ORDER O – 385

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

CEXA/12/2020
IA NO: GA/2/2020 (Old No: GA/987/2020)
GA/2/2020 (Old No: GA/988/2020)
COMMISSIONER OF CENTRAL EXCISE, BOLPUR
VERSUS
M/S. SAIL

BEFORE :
THE HON'BLE JUSTICE SURYA PRAKASH KESARWANI
AND
THE HON'BLE JUSTICE RAJARSHI BHARADWAJ
Date : 3rd May 2024.

Appearance:

Mr. Uday Shankar Bhattacharya, Advocate
Mr. Tapan Bhanja, Advocate
... for the appellant.

Mr. Samir Chakraborty, Advocate
Mr. B. Sengupta, Advocate
... for the respondent.

Order on IA GA/1/2020 (Delay Condonation Application)

1. This appeal has been filed beyond limitation by 223 days along with delay condonation application. Learned counsel for the respondent states that the respondent has no objection to the condonation of delay.

2. In view of the aforesaid, the delay in filing the appeal is condoned. Delay condonation application being IA GA/1/2020 is allowed.

Order on Appeal

3. Heard Sri Uday Shankar Bhattacharya, learned senior standing counsel, assisted by Sri Tapan Bhanja, learned counsel for the appellant and perused the impugned order dated 27.08.2018 in Excise Appeal No.642 of 2006 [M/s. SAIL v. CCEx., Bolpur] passed by the Customs, Excise and Service Tax Appellate Tribunal, East Regional Bench, Kolkata.

4. The Tribunal has recorded the following finding in paragraphs 5, 6 and 7 of the impugned order:-

> *5. Heard both sides and perused the records of the case.*
>
> *6. We find that the alleged discrepancy is due to Page No.369 of the Annual Statistics Reports (annexed at page 27 of the Appeal Paper Books) puts the consumption figure of oxygen gas as 80660.124 Cu. Mtr., whereas one more sheet of the same Account Books annexed at page 26 of the appeal, puts the same as 1,11,796.522 Cu. Mtr.. These figures have been allegedly used by the Department to foist the case of the clandestine removal against the appellants. We find that the Department contends that RT-12 Returns showing the consumption of 1,38,780.948 Cu Mtr and therefore, the difference of 58120.823 Cu. Mtr. is not utilized for captive consumption, but has been cleared clandestinely without payment of duty. We find that no statements have been recorded and no further investigation has been done. The Learned Commissioner has simply proceeded by brushing aside the submission made by the appellants. We find that the appellants submitted that at Page 429 of the Annual Report, it cannot be seen in isolation and at other pages i.e. 369 & 197 also show the consumption of oxygen gas internally. The Learned Commissioner has not given any reasoning for not considering the statistics*

reflected in other pages and has concluded that the appellants have not shown any reasons as to why such figures were shown in Page 429 of the Annual Statistics Reports. We find that no other effort has been made by the Department to find as to what has happened to the balance quantity, if at all, there was a discrepancy. No statements were recorded and no proof of any clandestine removal, transportation of the same and financial transaction in that regard are put forth. Understandably, clandestine removal is a serious charge. Without prima-facie, establishing the fact that there has been a clandestine removal (if not with an arithmetical precision), such an allegation, will not survive. It is seen that not even a statement of the person, who managed the production/consumption of oxygen or the person who has maintained the statistical report, has been recorded by the Revenue. Without such bare a minimum enquiry, the charge of clandestine removal, cannot be sustained. We find that the case laws submitted by the appellants, particularly, the judgments of the Hon'ble High Court of Rajasthan and jurisdictional High Court of Odisha, are in the appellants' favour. Therefore, we do not find any merit in the allegation in the show cause notice and hold that the same are not sustained. Moreover, the issue pertains to 2001-2002. The Annual Book of Statistics was given to the authorities in 2002 itself. The Revenue does not deny this fact and therefore, issuing the show-cause notice, after two years, is not tenable. The appellant, being a Public Sector Undertaking, no mens rea can be attributed as no particular independent officer of the appellant is going to be benefited by such act of suppression and concealment of figures. Courts and Tribunal have given such a ruling in umpteen number of cases. It is not the case of the Department that Annual Book of Statistics has been recovered during any search or investigation. The Book has been routinely given by the appellant *to the Department over the years. Therefore, department can not allege suppression of facts etc to invoke extended period of limitation. We find, therefore, that the impugned order is also hit by limitation. We find, in view of the above, that the demand is not sustained either on merits or on limitation. Therefore, penalty imposed is also not sustainable.*

7. In the result, the impugned order is set aside and the appeal is allowed with consequential relief to the appellant, if any."

5. We find that the findings recorded by the Tribunal are findings of fact based on consideration of relevant documentary and other evidences on record. Therefore, no substantial question of law is involved. Consequently, the appeal is dismissed at the admission stage.

(SURYA PRAKASH KESARWANI, J.)

(RAJARSHI BHARADWAJ, J.)

S. Kumar