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CEXA/21/2022
IA No.GA/1/2022

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction
ORIGINAL SIDE

COMMISSIONER OF CGST AND CX
KOLKATA SOUTH COMMISSIONERATE

-Versus-

M/S KTECH ENGINEERING BUILDERS
COMPANY PRIVATE LIMITED

Appearance:
Mr. Bhaskar Prasad Banerjee, Adv.
Mr. Tapan Bhanja, Adv.
Mr. Parasar Baidya, Adv.
...for the appellant.

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

BEFORE:
The Hon'ble JUSTICE T.S. SIVAGNANAM
-And-
The Hon'ble JUSTICE HIRANMAY BHATTACHARYYA

Date : 22nd December, 2022.

The Court : This appeal filed by the revenue under Section 35G of the Central Excise Act, 1944 (the 'Act' for brevity) is directed against the final order No.75362 of 2022 dated 15th June, 2022 passed by the Custom, Excise and Service Tax Appellate Tribunal, Kolkata (Tribunal).

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

(i) *Whether the observation of the learned Tribunal's that "the departmental appeal has become infructuous" is erroneous and suffers from legal infirmity and in violation of the principles of natural justice inasmuch as learned Tribunal before dismissing the appeal of the department failed to give its independent finding on the legal points raised by the appellant ?*

(ii) *Whether the learned Tribunal was prevented to decide the appeal of the department on merits, when the Appellate order is under challenge before the learned Tribunal by the department and compliance of the Appellate order by the adjudicating authority does not make the appeal of the department infructuous and, as such, the reasoning of the learned Tribunal is erroneous and cannot be sustained ?*

We have heard Mr. Bhaskar Prasad Banerjee, learned standing counsel, assisted by Mr. Tapan Bhanja, learned Advocate appearing for the appellant and Mr. Ankit Kanodia, learned counsel appearing for the respondent.

The learned Tribunal had dismissed the revenue's appeal as having become infructuous. Contending that the appeal ought to have been decided on merits, the revenue is before us by way of the present appeal. Certain subsequent developments have taken place pursuant to the order passed by the Commissioner (Appeals) dated 10th September, 2021. The

Commissioner by the said order allowed the appeal filed by the appellant, set aside the order in original dated 28th February, 2018 and directed that without disturbing the findings and observations on allowability of the refund claim the original authority shall reconsider the claim. Further, the appellate authority held that it is not only the respondent but Military Engineering Service (MES) also to pursue the refund claim and MES shall join as co-applicant. Pursuant to such direction, the adjudicating authority has taken up the case for *de novo* adjudication, added MES as a co-applicant and has passed an order dated 8th February, 2022, which being against the respondent they have preferred appeal before the Commissioner (Appeals).

It is the submission made on behalf the revenue that the observations made by the Commissioner (Appeals) in his order dated 10th September, 2021 directing that MES should also pursue the refund claim and they should be joined as a co-applicant is a finding which is being agitated by the revenue.

In our considered view, since already the adjudicating authority has decided against the respondent/assessee and the assessee is before the Commissioner (Appeals) by way of appeal, all issues can be canvassed in the pending appeal and, therefore, the order passed by the learned Tribunal need not be disturbed.

In the result, the appeal (CEXA/21/2022) filed by the revenue is disposed on the above ground and the substantial questions of law are left open.

Consequently, the connected application for stay (IA No.GA/1/2022) also stands closed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

As./GH/SN