(2015) 03 BOM CK 0393

In the Bombay High Court

Case No : Writ Petition No. 1191 of 2014

BMW India Pvt. Ltd. — APPELLANT

Vs

Union of India — RESPONDENT

Date of Decision : 30-03-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A(15), 11A(5), 11AA, 11AC(1)(b), 32F
Constitution of India, 1950 — Article 226

Citation : (2015) 324 ELT 115

Hon'ble Judges : B.R. Gavai and A.S. Gadkari, JJ.

Bench : Division Bench

Advocate : N. Venkatraman, Sr. Advocate, Kishore Kunal, Prakash Shah, Jas Sanghavi and Niyati Hakani, Advocates i/b. PDS Legal, for the Appellant; A.S. Rao and S.D. Bhosale, Advocates, for the Respondent

Judgement

1. The Petition challenges the show cause notice issued to the Petitioner on 6-12-2013 thereby inter alia calling upon the Petitioner to show cause as to why total inadmissible Cenvat Credit amounting to Rs. 20,78,77,048/- should not be demanded and recovered from them under the provisions of Section 11A(5) of Central Excise Act, 1944 read with Rule 14 of the Cenvat Credit Rules, 2004; so also as to why an interest at appropriate rate should not be charged from them on the amount of Cenvat Credit under the provisions of Section 11AA of Central Excise Act, 1944 read with Section 11A(15) and Rule 15 of the Cenvat Credit Rules, 2004; and also as to why penalty should not be recovered from them under Section 11AC(1)(b) of Central Excise Act, 1944 read with Rule 15 of the Cenvat Credit Rules, 2004. Shri N. Venkatraman, learned senior Counsel appearing on behalf of the Petitioner submits that for the said period earlier show cause notice was issued to the Petitioner on 9-11-2012. The learned Senior Counsel for the Petitioner submits that the said show cause notice was issued on the premise that though the activities of the Petitioner could not strictly come within the ambit of definition of word "manufacturing" by deeming provision. It was included in the term "manufacture". He submits that the Petitioner did not

dispute with regard to the said position and went before the Settlement Commission. He submits that an issue before the learned Settlement Commission was as to whether prior to the period of registration, the Petitioner was entitled to avail Cenvat Credit or not. He submits that the Petitioner had relied upon the Judgment of the Hon''ble Karnataka High Court in the case of mPortal India Wireless Solutions (P.) Ltd. Vs. Commissioner of Service Tax,] which holds that there is no bar on a manufacturer availing Cenvat credit even if it is not registered. He submits that not only that but the Petitioner had relied on two judgments of the learned Settlement Commissioner itself in support of the said proposition. It is submitted that though the learned Tribunal had given an opportunity to the Revenue to point out Judgments taking contrary view, the Revenue did not produce any judgment before the Settlement Commission and as such the learned Tribunal had held that the claim for Cenvat credit of the additional duty and special additional duty paid at the time of import, towards payment of Central Excise duty in the present case should be allowed. He therefore, submits that the impugned show-cause notice which seeks to reopen the same issue is not permissible in view of Section 32M of the said Act.

2. Shri Rao, learned Counsel for the respondents submits that the Petitioner has approached this Court at a premature stage. He submits that the petition is only challenging the show cause notice. He further submits that the show cause notice which was the subject matter of the learned Settlement Commission is different. He therefore submits that Writ Petition be dismissed in limini.

3. No doubt that this Court would not have ordinarily entertained the petition which challenges the show-cause notice. In ordinary course, the parties could have been directed to file reply to show cause notice and adjudicating authority could have been permitted to take decision in accordance with law. However, it is noticed that the show cause notice expressed in contravention of the statutory provision, this Court could not have been powerless under the Article 226 of the Constitution of India to entertain a petition challenging the show cause notice, which is ex-facie illegal.

4. It will be relevant to refer to Section 32M of the said Act which reads thus:

"32M. Order of settlement to be conclusive. - Every order of settlement passed under sub-section (5) of Section 32F shall be conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in this Chapter, be reopened in any proceeding under this Act or under any other law for the time being in force."

Perusal of the said section would reveal that every order of settlement passed under sub-section of Section 32F shall be conclusive as to the matters stated therein and no matter covered by such order shall, as otherwise provided in this Chapter, be reopened in any proceeding under this act or under any other law for the time being in force.

5. Perusal of the show-cause notice which was a subject matter of the

proceedings before the learned Settlement Commissioner would reveal that the period for which the show-cause notice was issued is the same period for which the impugned show cause notice is also issued. It would also reveal that the main issue on which the petitioner was called upon to show cause in the said notice was regarding non-payment of central excise duty prior to the period of registration which in the opinion of the department amounted to contravention of the Central Excise Act and Rules thereunder. Perusal of paragraphs 20 and 21 of the impugned show-cause notice makes it clear that the issue was with regard to the non-payment of duty prior to registration. The material on record further reveals that the petitioner accepting that it was liable to payment of duty, had approached the learned Settlement Commission only with a contention that even prior to registration, it was entitled to avail Cenvat credit.

6. The Petitioner had relied on the judgment of Karnataka High Court and also judgments of the learned Settlement Commissioner itself. It is relevant to mention paragraph 19.1 of the Judgment and order passed by the learned Settlement Commissioner dated 17-12-2013 which reads thus:

"19.1 The Bench observed that Revenue has sought to argue that the applicant is not entitled to utilize cenvat credit of the Additional Duty and Special Duty paid on auto parts at the time of import. This is because the applicant was not registered with Central Excise authorities. However, the Karnataka High Court in the case of mPortal India Wireless Solutions (P) Ltd. (CEA No. 6 of 2011) has held that there is no statutory provision which prescribes that this is a mandatory pre condition for availing and utilizing cenvat credit. The Bench had specifically asked Revenue to cite any provisions or any order of a Court which is contrary to the decision of Karnataka High Court and various decisions of CESTAT cited by the applicant in support of their contention. The Revenue has been unable to provide any such authority. The Bench also noted that in another case of M/s. Narangs Hospitality Services (P) Limited (F. No. 15/CEX/NGG/2011-SC(MB) another full Bench of the Commission had followed this reasoning laid down by the Karnataka High Court. The Bench felt that the applicant''s claim for utilizing cenvat credit of the Additional Duty and Special Additional Duty paid at the time of import towards payment of Central Excise duty in the present case should be allowed."

7. It would also be relevant to refer to operative part of the order passed by the learned Tribunal as could be seen in paragraph-20. Insofar as payment of duty is concerned, the learned Settlement Commission has ordered thus:

"Duty:- The Central Duty in this case is settled at Rs. 19,99,33,727/- against the applicant. An amount of Rs. 19,99,33,727/- deposited by the applicant is ordered to be appropriated towards the settled amount of duty. Nothing further remains to be paid on this count."

8. Perusal of the impugned show-cause notice and particularly paragraphs 8 and 14 would reveal that the show cause notice is issued on the premise that the

Petitioners were not entitled for obtaining Cenvat credit amounting to Rs. 20,78,77,048/-. In effect the show-cause notice proceeds on the premise that the Cenvat credit sought to be credited by the petitioner prior to the date of registration was inadmissible in law. The show-cause notice therefore demands as to why the said amount should not be recovered from the Petitioner and as to why interest and penalty should not be levied. Perusal of Section 32M would reveal that the very order of settlement passed under Section 5 and Section 32F shall be conclusive as to the matters stated therein and no matters covered by such order shall be reopened in proceedings. The only exception is that it can be done save as provided in this chapter. Nothing has been pointed out by the learned Counsel for the Revenue, which would permit the issue which is already concluded by the order passed by the learned Settlement Commission to be reopened again. We find that the impugned show cause notice seeks to reopen the issue which is finally concluded by an order passed by the learned Settlement Commissioner. In that view of the matter, Rule.

9. There shall be ad-interim relief in terms of prayer clause (e). Taking into consideration the issue involved, hearing is expedited.

