

(2000) 02 AHC CK 0184

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 1127 of 1999

Jalan Castings (P) Ltd.

APPELLANT

Vs

Commissioner, Central Excise

RESPONDENT

Date of Decision : 28-02-2000

Acts Referred:

Central Excise Rules, 1944 — Rule 96ZO, 96ZO(3)
Central Excises and Salt Act, 1944 — Section 3A(1), 3A(4)
Constitution of India, 1950 — Article 226

Citation : (2000) 119 ELT 531

Hon'ble Judges : M. Katju, J;D.R. Chaudhary, J

Bench : Division Bench

Advocate : None, for the Appellant; Surya Prakash Kesarwani, for the Respondent

Final Decision : Dismissed

Judgement

M. Katju, J.—This writ petition has been filed with a prayer for mandamus directing respondents to decide the petitioners application u/s 3A(4) of the Central Excise Act and not to take coercive measures against the petitioner before determining the actual production u/s 3A(4) of the Act.

2. We have heard learned counsel for the petitioner and Shri Surya Prakash Kesarwani for the respondent.

3. The petitioner is engaged in the manufacture of M.S. Casted Blooms. A provisional determination and final determination was made u/s 3A(1) of the Act, copies of which are Annexures 1 and 2 to the petition. Against the said determination the petitioner made a representation dated 20-11-1998, copy of which is Annexure 3 to the petition. It also made a written submission vide Annexure 5 to the petition. The petitioner wrote a letter dated 29-11-1999 to the Commissioner, Central Excise, Allahabad praying for a re-determination u/s 3A(4) vide Annexure 6 to the petition. However, no action was taken in respect of the same and hence this writ petition has been filed.

4. The Department has filed a counter affidavit. In paragraph 5 of the same it is stated that the petitioner is engaged in manufacture of M.S. Ingots and Billets under Chapter heading No. 7206.90 and not under Chapter heading No. 7244.90 of the Act. In paragraph 8 of the same it is stated that in its letter to the Commissioner dated 1-9-1997 the petitioner opted to avail the benefit of the Scheme in Sub-rule (3) of the Rule 96ZO(3). The said provision reads as under :-

(3) Notwithstanding anything contained elsewhere in these rules, if a manufacturer having a total furnace capacity of 3 metric tonnes installed in his factory so desires, he may, from the first day of September, 1997 to the 31st day of March, 1998 or any other financial year, as the case may be, pay a sum of rupees five lakhs per month in two equal instalments, the first instalment latest by the 15th day of each month, and the second instalment latest by the last day of each month, and the amounts so paid shall be deemed to be full and final discharge of his duty liability for the period from the 1st day of September, 1997 to the 31st day of March, 1998 or any other financial year, as the case may be, subject to the condition that the manufacturer shall not avail of the benefit, if any, under Sub-section (4) of the Section 3A of the Central Excise Act, 1944 (1 of 1944):

Provided that for the month of September 1997 the Commissioner may allow a manufacturer to pay the sum of rupees five lakhs by the 30th day of September, 1997:

Provided further that if the capacity of the furnaces installed in a factory is more than or less than 3 metric tonnes, or there is any change in the total capacity, the manufacturer shall pay the amount, calculated pro rata:

A perusal of Rule 96Z(O) makes it clear that a provision for a lump sum assessment has been made instead of the normal method of assessment, and it is obvious that this provision was made for the sake of convenience for both the assessee as well as the Department. Sub-rule (3) of Rule 96Z(O) states that a person who avails the benefit of Rule 96Z(O) shall not avail of the benefit of Section 3A(4).

5. The allegation in paragraph 8 of the counter affidavit that the petitioner applied for the benefit of the Scheme in Rule 96Z(O) has not been specifically denied in paragraph 8 of the rejoinder affidavit and hence it is to be treated as correct.

6. It may be noticed that where goods have been notified in the Official Gazette u/s 3A(1) then instead of the actual production the excise duty can be levied on the basis of the capacity of production as provided for in Sub-section (2) of the aforesaid provision. However, if an assessee contends that his actual production is less than the capacity of production he can make a representation to the Commissioner under subsection (4) of Section 3A. Hence it is contended by learned counsel for the petitioner that the petitioner's representation u/s 3A(4) should be decided by the Commissioner.

7. In our opinion, when the normal method of determination u/s 3A(2) is being followed then of course the petitioner would have been correct and it would have been open for him to file an application before the Commissioner under Sub-section (4). However, where the petitioner has itself asked for a lump sum method of assessment, and this was agreed by the department then the petitioner cannot back out and claim that he should be assessed by the normal mode. The very Scheme permitting a lump sum payment instead of the normal mode of assessment has been made for the convenience of the assessee as well as for the department, and if the petitioner avails of the same he cannot subsequently turn around and pray that the normal mode should be followed. The petitioner cannot blow hot and cold at the same time. Hence in our opinion the normal mode u/s 3A(4) is not available to the petitioner in the present case where he has opted for the benefit u/s Rule 96ZO of the Rules of making payment on a lump sum basis. In such a case, Section 3(4) has no application at all. Moreover since the petitioner himself has agreed for the payment on lump sum basis we are not inclined to exercise our discretion in such a case, under Article 226 of the Constitution.

8. In *State of Kerala v. Builders Association*, 1997 UPTC 12 the Supreme Court upheld a similar provision for payment of lump sum basis instead of normal mode. The Supreme Court observed that this provision was made to provide a convenient, hassle free and simple method of assessment, and by opting for it the assessee saves himself the botheration of book keeping, assessment, appeals etc. It is a rough and ready method, and is optional. Hence the assessee cannot challenge it after opting for it. In *Jai Sharma Int. Udyog v. Dy. Collector* 1999 (116) STC 357 (all) the Allahabad High Court held that once the assessee opts for a lump sum payment scheme he cannot resile from the same. In *Sri Durga Brick Field v. State* 1991 UPTC 510 the High Court held that when a dealer elects to pay tax on lump sum basis he cannot thereafter contend that the agreement or election is not binding on him because his unit was lying closed or the turnover was nil or inadequate.

9. In the present case, moreover, the petitioner concealed the fact in his petition that he made an option for lump sum payment in his letter to the Commissioner dated 1-9-1997. This itself disentitles him to the discretionary jurisdiction under Article 226 of the Constitution.

10. For the reasons given above, the writ petition is dismissed.