Sharayu Khot.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO. 208 OF 2017

M/s. Ludhiana Woolen and Silk Mills (P) Limited ...**Appellant**

Versus

Commissioner of Central Excise, Thane ...**Respondent**

Mr. Bharat Raichandani, a/w Ms. Ankita Vashistha, i/by UBR Legal, for the Appellant.

Mr. Swapnil Bangur, a/w Mr. J.B. Mishra, for the Respondent.

CORAM : M.S. SANKLECHA & RIYAZ I. CHAGLA, JJ.

DATE : 5 September 2018

ORDER :

1. By the consent of both the parties, the Appeal itself is being disposed of at the stage of admission.

2. This Appeal under Section 35G of the Central Excise Act, 1944 (for short "***the Act***") challenges the order dated 30th

March 2017 passed by the Customs, Excise and Service Tax Appellate Tribunal (for short "the Tribunal").

3. The Appellant-Assessee urges only the following question of law for our consideration:-

> "Whether in the facts and circumstances of the case and in law was the Tribunal justified in holding that the Commissioner (Appeals) has exercised the powers under Rule 96ZM of the Central Excise Rules, 1944 ("***the Rules***") without going into the jurisdiction of the Joint Commissioner to pass the original order?"

4. The period involved in this Appeal is from 25th May 1990 to 28th November 1990.

5. The Appellant is engaged in process of embroidery on cotton and man made fabrics falling under Chapter heading 58.05 of the Central Excise Tariff Act, 1985. The Appellant was working under the compounded levy scheme under Chapter V of

the Act. On a surprise visit, the Revenue found that while the Appellant was working under the compounded levy scheme under Section 96ZH of the Rules and paying duty per machine/per shift on the length of machine under the Notification No. 211/82 CE dated 31st August 1982 and also additional duty at the rate of 15 percent of the basic duty of excise. It was found that although four machines were installed, it had debited central excise duty only on three machines, when it was alleged all four machines were working for three shifts.

6. Thus, on the above basis, the Collector of Central Excise issued a Show Cause Notice dated 25th April 1994 seeking to recover the duty amount of Rs. 18.22 Lakhs being the duty short paid under Section 11A of the Act. Thereafter, the Collector of Central Excise by a corrigendum made the Show Cause Notice dated 25th April 1994 answerable to the Joint Collector of Central Excise. The Appellant responded to the same by contesting the notice dated 25th April 1994 and pointed out that only three machines were in working condition.

However, the Joint Commissioner of Central Excise by an order dated 30th May 2008 confirmed the demand of Rs. 18.22 Lakhs as raised on Show Cause Notice dated 25th April 1994.

7. Being aggrieved, the Appellant filed an Appeal to the Commissioner of Central Excise (Appeals). By the order dated 14th October 2008, the Commissioner of Central Excise (Appeals) allowed the Respondent-Assessee's Appeal *inter alia* holding that the entire proceedings before the Joint Commissioner was without jurisdiction as it was contrary to the proviso of Section 11A of the Act, as it then existed. Thereafter, on merits also it reversed the order dated 30th May 2008 of the Joint Commissioner of Central Excise.

8. Being aggrieved, the Revenue filed an Appeal from the order dated 14th October 2008 of the Commissioner of Central Excise (Appeals) of the Tribunal. By the impugned order the Tribunal set aside the order dated 14th October 2008 of the Commissioner of Central Excise (Appeals) and restored the issue

to the Joint Commissioner of Central Excise for fresh consideration after holding that the lapse as per Rule 96ZM of the Rules could only be condoned by the jurisdictional Commissioner. In that view of the matter, it directed that the Appellant herein to approach the Commissioner for condonation of lapse as provided under Rule 96ZM of the Rules. It is only thereafter that the Adjudicating Authority was to dispose of the Show Cause Notice by passing a fresh order.

9. We find that the impugned order of the Tribunal has not dealt with the findings rendered by the Commissioner of Central Excise (Appeals) that the order dated 30th May 2008 passed by the Joint Commissioner of Central Excise is without jurisdiction. This, as it is in defiance of the provisions of Section 11A of the Act which at the relevant time only empowered the Collector to adjudicate a notice of demand invoking the proviso of Section 11A of the Act. This issue of jurisdiction goes to the root of the dispute and in the absence of the Tribunal reversing the finding of the Commissioner of Central Excise (Appeals) as

recorded in the order dated 14th October 2008, no occasion to give further directions to the original authority can arise. The impugned order of the Tribunal does not deal with the above aspects of lack of jurisdiction in the original Authority to pass the order. This is an aspect which goes to the root of the dispute between the parties and ought to have been dealt by the Tribunal in accordance with law.

10. In the above view, at this stage, there is no occasion for us to answer the proposed question of law. It would be appropriate that we set aside the impugned order dated 30th March 2007 of the Tribunal and restore the issue to it for fresh disposal in accordance with law.

11. The Appeal is disposed of in the above terms. No order as to costs.

[RIYAZ I. CHAGLA J.] **[M.S. SANKLECHA, J.]**