Form No.[J2]

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

PRESENT:
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA

CEXA/31/2021
IA NO:GA/2/2021

COMMISSIONER OF CENTRAL EXCISE, KOLKATA-IV
VS.
SAI CONSTRUCTION
....

CEXA/31/2021
IA NO:GA/1/2021

COMMISSIONER OF CENTRAL EXCISE, KOLKATA-IV
VS.
SAI CONSTRUCTION
....

For the appellant: Mr. Somnath Ganguly, Adv.,
Ms. Priyamvada Singh, Adv.

For the respondent: None appears.

Heard on : February 3, 2022.

Judgement on : February 3, 2022.

<u>RE: IA NO:GA/1/2021</u>

<u>T.S. SIVAGNANAM, J. :</u> We have heard Mr. Somnath Ganguly, learned senior standing counsel assisted by Ms. Priyamvada Singh for the appellant/revenue. There is a delay of 906 days in filing this appeal. We have perused the affidavit in support of the condone delay petition and we are not fully convinced with the reasons given therein for the inordinate delay of 906 days. Therefore, we would have been well justified in dismissing the application for condonation of delay. However, since this appeal has been preferred by the revenue under Section 35G of the Central Excise Act, 1944 and we have considered as to whether any question of law would arise in the appeal, we are inclined to hear the learned counsel for the appellant on the merits of the matter. On such suggestion the learned counsel rightly agreed. Therefore, for such reason alone, we exercise discretion and condone the delay in filing the appeal. Accordingly, the delay in filing this appeal is condoned.

The application, IA NO.GA/1/2021 stands disposed of accordingly.

RE: CEXA/31/2021

This appeal by the revenue filed under Section 35G of the Central Excise Act, 1944, (the Act, in brevity) is directed against the order dated 06.12.2018 passed by the Customs, Excise and Service Tax Appellate Tribunal, Kolkata, Eastern Zonal Branch, Kolkata (Tribunal) in Order No.77094/2018. The revenue has raised the following substantial questions of law for our consideration.

a. Whether the Ld. CESTAT has rightly dismissed the appeal filed by the applicant though the issue involved in the case is stayed by the Hon'ble Supreme Court in respect of SLP against the order in the matter of Indsur Global Ltd. vs. UOI ?

b. Whether the order passed by the Learned Tribunal is perverse as the Learned Tribunal decided the appeal without giving appropriate findings on the contentions raised by the Department in the Grounds of Appeal ?

c. Whether the Learned Tribunal erred in deciding the appeal in contrary to the records placed before it ?

We have heard Mr. Ganguly, learned senior standing counsel for the appellant.

The Commissioner of Central Excise, Kolkata-IV, issued show cause notice dated 05.09.2007 alleging that the respondent/assessee has evaded payment of central excise duty and, therefore, directed the assessee to show cause as to why the clearances made by them during the period from 6.10.2006 to 31.3.2007 by not making consignment-wise payment without utilising cenvat credit shall not be deemed to have been cleared without payment of central excise duty; why the said duty amount mentioned in the show cause notice be recovered from the assessee in terms of sub-rule (3A) of Rule 8 of the Central Excise Rules, 2002 read with Section 11A of the Act; why interest at the appropriate rate should not be charged in terms of Section 11AB of the Act; why penalty should not be imposed under rule 25(1)(a) of the Rules; and why penalty should not be imposed under rule 27 of the Rules for contravention of the provisions of the Rules. The assessee submitted their reply dated 26.10.2007 stating that they are a small scale unit engaged in the manufacture of engineering goods and those goods would fall under Chapter 73 of the Central Excise Tariff Act on tailor made basis. Further, they stated that they have failed to pay the duty of Rs.6,15,000/- by the due date, i.e., 05.09.2007 as they were facing financial hardship but they have paid the entire amount of duty with interest on 18.10.2006. Further, they stated that there is no mens-rea on their part for not paying the duty on time but they have paid it along with interest subsequently. Certain other explanations were also given on facts. The assessee was granted an opportunity of personal hearing. The Commissioner adjudicated the matter and took note of the fact that the duty has been paid by the assessee along with interest and, therefore, was of the view that further interest need not be levied. However, with regard to the clearances effected by the assessee during the relevant period, the Commissioner confirmed the proposal in the show cause notice by demanding the duty amount. The relief granted to the assessee was with regard to the levy of interest under Section 11AB and penalty under rules 25 and 27 of the Rules. The revenue filed appeal before the Tribunal. As rightly contended by the learned senior standing counsel for the appellant/revenue, the Tribunal did not go into the aspect as to whether the relief granted to the assessee by not levying interest and penalty was justified or not, but proceeded on the basis that rule 8(3A) of the Rules based on which duty has been demanded has been struck down by various High Courts in the country. After referring to those decisions, the appeal filed by the revenue was dismissed. It is pointed out by the learned senior standing counsel for the appellant/revenue that as against the decision of the High Court of Gujarat in Indsur Global Ltd. vs. Union of India reported in 2014(310) Excise Law Time 833 (Gujarat), the revenue has preferred an appeal before the Hon'ble Supreme Court and order of stay has also been granted.

In the light of the said legal position, the finding rendered by the Tribunal with regard to the validity of rule 8(3A) of the Rules has to be left open. However, with regard to the relief which was granted by the Commissioner to the assessee for not levying interest and penalty is concerned, on facts, we find that no question of law arises for consideration before us on the said issue. Therefore, the order dated 5.2.2008 passed by the Commissioner, Central Excise, Kolkata-IV is confirmed not on the grounds which the Tribunal had dismissed the revenue's appeal but on the ground that there is no question of law involved in the said issue.

We make it clear that the finding rendered by the Tribunal with regard to the validity of rule 8(3A) of the Central Excise Rules, 2002 is left open as the validity is now pending before the Hon'ble Supreme Court.

For all the above reasons, we find that no question of law arises for consideration in this appeal and the same is disposed of accordingly.

The stay application, IA NO.GA/2/2021 also stands disposed of.

(T.S. SIVAGNANAM, J.)

I agree.

(HIRANMAY BHATTACHARYYA, J.)

pkd/spal
AR(CR)