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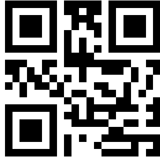

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/3569/2021

M/S JYOTHY LABS LTD.
(ERSTWHILE JYOTHY LABORATORIES LTD.), A LIMITED LIABILITY COMPANY WITHIN THE MEANING OF THE COMPANIES ACT, 1956 AND HAVING ITS REGD. PLACE OF BUSINESS AT EPIP, AMINGAON, GHY-31, ASSAM, THROUGH ARUNABHA MAJUMDAR, AUTHORISED REPRESENTATIVE OF THE PETITIONER COMPANY

VERSUS

UNION OF INDIA AND 2 ORS.
THROUGH THE FINANCE SECRETARY, MINISTRY OF FINANCE, HAVING HIS OFFICE AT NORTH BLOCK, NEW DELHI- 1100001

2:PRINCIPAL COMMISSIONER
CGST COMMISSIONERATE
GHY
GST BHAWAN
5TH FLOOR
KEDAR ROAD
MACHKHOWA
GHY-01

3:ASSTT. COMMISSIONER OF GST AND CENTRAL EXCISE
GUWAHATI-I DIVISION
GST BHAWAN
KEDAR ROAD
GHY-0

Advocate for the Petitioner : MR. S SHARMA

Advocate for the Respondent : ASSTT.S.G.I.

BEFORE
HONOURABLE MR. JUSTICE ACHINTYA MALLA BUJOR BARUA

JUDGMENT & ORDER (ORAL)

Date : 12-08-2021

Heard Mr. Laxmi Kumaran Varadachari, learned senior counsel for the petitioner, Mr. SC Keyal, learned counsel for the respondents in the GST Department and Mr. S Borthakur, learned CGC for the respondent No.1.

2. The petitioner M/s Jyothy Labs Ltd (MAXO Unit) (formally known as Jyothy Laboratories Limited) is a public limited company registered with the Central Excise Department bearing registration No. AAACJ3213BXMO12 and is engaged in the manufacture of certain excisable products namely mosquito coils falling under HSN 38 08 9191 of the First Schedule to the Central Excise Tariff Act, 1985. The petitioner with the intention to have the benefits under the Northeastern Industrial Policy of 24.12.1997 had established a manufacturing unit within the Northeastern Region. As per the Northeastern Industrial Policy, the petitioner was earlier entitled to an exemption to excise duty to certain extent.

3. By the notifications No.17/2008-CE dated 27.03.2008 and No.31/2008-CE dated 10.06.2008, certain modification was brought in by the respondent authorities to the exemption that was made available to the petitioner under the North Eastern Industrial Policy. The validity and vires of the notifications by which such modification was brought in regarding the entitlement of exemption of excise duties was assailed by the petitioner and some other similarly aggrieved manufacturers by way of WP(C) No.1789/2008 and other writ petitions.

4. One of the ground for assailing the notifications was based on the doctrine of promissory estoppels. WP(C) No.1789/2008 was given a final consideration by the judgment dated 24.06.2009, by which the notifications impugned dated 27.03.2008 and 10.06.2008 were held to be not sustainable in law and were accordingly set aside and quashed. The intra-Court appeal that was carried against the judgment of the

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learned Single Judge by the respondent authorities which was numbered as WA No. 243/2009, resulted in the judgment dated 20.11.2014, by which the judgment rendered by the learned Single Judge was upheld, meaning thereby that the interference with the notifications impugned was sustained. The respondents in the Union of India carried an appeal before the Supreme Court against the judgment in the writ appeal resulting in SLP No.11878/2015. In the said proceeding, the Supreme Court had passed an interim order dated 07.12.2015, wherein the following as extracted was provided:-

> "*Pending further orders, we direct that subject to the petitioners releasing 50% of the amount due to the respondent in terms of the impugned judgment on the respondents' furnishing solvent surety to the satisfaction of the jurisdictional commissioner, the operation of the impugned judgment shall remain stayed."*

5. In terms of the order dated 07.12.2015 of the Supreme Court, the respondent GST Department was required to release 50% of the amount that was due to the assessee during the pendency of the appeal before the Supreme Court. The said interim order was passed in an appeal by the Union of India against an assessee namely M/s Kamakhya Cosmetics and Pharmaceuticals and others. The Division Bench of this Court in Raj Coke Industries –vs- Union of India, reported in 2017 (349) ELT 120 (GAU), by a judgment dated 01.12.2016 had provided that the benefit of being paid the 50% of the amount involved as provided by the Supreme Court in its order dated 07.12.2015 would be applicable to all such similarly situated assesses.

6. After the judgment of the Division Bench in Raj Coke Industries (supra), an amount of Rs.8.05 crores and Rs.1.36 crores was refunded to the petitioner on 19.11.2018. In the meantime, the Supreme Court had given its final consideration to the appeal preferred by the respondent Union of India in the GST Department and by the order dated 22.04.2020 in Civil Appeal No.2256-2263 of 2020 arising out of SLP(C) No.28194-28201-2010 and other similar appeals had interfered with the judgment of the Division Bench dated 20.11.2014 in WA No. 243/2009 and other writ appeals and other similar judgments passed by the other High Courts.

7. Consequently, the writ petitions filed by the assesses before the respective High

Courts assailing the impugned notifications dated 27.03.2008 and 10.06.2008 stood dismissed. The Supreme Court also clarified that the judgment shall not affect the amount of excise duties already refunded prior to the two impugned notifications providing for modification of excise duty exemption and such refunds are not to be re-opened. It was also provided that the pending refund applications are to be decided as per the impugned notifications bringing in the modification. The implication of the judgment dated 22.04.2020 of the Supreme Court in Civil Appeal No. No.2256-2263 of 2020 arising out of SLP(C) No.28194-28201-2010 and other similar appeals would be that the excise exemption granted under the Northeastern Industrial Policy of 1997 which was earlier available would now be not available to the assessees.

8. In the resultant situation, there is also a requirement under the law for the assessees to refund the 50% amount that as was paid to them pursuant to the interim order dated 07.12.2015 of the Supreme Court.

9. In the aforesaid background, the petitioner relies upon a notification No.32/99-CE dated 18.07.1999, as amended, and notification No. 31/2008-CE dated 10.06.2008 which inter-alia provides that notwithstanding anything contained in paragraph 2A therein providing for the value additions to the manufactured goods, the manufacturer shall have the option not to avail the rates specified in the table and instead apply to the Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, having jurisdiction over the manufacturing unit of the manufacturer, for fixation of a special rate representing the actual value addition in respect of any goods manufactured and cleared under the said notifications.

10. The implication of the said provision would be that irrespective of the rates prescribed in the aforesaid two notifications, the manufacturer is provided a further option not to avail the rate specified in the tables contained in the two notifications, but to apply to the Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be having jurisdiction over the manufacturing unit of the manufacturer for fixation of a special rate representing the actual value addition. The time provided for filing such application for fixing of the special rate is provided in the notifications itself to be 30th September of that given financial year.

11. In the instant case, the petitioner had submitted an application on 18.05.2020 before the Commissioner of Central Excise and GST, Guwahati making a request for fixation of a special rate for the value addition on the manufactured goods for the financial year 2011-2012 in terms of the notifications No.32-99-CE dated 18.07.1999, as amended and No. 31/2008-CE dated 10.06.2008. Similar applications were also filed for fixation of a special rate in respect of other financial years. As the applications of the petitioner were not entertained and the department invoked the attachment of some properties of the petitioner, the petitioner approached this Court by way of WP(C) No.1644/2021, which was given a final consideration by the order dated 24.03.2021. Paragraphs 7 and 8 of the order dated 24.03.2021 are extracted as below:-

> "*7. This petition is instituted on the grievance that the Notification dated 27.03.2008 having been restored as per the judgment of the Supreme Court, two application dated 20.05.2020 under Clause3(1) of the Notification No.20/2008-Central Excise and Notification No.17/2008-Central Excise both dated 27.03.2008 was submitted by the petitioner claiming for a special rate, but the same has not been given its consideration and without giving a due consideration to the claim for special rate made by the petitioners, the respondents now intend to attach the bank accounts of the petitioner on the premises that the refund of excise duty would be as per the rates provided in the Notification dated 27.03.2008. As the Notification dated 27.03.2008 provides for a legal right to the assessee to claim for a special rate to be fixed in the event of there being any add-ons to the goods manufactured, we are of the view that without an appropriate decision being taken on such claim for special rate, it would be inappropriate for the department to proceed against the petitioners as per the rates provided in the Notification dated 27.03.2008.*
>
> *8. In view of the above, as agreed by the learned counsel for the parties, this petition stands disposed of by directing the Principal Commissioner of GST Guwahati to consider the aforesaid application of the petitioner*

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dated 20.05.2020 claiming for a special rate to be fixed on the basis of the add-ons made to the goods manufactured. After arriving at the special rate, if any as per the order to be passed by the Principal Commissioner, GST further process against the petitioner as per law may be initiated. Till such decision is taken, no coercive measure be taken against the petitioner pursuant to the communication impugned dated 18.02.2021."

12. From paragraph 7 of the order dated 24.03.2021, it transpires that the issue involved in the said writ petition was that the respondents intended to attach the bank account of the petitioner on the premises that the refund of the excise duties shall be as per the notification dated 27.03.2008, without considering the legal right of the petitioner assessee for fixation of a special rate for the value addition to the goods manufactured. In the circumstance, it was an agreed order between the petitioner and the respondents in the GST Department requiring the Principal Commissioner of GST, Guwahati to consider the aforesaid application of the petitioner dated 18.05.2020 claiming for a special rate to be fixed on the basis of the value addition made to the goods manufactured.

13. In response to the order dated 24.03.2021 in WP(C) No.1644/2021, the order dated 23.06.2021 was passed by the Principal Commissioner, GST, Guwahati. In the order dated 23.06.2021, the Principal Commissioner, GST, Guwahati came to his conclusion in paragraph 4.11 thereof, which is extracted below:-

"*The matter can be viewed from another angle. If it is to be argued that staying the judgment of Hon'ble Gauhati HC does not mean that the amending Notification became operational, in such a case the assessee and also other similarly placed taxpayers could not have availed exemption during the intervening period i.e. the date on which stay was granted and the date on which the case was finally decided by Hon'ble Supreme Court. Original Notification would not be in operation because of the stay and the amending Notification would also not be in operation. The orders of the Hon'ble Supreme Court and Hon'ble High Court do not have any express or implied intention to stay the operation of the*

amending Notification all together. In view of the discussions above, I do not go into the merit of the case."

14. A reading of paragraph 4.11 of the order of the Principal Commissioner, GST, Guwahati would go to show that the authorities had arrived at a conclusion that a stay of the judgment of the Division Bench in WA No.243/2009 would not mean that the notifications impugned therein became operational and that the petitioner assesse could have availed the exemption during the intervening period when the appeals were pending before the Supreme Court. The Principal Commissioner was also of the view that the orders of the Supreme Court and the High Court have not provided for any express or implied intention to stay the operation of the amended notification No.32/99-CE dated 19.07.1999.

15. We do not express any view on the said stand taken by the Principal Commissioner as regards the effect of the judgment of the Division Bench in the writ appeal concerned and the stay by the Supreme Court by the order dated 07.12.2015 on the said judgment. The issue before this Court is that whether under the notification No.32/99-CE dated 18.07.1999 as amended and the notification No. 31/2008-CE dated 10.06.2008 the manufacturers are entitled to have an option not to avail the rates specified in the tables contained in the notifications and whether they have a legal right to request the authorities for fixation of a special rate as per the actual value additions to the manufactured goods. Another aspect to look into is whether as per the notifications, such applications requesting for fixation of a special rate are to be made within 30th September of the given financial year for which such claim is made.

16. In the instant case, it is the case of the petitioner that the requirement of requesting for fixation of a special rate in respect of the value addition to the manufactured goods had arisen only after the final judgment of the Supreme Court on 20.04.2020, inasmuch, as long as the matter was pending before the Supreme Court and the interim order dated 07.12.2015 was in operation requiring a refund of 50% of the amount involved, no occasion had arisen for the assessee to claim for the fixation of a special rate in respect of the value addition to the manufactured goods. The

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dominant purpose of the two notifications i.e. amended notification No.32/99-CE dated 18.07.1999 and the notification No. 31/2008-CE dated 10.06.2008, is the bestowing of a legal right to the assessee to opt for the fixation of a special rate in respect of the value addition to a manufactured goods. The requirement that such applications are to be made not later than 30th day of September of the given financial year is a provision for streamlining the procedure for making such application and to avoid the situation where the process of making such applications would be a never ending matter.

17. Without going into the aspect whether the requirement to submit such application within 30th September of the given financial year is a mandatory requirement or a directory requirement, what we take note of is that such a provision has been incorporated to streamline the process for submission of the application seeking for the fixation of a special rate to the value addition to manufactured goods.

18. We have to take note of that as long as there was a judgment of the Division Bench in WA No.243/2009 in favour of the petitioner interfering with the modification for exemption of excise duty and the matter thereafter was pending before the Supreme Court on an appeal with an interim order dated 07.12.2015 requiring a refund of the 50% of the amount of excise duty, the occasion had not arisen for the assessee to go further and seek for a fixation of a special rate in respect of the value addition to the manufactured goods and even if there would have been a determination of such special rate, the same would have remained ineffective and un-implementable till the Supreme Court had finally decided the issue which was done as per the judgment dated 20.04.2020 in Civil Appeal No.2256-2263 of 2020, and further the relevance of such determination would again depend on the outcome of the appeal that was pending before the Supreme Court. We have taken note of that immediately after the judgment dated 20.04.2020 in Civil Appeal No.2256-2263 of 2020, when the occasion had again arisen for the petitioner assessee to seek for fixation of a special rate in respect of the value addition to the manufactured goods for the purpose of payment of the excise duty, the application for such request was made within a period of one month, which is on 18.05.2020. From such point of view, it cannot be wholly said that the petitioner would now be prevented from claiming their legal right for fixation of a

special rate to the value addition to the manufactured goods merely because such application was not made within 30th September of that given financial year to which the claim for fixation of the said rate pertains to.

19. In the peculiar facts and circumstances of the present case, where the necessity for making of a request for fixation of the special rate for the value addition to the manufactured goods may not have occasioned earlier, we deem it appropriate that the Principal Commissioner of GST, Guwahati decides the application of the petitioner dated 18.05.2020 on its own merit as regards the claim for fixation of a special rate to the value addition to the manufactured goods of the given financial year. We also take note of that in the earlier order dated 24.03.2021 in WP(C) No.1644/2021, it was an agreed stand of the respondent GST Department that the application of the petitioner requesting for fixation of a special rate on the value addition to the manufactured goods would be considered and the possibility that the application would be rejected on the ground of it having not been submitted prior to 30th September of that given financial year was not raised when the said order was passed by the Court.

20. If any such apprehension would have been expressed, the matter possibly would have been decided in the earlier writ petition itself. From such point of view also, on the principle of constructive res-judicata, the ground for rejecting such application for the reason that it was not submitted within 30th September of the given financial year would perhaps be not available for the respondent authorities for rejecting the application.

21. In the circumstance, we direct the Principal Commissioner, GST, Guwahati to consider the application of the petitioner dated 18.05.2020 seeking for fixation of a special rate to the value addition to the manufactured goods of the given financial year and decide the same as per law.

22. Writ petition stands allowed in the above terms.

JUDGE

Comparing Assistant

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