(2010) 05 BOM CK 0019

In the Bombay High Court

Case No : Writ Petition No. 3921 of 2010

Bilpower Ltd. APPELLANT

Vs

The Union of India (UOI) and Others RESPONDENT

Date of Decision : 04-05-2010

Acts Referred:

Central Excise Rules, 2002 — Rule 8(1)
CENVAT (Credit) Rules, 2004 — Rule 3(4)
Constitution of India, 1950 — Article 226

Citation : (2010) 177 ECR 187 : (2010) 254 ELT 30

Hon'ble Judges : V.C. Daga, J;K.K. Tated, J

Bench : Division Bench

Advocate : Prakash Shah and Jas Sanghvi, instructed by PDS Legal, for the Appellant; P.S. Jately, for the Respondent

Judgement

V.C. Daga, J.—Heard.

Perused petition.

Rule, returnable forthwith.

Mr. Jately waives service.

Heard finally by consent of parties.

THE FACTS

2. This petition filed under Article 226 of the Constitution of India is directed against the order dated 29th March, 2010 passed by respondent No. 2, Member, Central Board of Excise and Customs, Government of India, Ministry of Finance, New Delhi. By the impugned order, the facility of monthly payment of excise duty as provided under Rule 8(1) of the Central Excise Rules, 2002 was ordered to be withdrawn and directions were issued to the petitioner requiring it to pay excise duty for each consignment at the time of removal of goods w.e.f. 1st April, 2010 to 30th November, 2010. It was also ordered that payment of Excise duty by

utilization of CENVAT credit as provided under Rule 3(4) of the CENVAT Credit Rules, 2004 to be stopped w.e.f. 1st April, 2010 to 30th November, 2010, during which period the petitioner was required to pay excise duty without utilizing CENVAT credit. However, the petitioner was permitted to take CEVNAT credit during this period which can be utilized for payment of duty after the aforesaid period is over.

3. During the course of hearing, it is pointed out that, at the time of sending proposal, the Deputy Director of DGCEI, New Delhi by his letter dated 10th November, 2009 inter alia, informed the petitioner that a proposal from ADG DGCEI, Ahmedabad has been received under the provisions of Notification No.32/2006-CE(NT) dated 30th December, 2006 recommending that, the facility of monthly payment of duty may be withdrawn and the petitioner should be made to pay excise duty for each consignment at the time of removal of goods for a period of three months and that the payment of duty by utilization of CENVAT credit may be restricted and the petitioner shall be required to pay excise duty without utilizing the CENVAT Credit for a period of three months. By the said letter, the Deputy Director called upon the petitioner to make representation within seven days of receipt of the said notice as to why the restrictions as mentioned above should not be imposed in respect of the goods cleared from the petitioner?s factory. By the said letter, the petitioner was also granted a personal hearing before respondent No. 3 to explain its case.

4. The petitioner by its letter dated 13th November, 2009 requested for extension of time for making representations. The petitioner on 2nd December, 2009 appeared before respondent No. 3 and made representation on behalf of petitioner and also submitted a written submissions.

SUBMISSIONS

5. Mr. Shah submits that even though show cause notice was for withholding the CENVAT credit facility for a period of three months, ultimately, the authority has passed the order withholding the same for six months. He, thus, submits that the impugned order travels beyond the scope of show cause notice. It is further submitted that the authority who has issued the notice to the petitioner, did not pass the order. In other words, hearing was given by one authority whereas, the order was passed by another authority, which according to the petitioner is unsustainable in the eye of law.

6. Mr. Jately, on the other hand supported the order by submitting that once the hearing is given by one authority, it is not necessary for the another authority to pass the order hearing the petitioner once again. He further submits that even if the show cause notice was issued withholding the CENVAT credit for a period of three months, the impugned order is made operative for six months, no prejudice can be said to have caused to the petitioner. He, thus, submits that the petition is liable to be dismissed.

CONSIDERATION:

7. Having heard rival parties, considering the fact that the order for withdrawal of CENVAT credit has been ordered for six months as against the proposal of the same for three months, learned Counsel for the respondents submitted that without treating it as a precedent, as an exceptional case, the department has no objection if it is ordered that the petitioner should be heard by the Member (Central Excise), Govt. of India, New Delhi, in view of the peculiar facts and circumstances of this case. Learned Counsel appearing for the petitioner states that till the fresh order is passed, the petitioner may be permitted to utilize the CENVAT credit by keeping the credit balance intact from the accumulated credit for all the time.

8. Considering the aforesaid aspect of the matter, the impugned 29th March, 2010, which is annexed at Exhibit-A to the petition, is set aside with a direction that the Member (Central Excise), Govt. of India, New Delhi, shall hear the petitioner and pass an appropriate reasoned order again in accordance with law following principles of natural justice, latest within a period of four weeks from the date of receipt of the copy of this order. However, it will be open to the Member (Central Excise) to take a decision earlier than the stipulated period. The petitioner to co-operate with the Member (Central Excise) and will not seek any adjournment in any manner and shall remain present on the relevant day with the full record of the case. However, the petitioner may be informed well in advance the date on which it is required to attend the office.

9. The petition is accordingly disposed of subject to the aforesaid directions. It is clarified that this order is passed in view of the peculiar facts and circumstances of the case and it is not to be treated as a precedent in any other case. By setting aside the impugned order, it should not be construed that this Court has expressed its opinion on the merits of the case in any manner and all the questions raised and arguments advanced are kept open for the determination of the Member (Central Excise). This order is passed without prejudice to the rights and contentions of both the parties. Accordingly, Rule is made absolute in terms of this order with no order as to costs.