IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No. 1263 of 2011

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COMMISSIONER OF CENTRAL EXCISE AHMEDABAD - II - Appellant(s)
Versus
NITA TEXTILES & INDUSTRIES - Opponent(s)

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Appearance :
MR DARSHAN M PARIKH for Appellant(s) : 1,
MR PARESH M DAVE for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MS.JUSTICE HARSHA DEVANI

Date : 17/09/2012

ORAL ORDER

(Per : HONOURABLE MR.JUSTICE AKIL KURESHI)

Department has preferred this appeal calling in question the judgment of the Customs, Excise and Service Tax Appellate Tribunal ('the Tribunal' for short) dated 23.2.11. Following questions have been raised for our consideration :

> "1. Whether in facts and circumstances of the case, the Tribunal was justified in holding that the demand was barred by limitation?
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> 2. Whether in the facts and circumstances of the case, since there was no case of limitation raised before the Original adjudication authority and in absence of such a case, since the adjudicating authority had not recorded any finding, the matter should have been remanded for fresh adjudication?
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> 3. In the facts and circumstances of the case, whether CESTAT can entertain the plea of the

party on the issue of limitation, for the first time which was never raised earlier in an appeal filed by the revenue?"

Briefly stated, facts are follows:

Respondent-assessee is engaged in manufacturing of gauze fabrics. Commissioner of Central Excise served a show cause notice dated 28.8.03 why excise duty should not be recovered from the respondent. The respondent replied to the show cause notice and contended that there was no manufacturing process involved. It was the case of the respondent that the marketability of the fabrics is fulfilled only when it was bleached and some process is done. Only thereafter such gauze fabric is marketable. The process undertaken by the assessee does not amount to manufacturing process. During personal hearing, in addition to reiterating the above aspects, the respondent also contended that under bona fide belief that no manufacturing activity is carried on, duty was not paid.

The Commissioner of Central Excise by his order dated 31.12.04 upheld the contention of the respondent assessee. He was of the opinion that in absence of any manufacturing activity, the respondent was not liable to pay any excise duty. Such judgment was carried in appeal by the Revenue before the Tribunal. The Tribunal by the impugned judgment, partially reversed the order of the Commissioner. In so far as the question of excisability is concerned, the matter was decided in favour of the Revenue.

However, the Tribunal was of the opinion that since the assessee had bonafide believed that there was no manufacturing activity and since the Commissioner also upheld such view of the assessee, larger period of limitation could not be applied. On such basis while upholding the demand in part, for the period beyond one year from the date of show cause notice, the demand was quashed. It is this judgment of the Tribunal, which the Department has challenged to the extent the same is against the Department.

Counsel Shri Parikh for the appellant submitted that the assessee had not raised the question of limitation before the adjudicating authority. Such question being a mixed question of law and fact cannot be raised for the first time before the Tribunal. He, therefore, submitted that the Tribunal committed an error in entertaining such a issue at an appellate stage. On the other hand, counsel for the respondent opposed the appeal contending that the Tribunal has come to a correct conclusion and no question of law arises in the appeal.

Having perused the documents on record and having heard the learned counsel for the parties, it is true that in the show cause notice it was conveyed that the respondent had not registered itself with a view to evading duty and that therefore larger period of limitation would be invoked. It may be that such issue of allegation was not in so many words denied by the respondent. However, in the show cause notice

and during personal hearing before the Commissioner, the central defence of the respondent was that the respondent undertook no manufacturing activity to bring into existence gauze fabrics. Further that before further process, such fabric could not be marketed. On such twin grounds, the assessee held a belief that no duty was required to be paid. It was also pointed out that the assessee did not avail of any Cenvat credit on the inputs used.

Under the circumstances, the respondent had put up a case of bonafide belief. In fact, the entire issue on merits was decided by the Commissioner in favour of the respondent. It was on the basis of these factors, the Tribunal held that larger period of limitation would not be available to the Department.

We are of the opinion that the Tribunal committed no error. When full facts were before the authorities and in fact, the adjudicating authority held that the assessee was justified in not registering itself and paying duty, the Tribunal's view that the assessee held bonafide belief cannot be faulted. In the result, the Tax Appeal is dismissed since no question of law arises.

(Akil Kureshi, J.)

(Harsha Devani, J.)

(vjn)