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IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (CENTRAL EXCISE ACT, 1944 AS AMENDED)
ORIGINAL SIDE

IA NO:GA/1/2016 (Old No: GA/846/2016)
IN
CEXA/2/2016
M/S. HOWRAH MILLS COMPANY LTD.
VS.
COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX, KOL-II COMM.

BEFORE :

THE HON'BLE JUSTICE T.S.SIVAGNANAM
A N D
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
DATED : NOVEMBER 23, 2021.
[*Via Video Conference*]

Appearance :
Mr. N.K. Chowdhury, Advocate
Mr.Arijit Chakrabarti, Advocate
Mr. Nilotpal Chowdhury, Advocate
Mr. Prabir Bera, Advocate
…for petitioner

Mr. Bhasker Prosad Banerjee, Sr. Advocate
Ms. Ekta Sinha, Advocate
..for respondent

The Court :- This appeal by the assessee filed under section 35(G)(1) of the Central Excise Act, 1944 ('The Act') is directed against the order passed by the Customs Excise and Service Tax Appellate Tribunal, East Zonal Bench, Kolkata (Tribunal) dated 16.09.2015. The appellant has raised the following substantial questions of law for consideration:-

(a) Whether in the facts and circumstances of this case, the Orders passed by the Ld. Tribunal is maintainable in law since the same has been passed ignoring the position of law that right of appeal vest on the assessee on the date of the commencement of the proceeding/lis and such right is the continuation of the original proceeding and in that view of the mater, the right of Appeal as per erstwhile provision of law would not be affected by the provisions introduced by the amendment of Section 35F in the Finance Act, 2014 ?

(b) Whether in the facts and circumstances of this case, the Ld. Tribunal is justified in passing the said Orders by dismissing the Appeal for not filing the Appeal in compliance kof the amended provisions, more particularly when the amended provisions is not applicable to the appellant and the appellant was governed by the law on the date of initiation of lis ?

(c) Whether in the facts and circumstances of this case, the Orders passed by the Hon'ble CESTAT in maintainable in law, ignoring the question that the amended provisions of Section 35F of the Central Excise Act, 1944 is only prospective and not retrospective and therefore, the vested right of Appeal accrued earlier to the said amendment can be exercised in filing the Appeal along with the Stay Application and not filing the Appeal along with some amount of pre-deposit ?

We have heard learned Counsel for the parties. Though the present appeal filed by the assessee is against the order passed by the Tribunal dismissing the appeal for non-compliance of the mandatory pre-deposit, the issue has become academic owing to the decision of the Hon'ble Supreme Court in RDB Textiles Ltd. Versus Commissioner of C.EX. & S.T., Kolkata-IV reported in 2018(359) E.L.T. 433 (S.C.). We are inclined to dispose of the appeal on merits as identical issues arose for consideration before the Hon'ble Division Bench of this Court in 2018(362) E.L.T. 431 (Cal.) and in the said case also the appeal was filed challenging the order passed by the Tribunal dismissing the appeal of the assessee on account of non-compliance of the mandatory pre-deposit condition. The Hon'ble Division Bench taking note of the legal position as laid down by the Hon'ble Supreme Court in RDB Textiles (supra) allowed the appeals and set aside the order of adjudication. For better appreciation we quote the judgment of the Hon'ble Division Bench hereinunder :-

"The Court:- These three appeals and the connected writ petitions arise our of the same individual orders passed by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT).

2. Pursuant to the amendment to Section 35F of the Central Excise Act, 1944, the Appellate Tribunal found that the appeals in the individual cases were incompetent without the statutory pre-deposit being put in. CEXA 4 of 2015, CEXA 13 of 2015 and CEXA 5 of 2016 arise out of such orders.

3. In addition, the assesses had also carried writ petitions to this Court by way of WP No.4150(W) of 2017, WP No. 4154(W) of 2017 and WP No. 4157 (W) of 2017 not only challenging the relevant orders by which their appeals were found to the incompetent, but also questioning the propriety of the amendment and assailing the vires of the amended provision. In view of the pendency of the appeals under the Act of 1944, the writ petitions were referred to the Division Bench taking up the relevant appeals.

4. The legal question involved in the appeals has now been decided in favour of the assessee by the Supreme Court in the judgment reported at 2018 (359) E.L.T. 433 (RDB Textiles Ltd. v. CCE). The Supreme Court judgment expressed the opinion that merely because the customers of these jute manufacturing assesses required the desired brand name to be indicated in the bags, it would not imply that the assessees would not be entitled to the exemption that they could otherwise claim.

5. The Central Excise authorities are represented in Court today. The Central Excise authorities accept that in view of the

Supreme Court judgment, the benefit has to be given to all similarly-placed assessees, including the assesses involved in the maters listed today.

6. In the light of such fair submission on the part of the Central Excise authorities, the challenge to the vires of the amended provision becomes academic and it is no longer necessary to assess the propriety of the orders impugned, both in the regular appeals and in the writ petitions, by which the Appellate Tribunal dismissed the appeals without going into the merits thereof.

7. CEXA 4 of 2015, CEXA 13 of 2015 and CEXA 5 of 2016 are disposed of along with WP No. 4150(W) of 2017, WP No. 4154 (W) of 2017 and WP No. 4157(W) of 2017 by recording that in view of the Supreme Court judgement in the case of RDB Textiles Ltd., referred to above, the assessees in the present case will get the benefit in terms thereof. Since the Supreme Court's view is that the branding, in the facts and circumstances pertaining to the present matters, does not amount to branding at all and the assessees are entitled to the exemption, the same principle will apply to the cases of these three assessees.

8. The order of adjudication of July 11, 2014 pertaining to AI Champdany Industries Limited, the order dated October 14, 2014 pertaining to RDB Textiles Ltd. and order dated March 17, 2015 pertaining to Mahadeo Jute & Industries Limited, all passed by the adjudicating authority, will stand set aside.

9. There will be no order as to costs."

The above decision rendered by the Hon'ble Division Bench of this Court would squarely cover the case on merit. Accordingly, the appeal is allowed and the order of adjudication dated 3rd February, 2015 is set aside. The connected application also stands disposed of.

There will be no order as to costs.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

GH/D.Ghosh.