

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

Reserved on 15.12.2023
Pronounced on 30.12.2023

WP (C) No. 1739/2023

M/s Godrej Agrovet Limited IGC Samba
Through Vishal Diga

.... Petitioners(s)
Through: Mr Sudhir Malhotra, Advocate
Ms Snigdha Shekhar, Advocate
Ms Kanika Malhotra, Advocate

v.

Union of India and another

... Respondent(s)

Through: Mr Rohan Nanda, CGSC

CORAM:

**HON'BLE THE CHIEF JUSTICE
HON'BLE MS JUSTICE MOKSHA KHAJURIA KAZMI, JUDGE**

ORDER

1/- Petitioner, seeking quashment of Notification No. 21/2017 CE dated 18.07.2017 vide which Notification No. 1/2010 CE was rescinded without saving operation regarding filing of application for fixation of special rate of actual value addition in respect of goods manufactured and cleared during the period April 2017 to 07.07.2017 besides the order of Commissioner, CGST Comm'r'ate Jammu dated 03.05.2023 by virtue of which the application of the petitioner has been dismissed and petitioner denied the benefit of special rate of value addition for the period w.e.f. 01.04.2017 to 30.06.2017. The petitioner has further sought a writ of mandamus to the effect that respondent no. 2 be directed to allow the benefit of the special rate of value addition for the period 01.04.2017 to 30.06.2017 by considering the application of the petitioner dated 08.02.2023.

2/- In order to appreciate the controversy in its right perspective, a brief resume of the events is recorded herein, thus:

- i) An Industrial Policy was floated by the erstwhile State of Jammu and Kashmir and the Central Government for accelerating the industrial development with a view that the confidence of the investors is uplifted. A notification dated 14.11.2002, in this behalf, was issued exempting goods cleared from units located in specified areas from the duty equivalent to the amount of duty paid by the manufacturer, other than an amount of duty paid by utilization of CENVAT credit was to be refunded in cash.
- ii) This Notification was followed by notifications dated 27.03.2008; 10.06.2008 and 06.02.2010 amending the earlier notification by granting exemption by way of refund of excise duty to a maximum limit as mentioned in the table in respect of different goods. The Policy, however, permitted the additional fixation of special rate of exemption in certain cases.
- iii) The petitioner filed an application seeking fixation of special rate of actual value addition for the period April 2017 to June 17, which was rejected by the Commissioner, CGST Comm'rte Jammu, in terms of order dated 03.05.2023, hereinafter, impugned order, being time barred.
- iv) Feeling aggrieved of the order impugned, the present petition has been filed.

3/- We have heard learned counsel for the parties and considered the submissions made.

4/- Learned counsel for the petitioner referred to the orders of this Court and the Guahati High Court passed in similar matters seeking same relief.

5/- Learned counsel for the petitioner submits that he is not challenging the order impugned on merits, but is actually challenging the vires of notification No. 21/2017 CE dated 18.07.2017 vide which notification No. 01/2010 was rescinded well before due date of 30.09.2018 of filing application for fixation of actual rate of value addition. Learned counsel for the petitioner further submits that the order impugned has been passed by respondent no. 2 while relying upon the rescinded notification no. 1/2010.

6/- On the other hand, the learned counsel for the respondents submits that the order impugned does not suffer from any legal infirmity. He submits that the petitioner has an alternate efficacious remedy against the order impugned and in view of availability of such efficacious remedy, the present petition is not maintainable.

7/- The contention of the learned counsel for the petitioner that the present petition is filed only to challenge the vires of the notification does not inspire confidence, in that, the specific prayer made in the writ petition is in respect of the impugned order only seeking its quashment by a writ of certiorari.

8/- The order passed by the Commissioner Central Excise/Central Goods & Services Tax Commissionerate, Jammu (J&K) is appealable, as admitted in the paragraph 19 of the Writ Petition by the petitioner itself, before the CESTAT in terms of Section 35B of the Central Excise Act, 1944. It would be profitable to reproduce relevant provision of law, herein, thus:

35B. Appeals to the Appellate Tribunal.—(1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order—

(a) a decision or order passed by the [Principal Commissioner of Central Excise or Commissioner of Central Excise] as an adjudicating authority;

(b) an order passed by the 1 [Commissioner (Appeals)] under Section 35-A;

(c) an order passed by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) (hereafter in this Chapter referred to as the Board) or the

Appellate 2 [Principal Commissioner of Central Excise or Commissioner of Central Excise] under Section 35, as it stood immediately before the appointed day;

(d) an order passed by the Board or the [Principal Commissioner of Central Excise or Commissioner of Central Excise], either before or after the appointed day, under Section 35-A, as it stood immediately before that day:

[Provided that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to,—

(a) a case of loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse;

(b) a rebate of duty of excise on goods exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India;

(c) goods exported outside India (except to Nepal or Bhutan) without payment of duty;

[(d) credit of any duty allowed to be utilised towards payment of excise duty on final products under the provisions of this Act or the rules made thereunder and such order is passed by the Commissioner (Appeals) on or after the date appointed under Section 109 of the Finance (No. 2) Act, 1998;]

Provided further that] the Appellate Tribunal may, in its discretion, refuse to admit an appeal in respect of an order referred to in clause (b) or clause (c) or clause (d) where—

(i) in any disputed case, other than a case where the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; or

(ii) the amount of fine or penalty determined by such order, does not exceed [two lakh rupees].
[(1A) Every appeal against any order of the nature referred to in the first proviso to subsection (1), which is pending immediately before the commencement of Section 47 of the Finance Act, 1984, before the Appellate Tribunal and any matter arising out of, or connected with, such appeal and which is so pending shall stand transferred on such commencement to the Central Government, and the Central Government shall deal with such appeal or matter under Section 35-EE as if such appeal or matter were an

application or a matter arising out of an application made to it under that section.]

[(1B) (i) The Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) may, [by order], constitute such Committees as may be necessary for the purposes of this Act.

(ii) Every Committee constituted under clause (i) shall consist of two [Principal Chief Commissioner of Central Excise or Chief Commissioner of Central Excise] or two [Principal Commissioner of Central Excise or Commissioner of Central Excise], as the case may be.]

[(2) [The Committee of Commissioners of Central Excise may, if it is] is of opinion that an order passed by the Appellate [Principal Commissioner of Central Excise or Commissioner of Central Excise] under Section 35, as it stood immediately before the appointed day, or the [Commissioner (Appeals)] under Section 35-A, is not legal or proper, direct any Central Excise Officer authorised by him in this behalf (hereafter in this Chapter referred to as the authorised officer) to appeal 8 [on its behalf] to the Appellate Tribunal against such order.]

[Provided that where the Committee of [Principal Commissioner of Central Excise or Commissioner of Central Excise] differs in its opinion regarding the appeal against the order of the Commissioner (Appeals), it shall state the point or points on which it differs and make a reference to the jurisdictional [Principal Chief Commissioner of Central Excise or Chief Commissioner of Central Excise] who shall, after considering the facts of the order, if is of the opinion that the order passed by the Commissioner (Appeals) is not legal or proper, direct any Central Excise Officer to appeal to the Appellate Tribunal against such order.]

Explanation.—For the purposes of this sub-section, “jurisdictional Chief Commissioner” means the [Principal Chief Commissioner of Central Excise or Chief Commissioner of Central Excise] having jurisdiction over the adjudicating authority in the matter.]

(3) Every appeal under this section shall be filed within three months from the date on which the order sought to be appealed against is communicated to the 1 [Principal Commissioner of Central Excise or Commissioner of Central Excise], or, as the case may be, the other party preferring the appeal.

(4) On receipt of notice that an appeal has been preferred under this section, the party against whom the appeal has been preferred may, notwithstanding that he may not have appealed against such order or any part thereof, file, within forty-five days of the receipt of the notice, a memorandum of cross-objections verified in the prescribed manner against any part of the order appealed against and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in sub-section (3).

(5) The Appellate Tribunal may admit an appeal or permit the filing of a memorandum of cross-objections after the expiry of the relevant period referred to in sub-section (3) or sub-section (4), if it is satisfied that there was sufficient cause for not presenting it within that period.

[(6) An appeal to the Appellate Tribunal shall be in the prescribed form and shall be verified in the prescribed manner and shall, irrespective of the date of

demand of duty and interest or of levy of penalty in relation to which the appeal is made, be accompanied by a fee of,—

- (a) where the amount of duty and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is five lakh rupees or less, one thousand rupees;*
- (b) where the amount of duty and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is more than five lakh rupees but not exceeding fifty lakh rupees, five thousand rupees;*
- (c) where the amount of duty and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is more than fifty lakh rupees, ten thousand rupees: Provided that no such fee shall be payable in the case of an appeal referred to in sub-section (2) or a memorandum of cross-objections referred to in sub-section (4).*

(7) Every application made before the Appellate Tribunal,—

- (a) in an appeal 3 [* * *] for rectification of mistake or for any other purpose; or*
- (b) for restoration of an appeal or an application, shall be accompanied by a fee of five hundred rupees:”*

9/- The above referred provision of law makes it explicitly clear that the remedy prescribed under the Act for any aggrieved person of the order of Commissioner, is an appeal before the CESTAT and without availing such remedy, the petitioner ought not to have rushed to this court with a writ petition.

10/- The Apex Court in numerous pronouncements has highlighted that alternate efficacious remedy should not be ordinarily given a goby. In **Punjab National Bank v. O.C. Krishnan and others (2001) 6 SCC 569**, the Supreme Court considered the maintainability of a writ petition filed under Article 227 of the Constitution against an order passed by the Tribunal under Section 19 of the DRT Act and observed as under:-

“5. In our opinion, the order which was passed by the Tribunal directing sale of mortgaged property was appealable under Section 20 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short ‘the Act’). The High Court ought not to have exercised its jurisdiction under Article 227 in view of the provision for alternative remedy contained in the Act. We do not propose to go into the correctness of the

decision of the High Court and whether the order passed by the Tribunal was correct or not has to be decided before an appropriate forum.

6. *The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is a hierarchy of appeal provided in the Act, namely, filing of an appeal under Section 20 and this fast-track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the court under Articles 226 and 227 of the Constitution, nevertheless, when there is an alternative remedy available, judicial prudence demands that the Court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act.”*

(Emphasis supplied)

11/- In yet another case titled CCT, Orissa and others v. Indian Explosives Ltd. (2008) 3 SCC 688, the Supreme Court took notice of the quashing of show cause notice by the High Court issued against the respondent under the Orissa Sales Tax Act and observed that the High Court had completely ignored the parameters laid down by this Court in a large number of cases relating to exhaustion of alternative remedy.

12/- The submission of learned counsel for the petitioner that the petitioner is not entering into the merits of the case vis-à-vis challenge to the impugned order is belied by the averments of the writ petition itself which unambiguously enter into the merits of the case by highlighting the legal lacunae's in the order impugned.

13/- The orders of this Court referred to by the learned counsel for the petitioner have been passed in different facts and circumstances, therefore, not applicable to the instant case.

14/- In view of above, the writ petition is held to be not maintainable against the order impugned having been filed without availing the efficacious alternate remedy provided by the Act.

15/- Accordingly, the writ petition is dismissed. There shall, however, be no order as to costs.

(Moksha Khajuria Kazmi)
Judge

(N. Kotiswar Singh)
Chief Justice

Jammu
30.12.2023
Amjad Lone, Secretary

Whether the order is speaking: Yes/No

Whether the order is non-speaking: Yes/No