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IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION
ORIGINAL SIDE

CEXA/13/2022
IA No.GA/2/2022
COMMISSIONER OF CGST & EXCISE, HOWRAH COMMISSIONERATE
VS.
M/S. BENGAL BEVERAGES PRIVATE LIMITED

BEFORE :

THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE SUPRATIM BHATTACHARYA
Date : 6th September, 2022

Appearance :
Mr. Uday Shankar Bhattacharya, Adv.
Ms. Aishwarya Rajyashree, Adv.
....for appellant.

Mr. Ankit Kanodia, Adv.
Ms. Megha Agarwal, Adv.
...for respondent.

The Court : This appeal filed by the revenue under Section 35G of the Central Excise Act, 1944 is directed against the order dated 25th August, 2021, passed by the Customs, Excise and Service Tax Appellate Tribunal, Eastern Zonal Bench, Kolkata (Tribunal) in Order No.FO 75550/2021, dated 25th August, 2021.

The revenue has raised the following substantial questions of law for consideration:

a) *Whether the respondent showed less quantity of goods manufactured and cleared either ER-1 Return and have paid amount of duty for their finished goods?*

b) *Whether the respondent suppressed the actual production clearance of unaccounted finished goods without payment of appropriate Central Excise Duty as in the Order-in-Original?*

c) *Whether the suppression of clearance of unaccounted finished goods without payment of duty by the respondent which clearly established from the corresponding period's ER-1 return, 3CD return and the trading invoices?*

d) *Whether the respondent did not disclose its actual products of finished goods and its clearance before the Income Tax Department in 3CD or ER-1 return?*

e) *Whether the decision of the Learned Tribunal is correct in ignoring the law as the settled legal position laid down by the Hon'ble Apex Court does not appear to have been taken into consideration by the Learned Tribunal?*

f) *Whether the respondent is wrong for not filing ER-1 return (Annual Financial Information Statement) electronically for the period of 2012-13, 2013-14 and 2015-16 which is mandatory as per rule 12(2)(a) of the Central Excise Rules, 2002 and by not furnishing requisite information to the extent of details of trading activity in serial no.4(iii) of the return?*

We have heard Mr. Uday Shankar Bhattacharya, learned standing counsel appearing for the appellant/revenue and Mr. Ankit Kanodia, learned advocate for the respondent/assessee.

The short question which falls for consideration is whether the department has been able to establish a case of clandestine removal of the products which have been manufactured by the respondent/assessee. The show-cause notice which was issued by the adjudicating authority was based upon such an information taken out from the Income tax records, more particularly, from Form 3CD. The respondent assessee had filed reconciliation statement pointing out as to how there are allegations of clandestine removal is not tenable. However, the adjudicating authority did not agree with the stand taken by the respondent assessee and by order dated 30th November, 2017, confirmed the proposal in the show-cause notice.

Challenging the said order the assessee preferred appeal before the Tribunal. On going through the order passed by the Tribunal, we find that Tribunal rightly took into consideration the reconciliation given by the assessee and also noted that the allegation against the assessee is only on the basis of the discrepancy in the figures which the appellant was able to reconciliate by producing Tax Auditor's certificate which had certified the reconciliation. Learned Tribunal took note of the decision of the High Court of Patna in the case of *Commissioner of Central Excise, Patna vs. Universal Polythene Industries, 2011(270) E.L.T. 168 (Pat.)*, which decision was upheld by the Hon'ble Supreme Court, as reported in *2016(342) E.L.T. A226 (S.C.).*

After taking note of the legal position the Tribunal also examined the facts of the case and noted that the assessee has been able to produce the relevant reconciliation to show the reasons of difference in clearance figures as per ER-1 and as per Form 3CD, which was on account of trading turnover of the respondent/assessee. That apart, the learned Tribunal rightly pointed out that the department had failed to discharge the burden of proof to prove the allegation of clandestine removal as the department did not conduct any investigation and the entire demand was based on assumptions and presumptions.

Thus, we find there is no error in the order passed by the learned Tribunal and there is no question of law, much less substantial question of law, arising for consideration in this appeal.

Accordingly, the appeal fails and is accordingly dismissed.

The stay application also stands dismissed.

(T.S. SIVAGNANAM, J.)

(SUPRATIM BHATTACHARYA, J.)

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