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

\+ **CUSAA 182/2019**

M/S GENEX FOODS PVT. LTD. ..... Appellant

Through Mr. R.Santhanam and Mr. A.P.Sinha, Advocates

versus

COMMISSIONER OF CENTRAL EXCISE DELHI-1..... Respondent

Through Mr. Harpreet Singh, Sr.standing counsel with Ms. Suhani Mathur, Advocates

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE I.S.MEHTA

O R D E R
% **15.05.2019**

CM Appl.No. No. 23185/2019 (Exemption)

1. Exemption allowed, subject to all just exceptions.

CM Appl.Nos. 23186/2019 & 23187/2019 (delay)

2. For the reasons stated in the applications, the delay of 82 days in filing the appeal and delay of 26 days in re-filing the appeal is condoned and the applications are disposed of.

CUSAA 182/2019 & CM Appl.No. 23184/2019 (stay)

3. **Admit.**

4. With the consent of learned counsel for the parties, the appeal is taken up

for final hearing.

5. The challenge in the present appeal is to the final order dated 5th June, 2018 passed by the Customs Excise and Service Tax Appellate Tribunal (CESTAT) dismissing the appeal Customs Appeal Nos. C/361-363/2010 (SM) and the subsequent order dated 21st February, 2019 passed by the CESTAT in Customs ROA Application No. C/ROA/50625-50627/2018 (SM) seeking recall of the aforementioned order dated 5th June, 2018.

6. The Appellant, M/s Genex Foods Pvt. Ltd., is engaged in the manufacturing and sale of refined Edible Oils and Vanaspati. Pursuant to certain intelligence gathered about one M/s Pioneer Soap & Chemicals, regarding misuse of some exemption under notifications dated 1st March, 2002 and 16th January, 2004 for importing crude palm oil at concessional rate of customs duty and not using it for the assigned purpose by diverting the same to the open market, a show cause notice (SCN) dated 24th April, 2007 was issued to 13 entities/persons including the present Appellant.

7. During the pendency of the SCN proceedings, an application was made by M/s Pioneer Soap & Chemicals through its Proprietor and 6 other entities/individuals (co-noticees) before the Customs Excise and Service Tax Settlement Commission (hereafter 'Settlement Commission'). On 24th February, 2009 the Settlement Commission passed its final order under Section 127 (C) (5) of the Customs Act, 1962 settling the customs duty interest and penalty amounts payable by M/s Pioneer Soap & Chemicals and 6 other co-noticees. The Revenue was given the liberty to take action as

deemed fit in respect of other co-noticees of the aforementioned SCN dated 24th April, 2007. It may be noted here that the Appellant was one of these 'co-noticees'.

8. In reply to the SCN, the Appellant drew attention to the aforementioned order of the Settlement Commission and contended that the proceedings against the Appellant should be dropped in view thereof.

9. The Appellant's contentions were negatived in the order in original dated 30th April, 2010 passed by the Commissioner of Central Excise. By the said order penalty of Rs.20 lakhs was imposed on the present Appellant.

10. The appeal filed by the present Appellant along with the appeals filed by its Director Shri Rohit Agarwal and M/s A V Agro Products Ltd. & Ors. came up for hearing before the CESTAT on 11th May, 2018. After reserving orders, the impugned order dated 5th June, 2018 was passed holding that the co-noticees including the Appellant could not claim immunity on the basis of the order dated 24th February 2009 of the Settlement Commission which was confined to the main noticee i.e. M/s Pioneer Soap & Chemicals and 6 other co-noticees. It was held that the benefit of the Kar Vivad Samadhan (KVS) Scheme could not *suo motu* be extended to these Appellants. The appeals were accordingly dismissed.

11. Thereafter each of the said Appellants including the present Appellant i.e. M/s. Genex Foods Pvt. Ltd. filed applications in the CESTAT for recall of the aforementioned order. It was pointed out that it was only a preliminary objection raised by the Department which was dealt with in the

order dated 5th June, 2018 whereby CESTAT held that the Appellants were not entitled to the benefit of the order of the Settlement Commission. It was pointed out that even if the said preliminary objection of the Department was accepted, it would mean that the appeals would still have to be considered on merits. It was further pointed out that the Appellants had placed reliance on a decision of this Court which had not been duly considered by the CESTAT whilst passing the impugned final order.

12. When the above application was listed before the CESTAT, its attention was drawn also to the decision dated 3rd November, 2016 of this Court in WP(C) No. 4819/1999 in ***M/s Lesag HBB (I) Ltd. and Others vs. CCE, Delhi*** where, after referring to the judgment of the Supreme Court in ***Union of India vs Omkar S Kanwar (2002) 145 ELT 266 (SC)*** it was held that the benefit of the KVS scheme should be extended even to those co-noticees who may not have been covered by the order of the Settlement Commission. By the second impugned order dated 21st February, 2019, the CESTAT has declined to recall its earlier order and held that after deciding the preliminary objection of the Department, "there is nothing which remains to still be adjudicated".

13. The question of law that arises for consideration in this appeal is as under:-

i) Was the CESTAT justified in declining to extend the benefit of the order passed by the Settlement Commission to the present Appellant?

ii) Was the CESTAT obliged to deal with the appeal on merits notwithstanding the preliminary objection raised by the Department on issue

(i) above?

14. As far as question (i) above is concerned, having heard learned counsel for the parties and having perused the impugned order, the Court is of the view that the mere fact that the Settlement Commission permitted the Department to proceed against the co-noticees in accordance with law did not mean that the co-noticees could not rely on the said order to argue, on the basis of the judgment of this Court in ***M/s Lesag HBB (I) Ltd. and Others vs. CCE, (supra)*** and that of the Supreme Court in ***Union of India vs Omkar S Kanwar (2002) 145 ELT 266 (SC) (supra)*** that the proceedings against them ought to have been dropped under the KVS Scheme. The Court finds that the CESTAT has not discussed the import of the two judgments in the impugned orders.

15. Even as regards question (ii), it is plain on reading the order dated 5th June, 2018 that there is no discussion on the merits of the appeal in the said order. In other words, once the CESTAT accepted the plea of the Department that the benfit of the order of the Settlement Commission should not be extended to the Appellant, the logical sequitur was that the appeal had to then be considered on merits. The Court fails to understand how the CESTAT could observe that nothing further remained to be decided in the appeals in view of the order of the Settlement Commission.

16. The Court is of the view that both issues (i) and (ii) above require reconsideration by the CESTAT. As a result, the impugned orders dated 5th June, 2018 and 21st February, 2019 of the CESTAT are hereby set aside.

Custom Appeal No. C/361-363/2010 (SM) is restored to the file of the CESTAT for being considered afresh uninfluenced by the earlier orders dated 5th June, 2018 and 21st February, 2019. It is clarified that the appeal before the CESTAT will be decided independent of any observations made in the present order on merits.

17. The appeal and application are disposed of in the above terms.

S.MURALIDHAR, J

I.S.MEHTA, J

MAY 15, 2019
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