OD – 4 & 5

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION
ORIGINAL SIDE

IA NO: GA/2/2021
IN
CEXA/30/2021

PRINCIPAL COMMISSIONER OF CGST & CENTRAL EXCISE,
HOWRAH COMMISSIONERATE
VS.
M/S. SHAKTI INDUSTRIES PVT. LTD. & ANR.

IA NO: GA/1/2021
IN
CEXA/30/2021

PRINCIPAL COMMISSIONER OF CGST & CENTRAL EXCISE,
HOWRAH COMMISSIONERATE
VS.
M/S. SHAKTI INDUSTRIES PVT. LTD. & ANR.

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

Date : February 17, 2022.

[Via Video Conference]

Appearance :
Mr. Somnath Ganguli, Adv.
Mr. Abhradip Maity, Adv.
... for the appellant

Ms. Aparajita Rao, Adv.
... for the respondent no. 1

Re.: IA No. GA 1 of 2021

The Court : We have heard Mr. Somnath Ganguli, learned standing counsel assisted by Mr. Abhradip Maity, learned counsel appearing for the appellant/revenue and Ms. Aparajita Rao, learned counsel appearing for the respondent no.1.

There is a delay of 950 days in filing the appeal. The appellant/revenue seeks to take the benefit of the order passed by the Hon'ble Supreme Court in SMW(C) No. 3 of 2020 and prays that the delay should be condoned. On perusal of the relevant dates, we find that the benefit of the decision of the Hon'ble Supreme Court cannot be extended to the appellant department as the period of limitation for filing the appeal expired sometime during April 2019. Having made this clear we have perused the affidavit filed in support of the condone delay petition and we find that there is absolutely no explanation for the inordinate delay in preferring the appeal. We also took note of the submission of the learned counsel for the respondent/assessee that the revenue cannot pursue this appeal on account of the national litigation policy which states that the monetary limit for pursuing the appeals before the High Courts is Rs.20 lakhs.

Learned counsel for the appellant/revenue would submit that in the circular instruction issued by the CBEC dated 17.08.2011 and the subsequent circular it has been clarified that diverse judgments relating to the cases where notification/instruction/order has been held illegal or *ultra vires* have to be contested irrespective of the amount involved. It is the submission of the learned counsel for the appellant that the interpretation of the Rule 8(3A) of the Central Excise Rules, 2002 is one of the findings rendered by the first appellate authority and the issue is now pending before the Hon'ble

Supreme Court and, therefore, the case will fall within the exceptional clause. Since such contention has been raised, though we are not satisfied with the reasons given by the appellant for condonation of the inordinate delay, we exercise discretion and condone the delay in filing the appeal.

The application being IA No.GA 1 of 2021 stands disposed of.

Re.: CEXA No.30 of 2021

This appeal filed by the revenue under Section 35B of the Central Excise Act, 1944 (the Act) is directed against the order dated 25.10.2018 in order no. 76809/2018 passed by the Customs, Excise and Service Tax Appellate Tribunal, East Zonal Bench, Kolkata (Tribunal).

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

1. Whether the Learned Tribunal was justified in setting aside the confirm demand and of cenvat duty and imposition of penalty as contemplated under Section 11A(1) & 11AC of the Central Excise Act, 1944 and Rule 25 of the Central Excise Rules, 2002, when there is detailed reasonable recording made by the Adjudicating Authority regarding imposing penalty upon the Respondent?
2. Whether the Ld. CESTAT has rightly dismissed the appeals filed by the appellant-department under

monetary limit holding that the amount involved in the case is below 20 lakhs though the issue involved in the case is stayed by the Hon'ble Supreme Court in respect of SLP against the order of Hon'ble Gujrat High Court in the matter of Indsur Global Ltd. V. UOI?

3. Whether the order of the Learned Tribunal is in violation of the principles of the natural justice and without giving proper reasoning in as much as the Learned Tribunal ignored the decisions of Hon'ble Apex Court and justification and reasoning of the adjudicating authority in imposing penalty upon the respondent and further proceeding by the Department in Appeal?

We have heard Mr. Somnath Ganguli, learned standing counsel assisted by Mr. Abhradip Maity, learned counsel appearing for the appellant/revenue and Ms. Aparajita Rao, learned counsel appearing for the respondent no.1.

The adjudicating authority by order dated 29.11.2013 imposed a penalty of Rs.86,461/- under Section 11A(1) of the Central Excise Act, 1944. Challenging the said order the assessee preferred appeal before the Commissioner of CGST and Central Excise (Appeals)-II, Kolkata (Commissioner of Appeals) who, by an order dated 19.04.2018, allowed the appeal and set aside the penalty.

Aggrieved by such order, the revenue preferred appeal before the Tribunal which has been dismissed by the impugned order.

Admittedly, the quantum of penalty which was imposed by the original authority is far below the threshold limit fixed by the CBEC in their circular instruction. Therefore, the appellant cannot pursue this appeal. Learned standing counsel for the appellant submitted that the Commissioner of Appeals has rendered certain findings touching upon the validity of Rule 8(3)A of the Central Excise Rules and referred to certain decisions of other Courts which struck down the rule as being ultra vires and also referred to one of the decisions of the High Court of Gujarat in the case of *Indsur Global Limited –vs- Union of India* reported in *(2014) 310 ELT (Gujarat).*

The revenue has preferred appeal before the Hon'ble Supreme Court and an order of stay has been granted. Therefore, it is submitted that the revenue should be permitted to pursue this appeal regardless of the fact that this is far below the monetary limit prescribed in the circular.

In our considered view, such a course need not be adopted for more than one reasons: firstly, as pointed out that there is no dispute to the fact that the circular instruction issued by the CBEC would prevent the department from pursuing the appeal as the penalty imposed was Rs.86,461/-. That apart, we find that the subject-matter of challenge before the authority as well as the tribunal was only with regard to the imposition of penalty. It may be true that certain observations have been made by the first appellate authority as regards the validity of Rule 8(3)A and also quoted certain decisions of the various High Courts which have struck down the rule. Thus, considering the factual scenario, we are of the view that if the legal issue with regard to the validity of Rule 8(3)A is left open, then the interest of the revenue will stand protected and at the same time if we hold that the appeal cannot be pursued by the revenue on account of the low tax effect, the interest of the assessee would also be safeguarded.

In the light of the above, the appeal filed by the revenue is dismissed on the ground that the amount of penalty imposed is lesser than the threshold limit fixed in the circular instruction by CBEC as part of the national litigation policy.

However, we make it clear that whatever observations made by the appellate authority touching upon the validity of Rule 8(3)A is left open.

The application being IA No.GA 2 of 2021 for stay also stands dismissed.

Let affidavit of service filed in Court today be kept with the records.

(T. S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

RS/GH