O-105

CEXA/4/2007

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction
ORIGINAL SIDE

COMMISSIONER OF CENTRAL EXCISE,
HALDIA COMMISSIONERATE

-Versus-

W.B. HANDLOOM & POWERLOOM
DEVELOPMENT CORPORATION LTD.
(TANTUSHREE)

Appearance:
Ms. Manasi Mukherjee, Adv.
...for the appellant.

BEFORE:
The Hon'ble JUSTICE T.S. SIVAGNANAM
-And-
The Hon'ble JUSTICE SUPRATIM BHATTACHARYA

Date : 9th September, 2022.

The Court : This appeal filed by the revenue under Section 35G of the Central Excise Act, 1944 is directed against the order dated 14th July, 2006 signed on 10th August, 2006 passed by the Customs, Excise & Service Tax Appellate Tribunal, East Zone Bench at Kolkata (the Tribunal).

The appeal was admitted on the following substantial question of law:

> *"Whether the order of the Tribunal setting aside the order of penalty on the respondent was correct in law ?"*

The Commissioner of Central Excise, Haldia Commissionerate was the adjudicating authority. The show cause notice was issued to the respondent and two other noticees on 27th December, 2002 on the ground that the yarn have not been actually purchased by the respondent and another similarly placed noticee but were actually purchased from various private traders already intimated directly from the spinning mill who was the first noticee making it appear as if the purchase of yarn was done by the respondent and the noticee no.3. Further, the certificate issued by the respondent in respect of the so called purchase of cross reel hank yarn by them from the first noticee, the spinning mill, was going to be used only on handlooms was factually wrong since such yarn even if considered to have been purchased from the spinning mill (the first noticee) was not sold by them to any handloom unit nor did they have any system devised for this purpose to ensure that such yarn really goes to the use only on handloom. Therefore, the first noticee namely, the spinning mill, was directed to show cause as to why the Central Excise Duty should not be demanded and recovered from them in terms of Section 11A(1) of the Act.

So far as the respondent is concerned, they were called upon to show cause as to why the penalty should not be imposed in terms of Rule 209A of the erstwhile Rules read with Rule 26 of the Central Excise Rules, 2001. The adjudicating authority, by order dated 29th December, 2003 affirmed the proposal of the show cause notice and imposed penalty on the respondent. Aggrieved by the same, the respondent had preferred appeal before the learned Tribunal which was allowed and aggrieved by the same, the revenue is before us by way of this appeal.

We have heard Ms. Manasi Mukherjee, learned standing counsel for the appellant/revenue. Though notice has been served, none appears for the respondent/assessee. Since the appeal is of the year 2007 and the respondent appears to have not been interested in the matter, we are constrained to hear the learned standing counsel for the appellant and dispose of the appeal on merits.

The short question involved in the instant case is whether the benefit of certain notifications issued by the Department were misused and the respondent/assessee being a party to the modus. The order of the adjudicating authority dated 29th December, 2003 is a very elaborate order. After considering the facts as well as the evidence which was available before the authority, it is pointed that the spinning mill used to remove the plan reel hank yarn and cones directly to various traders while the product cotton yarn cross reel which is dutiable but for the said exemption were consigned to the respondent and the third noticee by availing the benefit of the notification issued by the Government. The adjudicating authority on analysing the documents available on seizure and on scrutiny of the statements which were recorded from various persons, pointed out that the purchasing bills instead of delivering the cross reel hank yarn to the respondent and the noticee no.3, the apex bodies, delivered them directly to various trading concern who appear to be merchants and traders of yarn and not handloom weavers. The respondent contended before the adjudicating authority that the private traders were engaged by them for lifting yarn from the mills on their behalf for subsequent delivery to the weavers even in some cases on credit basis and even though the goods were lifted by the private dealers, the ownership continued to remain with the respondent and the sale and purchase took place between the producing mill and the respondent (Apex Bodies) and the private traders had no role to play in the matter of sale and purchase. The adjudicating authority examined the stand taken by the respondent and the other noticee namely, the noticee no.3 and pointed out that not only the stand taken by the respondent but also the spinning mill is not in tune with the general policy notified by the Yarn Committee in the matter of purchase of yarn from the mills and for distribution amongst handloom weavers. The following factual finding has been recorded by the adjudicating authority :

> "…………….. *The following facts clearly revealed from the scrutiny of the documents and also depositions made by the various persons. It has been clarified that in the event of fixing the minimum rate of sale by Noticee No. 1 at Rs. 50/- per unit and quoting of Rs. 70/- per unit by a trader against such minimum rate. Tantuja / Tantusree would have sent authorization for that traders for Rs. 70/- per unit and accordingly the mill (Noticee No. 1) would have issued Central Excise Invoices in the name of trader at the sale rate of Rs. 70/- per unit and Tantuja would get 1.5% commission for such sale. This indicates that Tantuja / Tantusree had no role for negotiation with the traders, since, otherwise. If Tantuja / Tantusree were the real purchasers, they would have definitely preferred to purchase the yarn from the Mill at a rate of Rs. 50/- per unit and would have collected Rs. 70/- per unit from the Trader thereby making a straight profit of Rs. 20/- per unit instead of getting only 1.5% of Rs. 70/- i.e. Rs. 1.05 p. per unit as commission. This point has not been controverted by the Noticee and there has been no effective defence against the said findings. It has also been found that the role of two Apex Bodies is that if a Commission Agent of Noticee No. 1 as well as of other spinning mills of the Government of West Bengal and their function, with reference to the sale*

> *of cross reel hank cotton yarn produced by various Spinning Mills including Noticee No. 1 is only for routing the payments from the traders who are the real purchasers/buyers of such yarn. The Noticee could not explain satisfactorily as to why commission / margin has to be paid to the Apex Bodies in relation to cross reel hank yarn when they are claiming that the Apex Bodies are the real purchasers of the yarn and not merely a commission or selling agent."*

From the above finding it is seen that the respondent has not controverted by producing any evidence to this alleged conclusion that a modus has been adopted by which the respondent received a commission and ultimately the yarn which was to be distributed to handloom weavers were taken of by the trades and other agencies. Thus, on analysing the evidence the adjudicating authority held that the system was evolved only to ensure that the sale should look like a sale from the spinning mill, the noticee no.1 to the respondent, the noticee no.2 and this was done in order to avail the benefit of exemption whereas the actual sale took place between the spinning mill and the private traders while the respondent and the other apex society merely acted as a commission/selling agent thereby earning commission at the rate of 1.5% as profit. Thus, the adjudicating authority records that this point could not be controverted by the respondent neither at the time of making written submission nor at the time of personal hearing.

With regard to the second contention to be eligible to the benefit of the notification relating to issuance of certificate that the yarn is to be used only in handlooms, the adjudicating authority pointed out that such certificates had been issued by two apex bodies namely, the respondent herein and the other apex body, the noticee no.3 and such certificates were issued not before effecting clearance of such yarn from the spinning mill (noticee no.1.) but on a later date. Further, the adjudicating authority, as a matter of fact, found that the certificates were issued by the respondent based on the certificates issued by the spinning mill (noticee no.1) and not on the basis of verification of facts. Further, the adjudicating authority found that the respondent was not at all aware as to where the yarn is ultimately going since they do not have any control on the sales of the traders to whom the yarns are actually sold. Therefore, it was held that the very spirit and the intention for which the notification has been issued giving benefit of duty of excise of cross reel hank yarn meant for the use of weavers belonging to handloom sector, has been totally defeated by the manner in which the transactions have taken place. Further, the adjudicating authority pointed out that even the traders who are the real buyers of the said hank yarn manufacturer and marketed by the spinning mill, noticee no.1, did not know and could not give any guarantee that the yarn is going to be used only on handlooms and factually it was established that the yarn is subsequently sold to various authorities in and outside the State on which the respondent had no control. Therefore, the adjudicating authority held that the certificates declaring that the yarn is going to be used only on handlooms as issued by the respondent and the other apex society are not based on factual verification but only based upon the certificate issued by the spinning mill concerned. Thus, the adjudicating authority held that the conditions stipulated in the notification for the purpose of exemption are not favourable in the case on hand. Accordingly, the proposal in the show cause notice was affirmed and a penalty of Rs.10,00,000/- was imposed against the respondent.

The learned tribunal while interfering with the order has not taken note of the notification in its entirety but only quoted a portion of the notification which appears to be in a truncated form. The tribunal observed that the goods were purchased by the respondent, apex body for further distribution to traders who further sold the same to ultimate handloom weavers but might be located at the interior of the country having no access to the respondent/apex body for direct purchase of the goods.

It is not clear as to how the tribunal had rendered such a finding. The tribunal has not rendered any finding as to the evidence which was available before the adjudicating authority who has clearly brought out the modus operandi which was adopted in the entire process. The evidence also pointed out that the respondent and other apex society have merely acted as a commission agent by receiving commission at the rate of 1.5% and by their conduct have defeated the very purpose for which the notification was issued. With regard to the certification which was also one of the conditions under the notification, the learned tribunal has not examined the aspect pointed out by the adjudicating authority that the certificate issued by the respondent and the other apex body was not based on any verification done by them, but solely based upon the certificate issued by the spinning mill. That apart, evidence has been brought on record to show that in the transaction, the respondent had no role and the transaction took place between the spinning mill and the traders and all that the respondent no.1 did was to lend their name thereby being entitled to a commission of 1.5%.

Thus, we find that the order passed by the tribunal is utterly perverse, as it has not dealt with any of the findings which has been rendered by the adjudicating authority by appreciating the facts and evidence brought on record. Thus, we have no hesitation to hold that the tribunal committed a serious error in interfering with the order of the adjudicating authority.

For the above reasons, the appeal (CEXA/4/2007) is allowed and the substantial question of law is answered in favour of the revenue.

(T.S. SIVAGNANAM, J.)

(SUPRATIM BHATTACHARYA, J.)

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