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

C/SP-76880/2018 & C/CO/77584/2018
And
Appeal No. C/78162/2018

CC., Kolkata (Admn. Airport)
Applicant (s)/Appellant (s)

Vs.

M/s. K. R. Modi & Co.
Respondent (s)

Appearance:
Shri S. Guha, AC (AR) for the Revenue
B. N. Pal, Advocate for the Respondent (s)

CORAM:
HON'BLE SHRI P.K.CHOUDHARY, MEMBER (JUDICIAL)
Date of Hearing/Decision: - 20.11.2018
ORDER NO. MO/76019-76020/2018 & FO/77010/2018

The present Stay Application has been filed by the Department for staying of the operation of the impugned Order-in-Appeal, passed by the Commissioner of Customs (Port).

2. The Ld. DR appearing on behalf of the Appellant/Revenue submits that the Commissioner (Appeals) has not pointed out any deficiency in the Adjudication Order nor has rationalized how the demand is barred by limitation of time. He further argued that the Ld. Commissioner (Appeals) did not verify the facts and data while negating the observation of the Lower Authority. Since the records show that the Respondent exporter has all along paid the cess on export of Mica and Mica products from the year 2010 itself at Kolkata Seaport. They have also paid cess at various other Customs Houses in India. Thus, the invoking of extended period of 5 years in the Show

Cause Notice is in accordance with Section 28(4) of Customs Act, 1962 and contended that the impugned order should be set aside and the Order of the Adjudicating Authoring restored.

3. The Ld. Advocate appearing on behalf of the Respondent-assessee reiterates the grounds of cess objection and submitted that after a long period, the department issued a demand Cum Show Cause Notice under section 28 (1)(b) read with section 124 of the Customs Act, 1962 directing the respondent assessee to show cause as to why the cess on export of Mica/Mica products should not be recovered from them.

It is his submission that the Adjudicating Authority did not draw any mens rea to establish the allegation of willful suppression of fact. He further submitted that the Ld. Commissioner (Appeals) vide the impugned order allowed their appeal by setting aside the order passed by the Lower Adjudicating Authority. Since the entire demand and interest raised against the assesse was barred by limitation, he prayed for upholding the impugned order and rejecting the appeal filed by the Revenue. He also submitted that there is no occasion for staying of the impugned order.

4. Heard both sides and perused the appeal records.

5. I find that the Adjudicating Authority confirmed the demand of 1,60,705/- and ordered for recovery of the same under section 28(4) of the Customs Act, 1962 along with interest.

5. The Ld. Commissioner (Appeals) vide the impugned Order allowed the appeal filed by the assessee considering that the demand and interest raised against them was barred by limitation. Revenue is

in appeal before the Tribunal and they have also filed this stay Application. The Respondent assessee has filed a cross objection.

6. On perusal of records, I find that the Committee of Commissioners vide Order No. KOL/CUS(Airport)/Review/08/2018 dated 06/08/2018 have observed as under:-

"From the above discussions it is observed that the disputed amount in the instant case is Rs. 1,60,705/- which is well within the threshold limit set by the Board under National Litigation Policy (NLP). However, attention is invited to the instructions issued by the Board on filing of departmental appeals vide F. No. 390/Misc./163/2010-JC dated 20.10.2010 and subsequently amended through instructions issued from even nos. dated 17.08.2011 and then dated 17.12.2015. From a reading of these instructions it transpires inter alia that no departmental appeals shall be filed before the Ld. CESTAT if the total revenue in dispute is less than Rs. 10 Lakhs until and unless the appeals contemplated to be filed are directed against adverse judgments delivered on the following grounds where appeals can be filed irrespective of monetary limits.

a. Where the constitutional validity of the provisions of an Act or Rule is under challenge.
b. Where Notification/Instruction/Order or Circular has been held illegal or ultra vires;
c. Classification and refund issues which are of legal and/or of recurrent nature.

It is amply clear from the discussion supra that the subject Order-in-Appeal No. KOL/CUS(A/P)/AA/908/2018 dated 08.05.2018 has been passed in complete disregard of the provisions of the Customs Act, 1962. Therefore, the question of the monetary limit in the present case is immaterial as the subject order-in-appeal is an adverse order falling under the clause (a) supra. Moreover, the issue has larger consequences on large number of similar such cases.

In view of the foregoing, in exercise of the powers conferred under Section 129A(s) of the Customs Act, 1962, the Committee of Commissioners, directed and authorized the Deputy Commissioner of Customs, NSCBI Airport, Kolkata-700052 vide review Order No. KOL/CUS/Airport/Review/08/2018 Dated: 06.08.2018 to prefer an appeal before the Hon'ble Customs, Central Excise & Service Tax Appellate Tribunal, EZB, Kolkata, against the Order-in-Appeal Nos. KOL/CUS(Air-Port)/AA/953/2018 dated 17.05.2018 passed by the Commissioner of Customs (Appeals), Kolkata, with the following prayers:-

7. I find that the committee of Commissioners have held that the impugned order falls under clause (a) of Para 3 of the instruction dated 17/08/2011 introduced vide instruction dated 17/12/2015.

8. I do not find that the constitutional validity of any of the provisions of the Act or Rules is under challenge before any of the Superior Courts in respect of the issue under dispute in the present appeal. Accordingly, on perusal of records, I find that the amount involved in this case is below the monetary limit of Rs. 10 lakhs.

9. In view of the above discussion, I do not find any reasons for staying of the impugned order as prayed by the appellant/Revenue. Accordingly, the Stay Petition being devoid of merits is rejected. The appeal filed by the Appellant/Revenue is well covered under the National Litigation Policy and the same is accordingly dismissed. The Cross Objection filed by the Respondent-Assessee also gets disposed of.

(Dictated and pronounced in the open court.)

Sd/-
(P. K. CHOUDHARI)
MEMBER (JUDICIAL)

Pooja