(2016) 12 BOM CK 0017

In the Bombay High Court

Case No : Writ Petition No. 10788 of 2015

Milton Plastics Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 13-12-2016

Acts Referred:

Citation : (2017) 347 ELT 258

Hon'ble Judges : S.C. Dharmadhikari and B.P. Colabawalla, JJ.

Bench : Division Bench

Advocate : Shri V. Sridharan, Senior Counsel with Durga Prasad Poojari, Jas Sanghavi and Ms. Shilpi Jain i/by M/s. PDS Legal, for the Petitioner; Shri M. Dwivedi with Ms. Ruju Thakkar, for the Respondent

Final Decision : Disposed Off

Judgement

S.C. Dharmadhikari, J. (Oral)—This writ petition under Article 226 of the Constitution of India seeks the following relief :-

"(a) that this Hon''ble Court be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other writ, order or direction under Article 226 of the Constitution of India calling for the records pertaining to the petitioner''s case and after going into the validity and legality thereof to quash and set aside the (i) Order-in-Original dated 29-1-2008 passed by the Respondent No. 3, (ii) Order-in-Appeal dated 25-10-2011 passed by the Commissioner (Appeals), and (iii) Final Order dated 26-3-2014 passed by Respondent No. 4;".

2. With the consent of both sides, we take up this writ petition for hearing and final disposal forthwith. Hence, rule. The respondents waive service.

3. The petitioners have filed this writ petition in this Court on 8-10-2014. They state that they are engaged, inter alia, in the manufacture of Insulated Wares of Plastic, Table ware and Vacuum Flask, falling under Chapter Headings 3924, 3923 and 9617, respectively, of the First Schedule to the Central Excise Tariff Act, 1985.

4. They are holding a Central Excise registration. It is their case that they were manufacturing and clearing excisable final products on payment of applicable excise duty. They were duly maintaining all the records and accounts. Those were filed at the time of clearance.

5. The petitioners purchased duty paid inputs/raw materials from outside suppliers for the purpose of manufacturing final products. They received such inputs under the cover of appropriate duty paying documents, as required by Rule 7(1) of the Cenvat Credit Rules, 2002 (for short, "the CC Rules"). They availed Cenvat credit of excise duty paid on the inputs received in their factory in terms of Rule 3(1) read with Rule 3(3) of the CC Rules. They have maintained proper Cenvat register/account for the inputs so received and the Cenvat credit availed by them in terms of Rule 7(4) of the CC Rules.

6. The petitioners also have a unit/factory at Silvassa and Bhayander. These units are separately registered with the Central Excise Department. They are also manufacturing and clearing their excisable products. The petitioners state that these two units and the petitioners are purchasing inputs independently from various outside suppliers for manufacturing their final product and availing Cenvat credit on such production.

7. However, on few occasions and to meet certain urgent requirements, the petitioners indulged in what is called as stock transfer. In such cases, inputs which are a stock with the other units were transferred on reversal of appropriate excise duty under the cover of an invoice. The petitioner-unit after setting out this elaborate procedure has claimed that there was no warrant to issue Show Cause-cum-Demand Notice dated 19-4-2007 for recovery of Cenvat credit amounting to Rs. 7,98,869/- availed on inputs during the period 1-4-2002 to 28-2-2003. The recovery was threatened under Rule 12 of the CC Rules read with Section 11A of the Central Excise Act, 1944.

8. Mr. Sridharan, learned Senior Counsel appearing on behalf of the petitioners, would submit that the petitioners are not challenging the order passed by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) dismissing their statutory appeal. They are also not challenging the order passed by the Commissioner of Central Excise (Appeals). He submits that both appeals were dismissed on the ground of limitation/time-barred. The petitioners accept the fact that their appeals to the said authorities were barred by limitation, but they are not estopped in law from questioning the Original Order. Particularly Mr. Sridharan submits that this can be done in the facts of the present case where the said order passed on the show cause notice by the adjudicating authority fails to take note of an important contention and that is, that the Cenvat Credit Rules were amended by Notification No. 13/2003, dated 1-3-2003. Rule 7 of the CC Rules which hitherto employed the word "Purchased" was substituted by inserting the word "Procured". The question is, whether during the period of availment of Cenvat credit from 1-4-2002 to 28-2-2003, whether this amended provision would apply Whether that amended provision is clarificatory or a

substantive one and, therefore, would operate prospectively is a question or issue not addressed in the order passed by the Joint Commissioner on 29-1-2008, is the submission of Mr. Sridharan.

9. Mr. Dwivedi, appearing on behalf of the respondents, on the other hand, would submit that as far as the limitation goes, the finding of fact rendered in both orders, namely, that of the Commissioner of Central Excise (Appeals) and the CESTAT does not require any interference as the same is consistent with the statutory provision. However, he fairly states that in the order of the Joint Commissioner the above aspect has not been discussed and all that is held is that because of the period of availment of the Cenvat credit, the amended Notification and the provision will not apply.

10. After having heard both sides, we find that the finding of fact that there is violation of Rule 7(4) read with Rule 13(2) of the CC Rules and that would attract penalty and interest is a finding rendered without adverting to the important contention raised before us, namely, whether the provision in question, as amended, is clarificatory and, therefore, would apply irrespective of the date of clearance or availment of the Cenvat credit or will it have prospective operation, namely, from the date of its introduction. That ought to be considered. That issue has not been addressed. We have perused carefully the findings in the order passed on 29-1-2008 from running pages 93 to 95 (internal pages 6 to 8). However, there is no discussion on this aspect, though squarely raised.

11. In the light of the above, we are of the opinion that in the facts and circumstances of the present case and without this order being treated as a precedent for future cases, the impugned demand can be and is accordingly quashed and set aside. However, the show cause notice is kept alive for adjudication. The petitioners shall appear before the adjudicating authority on 22-12-2016. The adjudicating authority, if the petitioners so appear, shall hear the matter again and pass a fresh order. While passing the fresh order on the point noted above, the adjudicating authority shall not be influenced by any earlier conclusions. We expressly keep open the rival contentions. We clarify that we have not held the said provision to be prospective or clarificatory. That issue must be squarely addressed and decided by the authority in terms of our directions.

12. We clarify that we have not allowed the petitioners to raise any ground before us on the point of limitation, as applicable to the appellate remedy. But we clarify that insofar as the demand is concerned, our order and findings do not preclude the petitioners from raising appropriate contentions and pointing out that the show cause notice itself could not have been issued in the light of the bar of limitation and as amended in the statute.

13. The writ petition succeeds accordingly. There will be no order as to costs.