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

Excise Appeal Nos.578/09, 628/09, 665/09 & 668/2009

(Arising out of Order-in-Original Nos. 27(DE-NOVO)/COMMR/CE/KOL-III/2009-10 dated 04.08.2009 & No. 29-35/COMMR/CE/KOL-III/2009-10 dated-07/09/2009 passed by the Commissioner of Central Excise, Kolkata-III)

M/s. Madhva Textile Processors Pvt. Ltd. (E. No. 578,665/2009)

Applicant (s)/Appellant (s)

Vs.

Commr. of Central Excise, Kolkata-III AND

Respondent (s)

VICE VERSA (E. No. 628,668/2009)

Appearance:

Shri N.K. Choudhary, Advocate . for the Appellant (s)
Shri A. Roy, Supdt.(AR) for the Respondent (s)

CORAM:

SHRI P.K. CHOUDHARY, HON'BLE JUDICIAL MEMBER
SHRI V. PADMANABHAN, HON'BLE TECHNICAL MEMBER

Date of Hearing/Decision :- 06.12.2018

ORDER NO: FO/A/77281-77284/2018

PER SHRI V. PADMANABHAN

M/s. Madhva Textiles Processors Ltd. (MTPPL) were engaged as textile processor. The processing of Textile Fabrics has been specified by the Govt. under Notification No. 41/98-CE(NT) dated- 10/12/1998 as notified goods on which Central Excise duty shall be levied and collected in accordance with the provisions of Section 3A (as it existed during the relevant time) of the Central Excise Act, 1944. The assessee was required to discharge its liability from 16/12/1998 on the processed textile fabrics in terms of erstwhile Rule 96ZQ of the Central Excise Rules, 1944 read with Annual Capacity of Production (ACP) determined under Hot-air Stenter Independent Textile Processors Annual Capacity Determination Rules, 1998. The assessee submitted declaration dated-22/12/1998 for determination of ACP, declaring one hot air Stenter Machine with five chambers. The ACP was provisionally fixed by the Commissioner vide his order dated 28/12/1998 and requiring the assessee to pay an amount of Rs.7.5 Lakhs per month. As per Sub-rule 3 of Rule 96ZQ, the above fixed duty was to be paid by 15th day of each calendar month to which it relates. Sub-Rule 7 of the same rule provides for abatement when the Independent processor does not produce/manufacture fabrics during any continuous period of not less than seven days.

2. The assessee filed claims for abatement for various periods claiming closure of its machine for a period of not less than 07 days in each case. Further, during the said period, the Department noticed that before claiming such abatement , the assessee had not paid the duty fixed at Rs.7.5 Lakhs per month as per ACP. The adjudicating authority, vide various impugned orders, confirmed payment of duty @ Rs.7.5 Lakhs per month after deducting the duty by way of abatement for the period of closure. She also ordered for payment of interest as well as imposed penalty.

3. The assessee has challenged these orders. The Revenue has also challenged a portion of these orders by taking the view that no abatement can be allowed when the assessee has failed to discharg the duty @ Rs.7.5 Lakhs as per ACP. The Revenue has also sought to point out certain other errors in these orders.

4. All the appeals are taken up together for decision through this common order.

5. The assessee is represented by Shri N.K. Choudhary, ld. Advocate and the Department is represented by Shri A. Roy, Supdt., Ld. (A.R.).

6. On behalf of the assessee it is submitted that the demand cannot be made against the assessee in view of the fact that the Hon'ble High Court of Madras in the case of Beauty Dyers Vs. Union of India reported in 2004 (166) ELT 27 (Madras) has struck down the *Hot Air Stetner Annual Capacity Determination Rules, 1998. The Hon'ble High Court held that these rules were ultra vires* of the erstwhile Section 3 A. He also relied on the following further case laws:

i) Karnataka Ginning & Pressing Factory Vs. Commr. of Central Excise ,
Thane-II [2008 (231) elt 257 (Tri-Mumbai)

ii) CCE Mumbai-III Vs. Valson Dyeing Bleaching & Printing Works
2010 (259) ELT 33 (Bom.)

iii) Hot-Air Stenter Independent Textile Processors Annual Capacity
Determination Rules 1998 under Notification No. 42/98-CE (NT)
Dated- 10/121998

iv) Raji Thangam Textile Limited Vs. Commr. of Central Excise, Coimbatore [2006 (205) ELT 0631 (Tri-Chennai)

v) Final Order No. 76409/2018 of Calcutta Silk Mfg. Co. Ltd.

7. The Ld. D.R. justified the impugned order and highlighted the grounds of appeal of the Revenue.

8. Heard both sides and perused the records.

9. The disputes in the present cases are centered around the Annual Capacity of Production basis during the period when levy of Central Excise Duty was in terms of the erstwhile Section 3A of the Act. As per the Rules framed under the Section 3A, the Annual Capacity of Production was to be fixed by the Commissioner and duty as per such capacity fixed by him was required to be paid every month before the 15th. Rules provided for claiming abatement whenever the stenters remained closed continuously for a period of over 7 days. In the dispute before us, the Adjudicating Authority has allowed such claims for abatement and has ordered for payment of duty as per ACP, after deducting the amounts towards abatement for closure.

10. It is urged before us, on behalf of the assessee, that no demand for duty in terms of the erstwhile Section 3A and the rules framed thereunder can survive in view of the fact that the Rules have been held to be *ultra vires* of the erstwhile Section 3A of the Act by the Hon'ble Madras High Court in the case of Beauty Dyers (supra). The SLP filed by Union of India against the said judgment has also been dismissed by the Hon'ble Supreme Court. In the decision of the Tribunal in the case of Raji Thangam Textile Limited (supra), the Chennai Bench of the Tribunal further held that the Commissioner was not having jurisdiction for raising any demand since Section 3A was omitted w.e.f. 11/05/2001 without any savings clause. In the more recent decision of this Bench in the case of Calcutta Silk Manufacturing, in Final Order No. 76409/2018 dated 17/05/2018, similar views were taken . The observations of Tribunal in this case are reproduced below:

> *" 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 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 of Ld.*

Commissioner (Appeals) inconsequential. This is the scenario emerging by the judgment of Hon′ble High Court and there is no escape from it , for the present.″

11. In view of the above discussions, we allow all the appeals filed by the assessee and dismiss all the appeals filed by the Revenue.

(Operative part of the order already pronounced in the court)

P.K. CHOUDHARY
(JUDICIAL MEMBER)

V. PADMANABHAN
(TECHNICAL MEMBER)

k.b/-