OD – 29 & 30

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (CENTRAL EXCISE)
ORIGINAL SIDE

IA NO.GA/1/2021
In
CEXA/24/2021
COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX, DURGAPUR COMMISSIONERATE
VS.
M/S. AMIT METALIKS LTD. AND ANR.

IA NO.GA/2/2021
In
CEXA/24/2021
COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX, DURGAPUR COMMISSIONERATE
VS.
M/S. AMIT METALIKS LTD. AND ANR.

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
A N D
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA

Date : March 11, 2022.

Appearance :
Mr. Somnath Ganguli, Adv.
Ms. Aishwarya Rajyashree, Adv.
… for the appellant

Mr. J.P. Khaitan, Sr. Adv.
Mr. Sourav Bagaria, Adv.
Mr. Nilay Sengupta, Adv.
… for the respondent

The Court : We have heard Mr. Somnath Ganguli, learned standing counsel appearing for the appellant revenue and Mr. J.P. Khaitan, learned senior counsel for the respondent assessee.

There is a delay of 856 days in filing the appeal. The respondent has filed affidavit in opposition and learned senior counsel appearing for the respondent would vehemently oppose the delay in filing the appeal. On perusal of the affidavit filed in support of the application for condonation of delay, we find the reasons given are not fully acceptable. However, since we are required to consider as to whether any substantial question of law would arise in the instant case as this appeal has been filed under Section 35G of the Central Excise Act, 1944, we exercise discretion and condone the delay in filing this appeal. Accordingly, the application for condonation of delay being IA No. GA/1/2021 is allowed.

RE : CEXA/24/2021

This appeal by the revenue filed under Section 35G of the Central Excise Act, 1944 challenges the order dated 2nd January, 2019 passed by the Customs, Excise & Service Tax Appellate Tribunal, Eastern Zonal Bench, Kolkata in Final Order No. 75023-75024/2019. The revenue has raised the following substantial questions of law for consideration :

i) Whether the Learned Tribunal is right in deleting the demand of duty and allowing consequent reliefs to the assessees/respondents herein on account of shortage of the finished goods and raw materials found during the joint stock verification which is accepted and could not able to explain such shortage by the assessee/respondents herein?

ii) Whether on the basis of private record, the Central Excise Duty can be demanded or not, when these private records show shortage of finished goods as well as raw materials than that reflected in statutory records resulting into removal of the excess stock clandestinely, that is, without issuance of Invoice and without making entries of production and clearance in the statutory records?

iii) Whether the Learned Tribunal is right in deciding appeal in favour of the assessee/respondents herein denying the allegation of clandestine removal of finished products as well as raw materials when the assessee/respondents herein accepted such shortage and voluntarily paid the Central Excise Duty and never offered any explanation for such shortage and never reconciled the said shortage?

iv) Whether the Learned Tribunal is right in shifting the liability to find out the reason of shortage of finished products and raw materials in as much as onus of proof of clandestine removal of the said shortage of goods on the appellant department in spite of that the assessee/respondent herein has not only accepted such shortage but also never refuted the said allegation and never offered any explanation for such shortage?

We have heard Mr. Somnath Ganguli, learned standing counsel appearing for the appellant revenue and Mr. J.P. Khaitan, learned senior counsel for the respondent assessee.

The Commissioner of Central Excise, Bolpur by order dated 16th January, 2013 had confirmed the demand of central excise duty on the ground that the respondent assessee was guilty of clandestine clearance of the finished goods without payment of excise duty. Apart from demanding excise duty, penalty was also imposed. The respondent challenged the said order by preferring appeal before the Tribunal.

It was contended that the assessee had submitted detailed reply to the show cause notice issued by the Commissioner and also produced the reconciliation statement to show that there was no clandestine removal of the finished goods and at the time of inspection the authorities alleged shortage of goods which is actually incorrect and has been duly explained. The respondent relied upon several decisions to show that unless and until there is paucity of proof to establish clandestine removal, such a charge cannot be made against the assessee.

The Tribunal firstly noted the factual position and pointed out that the allegation of clandestine removal cannot be fastened on the respondent assessee merely on the ground of shortage. The Tribunal also noted that though the assessee failed to explain the shortage during the visit of the revenue officers but they did not admit shortage and subsequently submitted all information along with reconciliation statement. Therefore, the Tribunal held that in the absence of any evidence to support the allegation of clandestine removal, such a charge could not have been made against the respondent assessee. Further, on facts the Tribunal held that the alleged shortage is merely on suspicion and there was no tangible evidence. Hence, the Tribunal on facts granted relief to the respondent assessee.

Thus, we find that there is no question of law, much less substantial question of law arising for consideration in this appeal. Accordingly, the appeal is dismissed.

With the dismissal of the appeal, the application for stay being IA No. GA/2/2021 is closed.

(T. S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

SN/RS