IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL KOLKATA
EAST ZONAL BENCH, KOLKATA

Date of Hearing/Order: 17.5.2018

Appeal No. E/549/2010-DB

(Arising out of Order-in-Original No. 2/Commr./CE/Kol-III/2010-11 dated 30.4.2010 passed by the Commissioner of Central Excise, Kolkata)

M/s The Calcutta Silk Manufacturing — Appellant

Vs.

Commissioner of Central Excise , Kolkata — Respondent

<u>Appearance</u>

Shri N.K. Choudhary, Advocate	-	for the appellant
Shri A. Roy, A.R.	-	for the respondent

CORAM: **Hon'ble Mr. P.K. Choudhary, Member (Judicial)**
Hon'ble Mr. Bijay Kumar, Member (Technical)

Final Order No. F/76409/2018

Per Bijay Kumar :

The present appeal has been filed against the Order-in-Original No. 2/COMMR/CE/KOL-III/210-11 dated 30.4.2010 vide which he has confirmed demand under the provisions of Hot Air Stenter Independent Textile Processors Annual Capacity Determination Rules, 1998, as notified under Notification No. 42/98-CE (NT), dated 10.12.1998 fixing duty liability on the appellant. As per the Show Cause Notice, the provisional duty was determined at Rs. 1.5 lakhs

P.M., which was subsequent finalised to Rs. 8.61 lakhs P.M. depending on the number of Chambers at 5.44 against provisionally declared to be 5.

2. Ld. Advocate on behalf of the appellant submitted that the order has become inconsequential in view of judgement in the case of ***Raji Thangam Textiles Ltd.*** – 2006 (205) ELT 631 in view of the decisions of the Hon'ble Madras High Court in the case of ***Beauty Dyers*** – 2004 (166) ELT 27 (Mad.) declaring the Notification No. 42/98-CE(NT) dated 10.12.1998 as ultra vires. The said decision is having the precedential value as has been held in the case of ***Valson Dyeing Bleaching and Printing Works*** – 2010 (259) ELT 33 (Bomb.). On the date of passing the order, the Commissioner was not having jurisdiction since Section 3A was omitted with effect from 11.5.2001 without any saving clause and therefore, the proceedings lapsed on that date, as has been held in the case of ***Karnataka Ginning & Pressing Factory*** – 2008 (231) ELT 257 (Tri.-Mumbai).

3. Ld. DR has reiterated the grounds contained in the order in appeal and supports the view taken by the ld. Adjudicating authority.

4. Heard the parties and perused the case record.

5. The issue regarding fixing capacity vide Notification No. 42/98-CE(NT) dated 10.12.1998 under the Hot Air Stenter Independent Textile Processors Annual Capacity Determination

Rules, 1998 has been subject matter of detailed scrutiny by the Hon'ble Madras High Court in the case of ***Beauty Dyers*** (supra) as referred above. It is a fact that the ACD Rules were held ultra vires by the Madras High Court and, therefore, findings recorded by the Commissioner against the assessee become irrelevant. It is not in dispute that the ACD Rules have been struck down by High Court as ultra vires. The rules, therefore, should be held to have been suffering from the vice of illegality and unconstitutionality right from the date on which they were made. If that be so, the appellant cannot be held to have been lawfully working under the Compounded Levy Scheme. It will follow that determination of ACD by the Commissioner and the procedural laid down for the matters such as determination of duty, liability, collection of duty, abatement of duty, etc. were all futile exercise. It would suffice to say that order or ld. Commissioner (Appeals) inconsequential. This is a scenario emerging by the judgement of Hon'ble High Court and there is no escape from, for the present.

6. In the result, the impugned order is set aside and this appeal is allowed.

(Pronounced in Court on)

Sd/- Sd/-

(P.K. Choudhary) (Bijay Kumar)
Member (Judicial) Member (Technical)

RM