OD-3

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION [CENTRAL EXCISE]
ORIGINAL SIDE

CEXA/18/2023
IA NO: GA/2/2023
RITIKA PRIVATE LIMITED PRESENTLY KNOWN AS RELIANCE RITU KUMAR PRIVATE LIMITED
VS
COMMISSIONER OF CENTRAL EXCISE KOLKATA 1

BEFORE :
THE HON'BLE THE CHIEF JUSTICE T.S SIVAGNANAM
-A N D-
HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
DATE : 24th May, 2024.

Appearance :
Mr. Vishal Agarwal, Adv.
Mr. Abhishek Deodhar, Adv.
Mr. Hersh Choudhary, Adv.
Mr. Vishwarup Acharyya, Adv.
Mr. Akash Dutta, Adv.
...for appellant.

Mr. K. K. Maiti, Adv.
Mr. Tapan Bhanjan, Adv.
...for respondent.

The Court :- This appeal filed by the assessee under Section 35G of the Central Excise Act, 1944 is directed against the order dated May 15, 2023 passed by the Customs, Excise and Service Tax Appellate Tribunal, Kolkata in final order dated September 01, 2017 as well as the order passed in the rectification application dated 15.05.2023. The appellant/assessee has raised the following substantial questions of law for consideration :-

a. Whether the Tribunal was justified in traversing beyond not only the scope of the SCN, but also the Order-in-Original in holding that the process of manufacture was not disclosed and that it came to the knowledge of the Department only when the officers visited the premises of the Appellant?

b. Whether the Tribunal was justified in upholding the Order-in-Original which traversed beyond the scope of the SCN in holding that around half of the processes undertaken were by machinery and were not manual, which was never the case made out in the SCN?

We have heard Mr. Abhishek Deodhar, learned Advocate appearing for the appellant and Mr. K K Maiti, learned standing Counsel assisted by Mr. Tapan Bhanja, learned Advocate appearing for the respondent department.

A preliminary objection has been raised by the learned standing Counsel appearing for the respondent contending that this appeal is not maintainable as the matter pertains to the classification issue as to whether the goods manufactured by the appellant would qualify as handicraft and be entitled for the benefit of the exemption from payment of excise duty as per notification 76/86 dated 10.02.1986 and the circular of the Board in Circular No. 76-73/6/2004 dated 28.01.2004.

As noted above, the substantial questions of law raised before this Court are with regard to the scope of the show-cause notice issued to the appellant as also the order-in-original and on the ground that order-in-original as prevailed beyond the scope of show-cause notice. Thus, it is required to be seen as to under such circumstances whether this Court would be entitled to entertain this appeal and adjudicate the correctness of the order passed by the Tribunal.

In the case of Commissioner, Service Tax, Delhi Vs. Bharati Airtel, 2013 (30) STR, 451(Del) a similar objection was raised before the High Court of Delhi as to whether the appeal would be maintainable before the High Court or not. It was pointed out that the determinative factor would be as to the nature of the order, which is impugned in the appeal. In the said case, it was held when the order under challenge is with reference to the nature of the order passed by the Tribunal the appeal was maintainable before the High Court. This decision was noted by High Court with approval in the case of Roots Multiclean Ltd. Versus Cestat, Chennai, 2016(336) E.L.T. 25(Mad.). In the said case also the revenue raised a similar issue as has been raised before us that the matter pertains to valuation/rate of duty and, therefore, the High Court cannot entertain the appeal. After noting the scope of Section 35B of the Act, the Court held that the issues before the Court are not upon the question relating to valuation of the goods or duty to be paid but with reference to the nature and validity of the order passed by the Tribunal.

Thus, when the issue is to be decided in this appeal is not with reference to valuation *per se* but with reference to the validity of the show-cause notice the order-in-original as well as the decision of the Tribunal, this Court is not precluded from entertaining this appeal as the grounds canvassed before the adjudicating authority as well as the Tribunal was not on the valuation issue *per se* but with regard to the scope of the show cause notice, whether the extended period of limitation could have been invoked and the correctness of the decision arrived at by the adjudicating authority. Therefore, we hold this appeal is maintainable before this Court.

The appellant/assessee by communication dated 16.03.2004 addressed the department stating that they are engaged in manufacturing of readymade garments, accessories to the readymade garments and made up articles of textiles and most of their products are categorized by hand printing and hand embroidery and these are categorized as handicrafts in terms of the circular dated 28.01.2004 issued by the Central Board of Excise and Customs.

In no uncertain terms, the appellant/assessee informed the department that they will be availing exemption under notification dated 10.02.1986 in respect to the products manufactured by them, which are handicrafts in the light of the circular issued by the Board. On receipt of the said communication, the department addressed a letter to the appellant/assessee dated 25.03.2004 seeking certain clarification as regards applicability of the circular issued by the Board. The assessee by reply dated 13.04.2004 set out in detail as to how their stand taken in their letter dated 16.03.2004 was justified. There was no further response from the department and the assessee appears to have been availing the benefit of the exemption notification. The department issued show-cause notice dated 19.12.2005 on the ground that though the notification was issued in the year 1986, the assessee have been clearing the goods upon payment of excise duty and only on 15.03.2004 they sought to avail the benefit of the exemption notification. Therefore, the department was of the prima facie view that they have cleared the goods during the period from 16.03.2004 to 8.7.2004 without payment of Central Excise Duty by suppression of material facts and mis-declaration with the intention to evade payment of Central Excise Duty wrongly availing the benefit of notification dated 8.10.86. The assessee submitted their reply dated 17.01.2006 made all the allegations in the show-cause notice and how the demand made in the show-cause notice is not sustainable on merits. In paragraph 8 of the reply, the assessee specifically dealt with the issue regarding limitation and contended that the show-cause notice fails to discharge the burden of proving that the assessee willfully and intentionally evaded the payment of duty. In support of its contention, the assessee placed reliance on the decision of the Hon'ble Supreme Court in Tamil Nadu Housing Board v. CCE, Madras [1994 (74) E.L.T.9(SC) and the decision of the High Court of Delhi in New Decent Footwear Industries v. Union of India [2002 (15) E.L.T. 71 (Del)]. Thus, the adjudicating authority was expected to adjudicate the show-cause notice and on the allegations contained in the show-cause notice and the reply submitted by the assessee. However, on a perusal of the order-in-original dated 29.01.2007, it is seen that adjudicating authority proceeded beyond the scope of show-cause notice. In fact, the allegations contained in the show-cause notice have not been the basis for the decision arrived at and the decision was solely based upon an inspection stated to have been conducted in the business premises of the assessee that to after the reply was submitted by the assessee. This would clearly show that the adjudicating authority went beyond the allegations in the show-cause notice and this would tantamount to clear case of violation of principles of natural justice and would render the order of adjudication as a nullity. With regard to the notification of the extended period of limitation is concerned, the onus is on the department at the first instance. Except for using the expressions “Suppression of material fact”, “misdeclaration” “intent to evade payment of natural excise duty” would not be sufficient. The department should have material to come to a conclusion that there has been a misdeclaration or a willful misstatement which should be coupled with the intention to evade payment of duty. In the absence of material to establish the same, would not entitle the department to invoke the extended period of limitation. In other words, mere use of these expressions would not be sufficient as there should be material available with the department which should be manifest in the show cause notice as to how in the prima facie view of the department there was misdeclaration, misstatement with intention to evade payment of duty. This being conspicuously absent, it has to be necessarily held that the department could not have been invoked the extended period of limitation.

For the above reasons, the appeal is allowed and the order passed by the learned Tribunal as well as the adjudicating authority and the show-cause notice are set aside and the substantial questions of law are answered in favour of the appellant/assessee.

.

(T.S. SIVAGNANAM)
CHIEF JUSTICE

(HIRANMAY BHATTACHARYYA, J.)

pkd/GH.