has no application to the facts of the present case. Learned counsel for the respondent on the other hand has submitted that it is a discretionary order passed by the Tribunal and this Court should not interfere with the said judgment.

After hearing learned counsel for the parties, we are of the view that in the facts and circumstances of this case the direction to make deposit of 25% of the excise duty demand by the department was not appropriate as pointed out above. The appellant being a small scale unit is not liable to pay any excise duty under the Act. The move on the part of the Commissioner to club the clearance of three separate small scale units is questioned by the appellant. No doubt the Commissioner had passed an order confirming the demand in the show cause notice, however, that order itself has been set aside by the Tribunal on the ground that it was in violation of principles of Natural Justice. Thus the version of the appellant is yet to be considered and it is only after considering the reply which would be given by the appellant to the show cause notice and the material which would be produced by the appellant when it is given an opportunity of being heard, that the Commissioner would be in a position to decide in an un-biased manner as to whether this is a fit case of clubbing the clearance of three separate small

scale units owned by the appellant. When the entire case as to whether the appellant is entitled to continue to get the benefit of exemption or is liable to pay excise duty is yet to be determined, we are of the view that direction to deposit 25% of excise duty demand as per the order which itself is non-existence, was not proper.

We have gone through the judgment of Punjab & Haryana High Court in the case of Shiv Sewa (Supra). It was a case where in spite of various opportunities granted to the appellant, it had failed to avail those opportunities before the Adjudicating Authority and that resulted in passing the orders against the appellant. The High Court took note of these facts and even made specific observations that the said party was adopting dilatory tactics. Notwithstanding these facts, the High Court still chose to give one opportunity to the said party to put up its defence and under these circumstances while setting aside the order the High Court also directed the appellant in the said case to deposit ₹ 10 lacs. The relevant observations in the said judgment were as under:-

“5.1 We have carefully looked into the developments in this case carefully. Show cause notice was issued on 29-12-2006. There was request by the appellant for additional time for reply to the show cause notice by their letter dated 5-2-2007 and the time was granted. Personal hearing was fixed on 24-4-2007 and the registered post regarding the intimation of personal hearing has reportedly been received back undelivered. Again personal hearing

was fixed on 25-7-2007. However, the advocate wrote a letter dated 24-7-2007 seeking four weeks' time to reply to the show cause notice. Learned advocate fairly concedes that no reply has been filed in spite of assurance in the letter dated 24-7-2007. After that also, several personal hearings have been offered. The grievance of the learned counsel is that, the notices regarding personal hearing should have been sent to the Advocate, who has been engaged instead of serving on the authorized representative of the company, and this has led to violation of principles of natural justice.

5.2 We have not been shown that the appellant submitted before the learned adjudicating authority reasons, as claimed before us, about the serious accident of the son of the Proprietor and the Proprietor himself because of which they could not reply to the show cause notice. We find that sufficient time and opportunities have been given to them for filing reply and several personal hearings granted. If there were genuine grounds from the appellants, we find the same have not been presented before the learned adjudicating authority. We do agree that there was any violation of principles of natural justice. They have not made out a case of waiver of pre-deposit of entire amount of dues as per the impugned order.

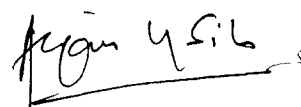
5.3 Their prayer is remand for consideration by the original authority. The fact remains that a huge demand has been confirmed penalties imposed without the benefit of reply and without hearing the party. In the interest of justice, we are inclined to order remand the matter but on certain conditions.

6.1 Under these circumstances, we direct the appellant to deposit a sum of Rs.10 lacs (rupees ten lacs only) within eight weeks from today and to report compliance before the Commissioner on 10th October, 2008. We also direct the appellant to file the reply within four weeks from today to the Commissioner."

There is no such position prevailing in the present case. It is neither the case of the respondent herein nor the Tribunal has made any comments in the impugned judgment on the conduct of the appellant herein. On the contrary as mentioned above, as per the case of the appellant, the appellant kept requesting the Adjudicating Authority to supply the documents to enable the appellant to furnish reply to the show cause notice. According to the appellant the fault lies with the Commissioner in not supplying the required documents thereby enabling the appellant to furnish the reply to the show cause notice and instead proceeding ex parte against the appellant. The impugned order would show that this plea of the appellant could not be controverted by the respondent herein and on the other hand, the Tribunal accepted this plea which led to setting aside of the order passed by the Adjudicating Authority. No doubt under certain circumstances, the Tribunal can pass such an order thereby directing the party to make deposit of certain amount, but such discretionary power has to be exercised on objective consideration. In fact that exercise was done by the Punjab & Haryana High Court in the case of Shiv Sewa (Supra) contrary thereto in the present case, we find that the Tribunal has not given any reason as to what prompted the Tribunal to direct the appellant to make deposit of 25% of excise duty demand. The impugned order shows that the simply referred judgment in

Shiv Sewa (Supra) and given the said direction. This cannot be countenance for the aforesaid reasons. We allow the present appeal and set aside the impugned order in so far as it directs the appellant to make deposit of 25% of the excise duty demand. We may also observe at this stage that the Tribunal was conscious of the fact that the matter should not be unnecessarily delayed and in order to take care of such an eventuality it has given appropriate direction to the Commissioner and the Adjudicating Authority to decide the case within time bound period. That direction, in our opinion, sufficiently, takes care of the interest of the appellant. We may clarify that the entire focus of this Court shall only on the direction of the Tribunal relating to the deposit to be made by the appellant and this Court has not gone into the merits of the controversy at all.

A copy of the order be given Dasti to learned counsel for the respondent.


A.K. SIKRI, J.


SURESH KAIT, J.

NOVEMBER 10, 2010
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%21.12.2010

Present: Mr. Vinay Garg, Advocate for the appellant.
Mr. Mukesh Anand, Advocate with Mr. RCS Bhadoria and
Mr. Shailesh Tiwari, Advocates for the
respondent/Department

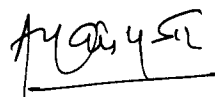
+CM APPL. 22883/2010 in CEAC 21/2010

In this application moved by the applicant, the applicant seeks to point out two typographical errors in the orders dated 10th November, 2010.

In the question of law formulated, instead of "CESTAT", ITAT is mentioned which needs to be corrected. It is also stated that after formulating the question, while taking note of the facts, it is mentioned that the word "Admittedly" is mentioned and the applicant points out that the facts are not admitted and, therefore, this word is deleted, as much as, it is for the adjudicating authority to consider the facts and the mentioning of the aforesaid word "Admittedly" make prejudice to the applicant before the adjudicating authority.

The submissions on both these counts are justified. We, therefore, make the corrections in today's date and initialled.

CM stands disposed of.


A.K. SIKRI, J.


SURESH KAIT, J.

DECEMBER 21, 2010

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