(2009) 03 SHI CK 0016

In the High Court Of Himachal Pradesh

C.B.E. and C. APPELLANT

Vs

Black Gold Rubber RESPONDENT

Date of Decision : 13-03-2009

Acts Referred:

Citation : (2010) 252 ELT 500

Hon'ble Judges : V.K. Ahuja, J;Deepak Gupta, J

Bench : Division Bench

Judgement

Deepak Gupta, J.—By means of this review petition, the petitioners have sought for recalling of the judgment dated 1-10-2007 delivered by us in CWP No, 23 of 2007.

2. Briefly stated the facts of the case are that the writ petitioner is a partnership firm engaged in the manufacturing and sale of tread rubber. The firm is located in District Sirmour, Himachal Pradesh. According to the writ petitioner, it was entitled to fiscal incentives granted to industrial units in backward areas w.e.f. 7-1-2003. According to the writ petitioner, the land on which its industry was set up, was inadvertently left out in the first notification issued by the Central Government and instead of mentioning Khasra Nos. 1 to 418 of Hadbust No. 110 of Tehsil Paonta Sahib only Khasra Nos. 1 to 41 were notified. This mistake was rectified by the Central Government vide notification dated 30th September, 2005.

3. Thereafter, petitioner''s firm was served with a show-cause notice dated 7-7-2006 by the Assistant Commissioner, Central Excise, respondent No. 5 in the writ petition, whereby it was alleged that the petitioner firm is not entitled to claim benefit of exemption prior to 30-9-2005. Reply was filed by the writ petitioner and the respondent No. 5 accepted the explanation of the petitioner and the benefit of the fiscal incentive was extended to the petitioner from the date of commencement of the commercial production after undertaking substantial expansion i.e. from 17-8-2004. Thereafter fresh show cause notices were issued for the same period by the respondent No. 4 in the writ petition, i.e.

Joint Commissioner, Central Excise, Chandigarh. The writ petitioner informed the said officer about the order passed in this regard by respondent No. 5. Despite being informed of this fact, the respondent No. 4 confirmed a demand of Rs. 8,05,874/- with equivalent penalty vide order dated 28-11-2006. On the same ground another notice was issued to the petitioner by respondent No. 5 on 21-12-2006. These notices were challenged in the writ petition.

4. In the judgment we had set out the following points for decision:

1. Whether respondent No. 4 had the authority to pass orders of issuance of fresh show cause notices to the petitioner/unit once the point in issue has been settled as per the orders passed by respondent No. 5.

2. Whether the notification can be said to be applicable retrospectively and as to whether the benefit of subsidy could be granted to the petitioner/Unit from the date of issuance of original notification in 2003 or from the date of issuance of the notification in the form of correction issued w.e.f. 1-10-2005.

3. Whether the petitioner/Unit had already taken the benefit under the scheme promulgated by respondent No. 2, as to whether they are entitled to refund of the excise duty in such circumstances or not.

5. We allowed the writ petition mainly on the ground that the order passed by the respondent No. 5 had attained finality and had not been challenged. In this review petition, it is stated that in fact by mistake it could not be brought to the notice of this Court that the order of the respondent No. 5 was appealed before the Commissioner (Appeals), Central Excise, Chandigarh. It was also not brought to the notice of this Court by the writ petitioner who was aware about such appeal having been filed, as is apparent from the communication dated 31-7-2007 addressed by the writ petitioner to the Commissioner (Appeals) requesting him to keep the matter pending till the writ petition out of which the present review petition arises is disposed of.

6. On the other hand, Ms. Jyotsna Rewal Dua learned Counsel for the respondent No. 1 submits that the order of the respondent No. 5 was challenged only during the pendency of the writ petition. She further submits that this later development has no effect on the merits of the case. According to her, even if the decision of respondent No. 5 is not taken into consideration, the show cause notices issued are totally illegal.

7. We have heard the matter in detail and find that the one common thread which runs through the judgment while dealing with all the issues is that the order passed by the respondent No. 5 has attained finality. The judgment virtually on every issue proceeds on this ground. This is an error apparent on the face of the record. No doubt, it was the duty of the department to have brought this fact to our notice. However, we cannot loose sight of the fact that even the writ petitioner was aware of this fact. Since our judgment has proceeded on this basis, we are of the considered opinion that the same has to be recalled because

the very basis of the judgment has now been shown to be incorrect.

8. Accordingly, the judgment passed in CWP No. 23 of 2007 dated 1st October, 2007 is recalled and the writ petition is now ordered to be listed for admission/ hearing. We may make it clear that while allowing the review petition we have not gone into the merits of the case at all. The Review Petition is disposed of accordingly.

