IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1434 OF 2019

Supermax Personal Care Pvt. Ltd. ...Petitioner
Versus
The Union of India
Through The Secretary & Ors. ...Respondents

Mr.Jas Sanghavi I/b PDS Legal for the Petitioner.

Mr.Pradeep S. Jetly a/w Mr.J.B. Mishrea for Respondents.

CORAM : M.S. SANKLECHA &
S.C. GUPTE, JJ

DATE : 09th AUGUST 2019

PC:-

1. At the very outset, Mr.Sanghavi appearing in support of the petitioner, seeks leave to amend the petition so as to challenge two show cause notices, dated 07th March 2018, relating to Financial Years 2013-2014 and 2014-2015. Mr.Jetly for the respondent has no objection. Amendment is allowed. Amendment to be carried out forthwith. Re-verification is dispensed with. Amended copy to be served on the other side.

2. At the request of the learned counsel for the parties, the

petition is taken up for final disposal at the stage of the admission.

3. This petition is under Article 226 of the Constitution essentially challenges two orders, both dated 25th September 2018 passed by respondent No.5-Assistant Commissioner of Central Excise, under the Central Excise Act, 1944 (the Act). By the two impugned orders dated 25th September 2018 the respondent No.5 not only finalized assessment for the Assessment Years 2013-2014 and 2014-2015 respectively but also confirmed a duty demand under Section 11A of the Act and also imposed penalties under Section 11AC of the Act while confirming the two show cause notices, dated 07th March 2018. Thus the petitioner also challenge the two show cause notice dated 07th March 2018 to the extent it seeks to demand duty under Section 11A of the Act and impose penalty under Section 11AC of the Act. This demand duty under Section 11A of the Act and consequent proposal to impose penalty in the show cause notices before finalizing of the provisional assessment, it is submitted, is without jurisdiction as it is contrary to the plain provision of Act and the decision of the Apex Court in ***ITC Ltd V/s. UOI***[1]

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4. Mr.Jetley, the learned counsel for the Revenue, submits that there is a alternate remedy of appeal under the Act; therefore this Court should not entertain this petition. On the other hand, Mr.Sanghavi for the petitioner submits that both the impugned orders dated 25th September 2018 and two show cause notices dated 07th March 2018, to the extent they seek to recover duty under Section 11A of the Act, propose penalty under Section 11AC of the Act on assessments are admittedly without jurisdiction. The petitioner responded to the show cause notices in the fond hope that the Assistant Commissioner of the Customs-respondent No.5 would, after hearing the petitioner, drop the proceedings to recover duty under Section 11A of the Act and impose penalty under Section 11AC of the Act till the assessments are finalized. However, it is the petitioner's grievance that in spite of its best efforts the Assistant Commissioner, Central Excise-respondent No.5 did not accept the submissions. It is in these circumstances, the petitioner has approached this Court in its extra-ordinary jurisdiction and has not filed an appeal under the provisions of the Act against the impugned orders and the impugned show cause notices to the extent they demand duty under Section 11A of the Act and imposes penalty under Section 11AC of the Act.

5. In the above view, we have decided to entertain this petition and examine the petitioner's grievance.

6. It is an admitted position between the parties that for the Financial Years 2013-2014 and 2014-2015 the petitioner's request for provisional assessment was allowed by the respondent-Deputy Commissioner of Central Excise-Respondent No.5. This was on the petitioner furnishing bond and bank guaranties to the satisfaction of the Revenue. The assessments of both the financial years 2013-2014 and 2014-2015 continued to remain provisional till the passing of the impugned orders dated 25th September 2018. Therefore, neither the impugned show cause notices nor the impugned order had occasion to invoke Section 11A of the Act while finalising of the assessment. In fact a plain reading of the section 11A of the Act clearly provides that the time to recover the duty under the above provision would commence from the relevant date. The relevant date as defined in Section 11A, in case of duty of excise which is provisionally assessed, would be the date of final assessment. So also, penalty under Section 11A of the Act consequent to the above demand would not arise at the stage as the provisional assessment continues. In support, the petitioner relied upon the decision of the Apex Court in ***ITC Ltd. (Supra).*** In the above case,

the Apex Court has held that the occasion to invoke Section 11A of the Act in the case of provisional assessment would only arise on finalization of the amount. It held that notices issued under Section 11A of the Act prior to the finalization of provisional assessment is without jurisdiction. The aforesaid decision of the Apex Court in ***ITC Ltd*** **(Supra)** completely covers the petitioner's case.

7. In the above view, the impugned orders dated 25th September 2018, being contrary to the plain reading of the Act and the binding decision of the Supreme Court in ***ITC Ltd (Supra),*** are quashed and set aside. The impugned show cause notices dated 07th March 2018 relating to assessment for the years 2013-2014 and 2014-2015 are also set aside to the extent they seek to demand duty under Section 11A of the Act, and impose penalty under Section 11AC of the Act. The show cause notices survive for the finalization of the provisional assessment. The assessment for the years 2013-2014 and 2014-2015 to be finalized after hearing the petitioner.

8. Accordingly, the petition is disposed of in the above terms.

(S.C. GUPTE,J.) **(M.S. SANKLECHA,J.)**