Item No.2.

IN THE HIGH COURT OF JUDICATURE AT CALCUTTA

CIVIL APPELLATE JURISDICTION

APPELLATE SIDE

HEARD ON: 30.09.2022

DELIVERED ON:30.09.2022

CORAM:

THE HON'BLE MR. JUSTICE T. S. SIVAGNANAM

AND

THE HON'BLE MR. JUSTICE SUPRATIM BHATTACHARYA

M.A.T. No.1627 of 2022
With
I.A. No.CAN 1 of 2022

M/s. Computer Exchange Private Limited & Anr.

Vs.

The Principal Commissioner of CGST & CX, Kolkata South Commissionerate & Anr.

Appearance:-
Mr. Ankit Kanodia,
Ms. Megha Agarwal,
Ms. Payel Shaw ..... for the appellants.

Mr. Kaushik Dey,
Mr. Tapan Bhanja .... for the respondents.

Ms. Tanusree Ghosh .... for Union of India.

JUDGMENT

(Judgment of the Court was delivered by* T.S. SIVAGNANAM, *J.)

1. This intra-Court appeal is directed against the order dated 23rd September, 2022 in W.P.A. No.21202 of 2022 by which the learned Single Bench declined to grant interim order and aggrieved by the same, the appellants are before us.

2. The writ petition was filed by the appellants challenging the order in original dated 27th July, 2022, passed by the Principal Commissioner of CGST and CX, Kolkata South. The respondents issued show cause cum demand notice dated 29th December, 2020 invoking the extended period of limitation and directing the appellants to show cause as to why an amount of Rs.3,78,40,454/- being the service tax payable for the financial years 2015-2016 to 2017- 2018 (upto June, 2017) shall not be demanded and also why appropriate interest should not be charged and penalty and late fee should not be demanded.

3. The appellants filed a reply to the show cause notice on 18th January, 2021 raising a preliminary objection as regards the

validity of the show cause notice invoking the extended period of limitation.

4. The sum and substance of the objection raised by the appellants is that for the financial years 2011-2012 to 2014-2015, show cause notice was issued, which culminated in an order of adjudication and the matter is now pending before the Tribunal at the instance of the appellants and in such circumstances, for the very same allegation for the subsequent period, i.e 2015-2016 to 2017-2018 extended period of limitation could not have been invoked. Several decisions were relied upon and more particularly, the decision of the Hon'ble Supreme Court in ***Nizam Sugar Factory Vs. Collector of Central Excise, A. P.*** reported in ***2006 (197) E.L.T. 465 (S.C.).*** This decision was relied on by the appellants for the proposition that when all relevant facts was within the knowledge of the authorities when first show cause notice was issued, while issuing the second and third show cause notices on similar facts could not be taken as a suppression of facts on the part of the assessee as these facts are already in the knowledge of the authorities and Section 11A and 11AC of the Central Excise Act, 1944 could not have been invoked.

5. Apart from the preliminary objection, the appellants had also filed their reply on the merits of the matter. The adjudicating authority while passing the order dated 27th July, 2022 has verbatim extracted the reply given by the appellants to the show cause notice in which the reliance on the decision in ***Nizam Sugar Factory (supra)*** has also been referred. However, the adjudicating authority has not dealt with the effect of the said decision rather taken note of two decisions of the Learned Tribunal and has held that extended period of limitation was rightly invoked.

6. In our considered view, once a preliminary objection is raised on the question of jurisdiction, it is but appropriate for the adjudicating authority to deal with the said issue as first amongst the several issues while passing the order of adjudication. However, the adjudicating authority has adopted a reverse process by deciding the merit first and then dealt with the question of limitation / jurisdiction.

7. The learned senior standing counsel appearing for the respondents would submit that the learned Tribunal had referred to a decision in the case of ***Noble Detective & Security***

Service P. Ltd. Vs. C.S.T., Ahmedabad reported in ***2014 (34) S.T.R. 289 (Tri. - Ahmd.)*** in which the decision in the case of ***Nizam Sugar Factory (supra)*** was referred to and noted. However, this is not clear from the impugned order. In any event, if for the earlier year show cause notice has been issued on the same allegation, the question would be for the subsequent period, suppression can be alleged for the purpose of invoking the extended period of limitation for initiating proceedings.

8. This legal issue can be decided only after the affidavit-in-opposition is filed by respondents in the writ petition. In the interregnum, if the order of adjudication dated 27th July, 2022 is given effect to, then the appellants would be put to prejudice. Therefore, the order of adjudication dated 27th July, 2022 shall remain stayed till the disposal of the writ petition.

9. The appeal stands allowed along with the connected application to the extent as indicated above.

10. The respondents / department are directed to file their affidavit-in-opposition within four weeks from the date of receipt of the server copy of this judgment and order. Reply

thereto, if any, be filed within a week thereafter and the Registry is directed to list the writ petition before the appropriate Hon'ble Single Bench after a period of five weeks.

11. There shall be no order as to costs.

12. Urgent photostat certified copy of this order, if applied for, be furnished to the parties expeditiously upon compliance of all legal formalities.

(T.S. SIVAGNANAM, J)

I agree,

(SUPRATIM BHATTACHARYA, J.)

NAREN/PALLAB(AR.C)