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(2010) 12 P&H CK 0606

In the Punjab And Haryana At Chandigarh

Case No : CWP No. 21859 of 2010 (O and M)

Modulus Prefab Solutions APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

Date of Decision : 21-12-2010

Acts Referred:

Central Excise Rules, 2002 — Rule 12CC, 8(1)
Central Excises and Salt Act, 1944 — Section 11AC
CENVAT (Credit) Rules, 2004 — Rule 12AA, 3(4)

Citation : (2011) 264 ELT 17

Hon'ble Judges : Rajesh Bindal, J;A.K. Goel, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Adarsh Kumar Goel, J.—This petition seeks quashing of order dated 26.11.2010, Annexure P-13, passed by the Member, Central Board of Excise and Customs, under Rule 12 CC of the Central Excise Rules, 2002 read with Notification No. 32/2006-CE (NT) dated 30.12.2006.

2. The Petitioner is manufacturer of Telecom Prefabricated Shelter/ Panels, Telecom Huts, Oil filters and other items and is registered with Central Excise Department. It uses galavanised corrogorated sheets (GC Sheets) and FRR Sheets for strengthening/ manufacturing the shalters/ panels/ telecom huts.

3. The department received information about evasion of duty by the Petitioner and issued a show cause notice dated 25.5.2010 u/s 11AC of the Central Excise Act, 1944 alleging that it was availing CENVAT credit, on Galvanized Corrugated Sheet without actual receipt and use of the same in manufacturing of final product, proposing recovery of about ` 70 lacs with interest and penalty. Before the said show cause notice was issued, the Chief Commissioner forwarded a proposal for action in terms of Rule 12 CC of the Central Excise Rules, 2002 read with notification dated 30.12.2006. After consideration of the said proposal, the Chief Commissioner made recommendations to the Board for passing an order

under the Rules. Accordingly, the Board vide order dated 23.8.2010, after recording a prima facie finding of evasion of duty by the Petitioner passed order, the operative part of which is as under:

8. In view of the foregoing, I hereby pass the following order:

i. The facility of monthly payment of excise duty by M/S Modulus Prefab Solutions, Sector 4, Old Kasauli Road, Parwanoo (H.P.), as provided under Rule 8 (1) of the Central Excise Rules, 2002 is ordered to be withdrawn and they are required to pay excise duty for each consignment at the time of removal of the goods with effect from 27.8.10 to 28.2.11.

ii. Payment of excise duty by utilization of CENVAT credit as provided under Rule 3 (4) of the CENVAT Credit Rules, 2004, is ordered to be stopped with effect from 27.8.10 to 28.2.11. During this period, they are required to pay excise duty without utilizing CENVAT Credit. However, they are permitted to take CENVAT credit during this period which can be utilized for payment of duty after the aforesaid period is over.

iii. The Assessee will maintain records of receipt, disposal, consumption and inventory of the principal inputs on which Cenvat credit has not been taken with effect from 27.8.10 to 30.11.10.

iv. The Assessee will intimate the jurisdictional Superintendent of Central Excise within twenty four hours of the receipt of principal inputs in the factory on which Cenvat credit has or has not been taken and the same should be kept available for verification for the next 48 hours. This restriction will be applicable for the period from 27.8.10 to 30.11.10.

9. M/s Modulus Prefab Solutions, Sector 4, Old Kasauli Road, Parwanoo (H.P.), are also informed that if they clear the goods in violation of the above mentioned restrictions, the said goods shall be treated as having been cleared in contravention of the provisions of Rule 12CC of the Central Excise Rules, 2002 and necessary action as provided in the law in this regard would be taken.

The Petitioner filed CWP No. 17480 of 2010 challenging notification dated 30.12.2006 whereby Rule 12 CC has been inserted in Central Excise Rules, 2002, Notification No. 31/2006-CE (N.T.) whereby Rule 12 AA has been inserted in Cenvat Credit Rules, 2004 and consequent Notification No. 32/2006-CE (N.T.) dated 30.12.2006 as well as order dated 23.8.2010.

4. The writ petition was disposed of on 15.11.2010 holding that the Board could not take a decision without considering the view point of the Petitioner against the recommendations of the Chief Commissioner as held by this Court on 15.10.2010 in CWP No. 16796 of 2010 (M/s Saviton Metplast (P) Ltd. V. Union of India and others). The impugned provisions were, however, upheld. A direction was issued for passing a fresh order within two weeks of receipt of comments of the Petitioner. The operative part of the order is as under:

8. Question now is as to what relief can be granted. The impugned order was passed before our order dated 5.10.2010 in M/s Saviton Metplast (P) Ltd. case (supra) on which reliance has been placed on behalf of the Petitioner. In these circumstances, instead of quashing the impugned order, the representative of the Board must be given an opportunity to pass a fresh order after considering the view point of the Petitioner. A copy of the recommendation of the Chief Commissioner has been furnished to counsel for the Petitioner today. The Petitioner may furnish its comments in the matter to the concerned authority within one week and after taking into account the said comments, a fresh order be passed within two weeks thereafter by the Member, Central Board of Excise and Customs in accordance with law. If no order is passed within two weeks after the filing of the comments by the Petitioner, the impugned order will cease to operate till a fresh order is passed. Status quo as on today will continue upto 6.12.2010 or till passing of a fresh order whichever is earlier. Thereafter the matter will abide by the fresh order so passed.

Accordingly, the Petitioner furnished its comments dated 17.11.2010 and denied the allegations of evasion of duty and non receipt of goods and their nor user in manufacturing. Stand of the Petitioner was that the goods were duly received and used in manufacturing and the CENVAT credit was validly availed. The Petitioner also claims to have made further representation dated 22.11.2010.

5. Thereafter, the impugned order dated 26.11.2010 has been passed, the operative part of which is as under:

14. In view of the foregoing, I hereby pass the following order:

(a) The facility of monthly payment of excise duty by M/s. Modulus Prefab Solutions, Sector 4, Old Kasauli Road, Parwanoo (H.P.), as provided under Rule 8 (1) of the Central Excise Rules, 2002 is ordered to be withdrawn and they are required to pay excise duty for each consignment at the time of removal of the goods with effect from 1/12/10 to 31/5/11.

(b) Payment of excise duty by utilization CENVAT credit as provided under Rule 3 (4) of the CENVAT Credit Rules, 2004, is ordered to be stopped with effect from 1/12/10 to 31/5/11. During this period, they are required to pay excise duty without utilizing CENVAT credit. However, they are permitted to take CENVAT credit during this period which can be utilized for payment of duty after the aforesaid period is over.

(c) The Assessee will maintain records of receipt, disposal, consumption and inventory of the principal inputs on which Cenvat Credit has not been taken with effect from 1/12/10 to 28/2/11.

(d) The Assessee will intimate the jurisdictional Superintendent of Central Excise within twenty four hours of the receipt of principal inputs in the factory on which Cenvat Credit has or has not been taken and the same should be kept available for verification for the next 48 hours. This restriction will be applicable for the period from 1/12/10 to 28/2/11.

6. We have heard learned Counsel for the parties.

7. Learned Counsel for the Petitioner submitted that the Petitioner neither evaded duty nor availed credit wrongly and in the circumstances there was no justification for passing of the impugned order. He also submitted that in the impugned order dated 26.11.2010, restrictions have been further enhanced from February 2011 to May 2011 for a period of three months without any change of situation. Learned Counsel for the Petitioner further submitted that beyond saying that the representation of the Petitioner was duly gone through, there is no consideration thereof.

8. In the reply filed by the Commissioner, the impugned order has been defended. The said reply can hardly be considered as relevant as the Commissioner cannot be taken to be representing the Board in respect of statutory order passed by it. It is a different matter that the Commissioner may otherwise defend the order as representative of the department.

9. The question for consideration is whether there was justification for the impugned order and for imposing higher and further restrictions in the impugned order over and above earlier order dated 23.8.2010.

10. As regards justification for the impugned order, we find that there is material in support of the allegation of wrong availment of CENVAT credit. As per proposal of the Chief Commissioner, the Assessee availed credit worth ` 65.66 lacs from December 2006 to August 2008 on G. C. Sheets which were not used for manufacturing of goods. This proposal was based on investigation and the statements, inter-alia, of Rajan Dhir, Shahid Hussain, Sameer Bhasin, Shri Tote and Suresh Sharma, who were conversant with the issue. The Chief Commissioner gave personal hearing to the representative of the Petitioner. Before passing of order, the Member of the Board also considered the representation and comments of the Petitioner. It cannot be held that the impugned order is without any basis or material or justification.

11. The impugned order shows consideration of the view point of the Petitioner in para 11 thereof. The conclusion is that the allegation was, prima facie, established. Having regard to the nature of power, the Board is not expected to finally adjudicate on the matter.

12. However, we find merit in the contention that after passing of order dated 23.8.2010, there was no occasion for further or enhanced restrictions in the absence of any fresh material or circumstance. There is no discussion for imposing higher restrictions in the impugned order over and above those in order dated 23.8.2010. To this extent, contention on behalf of the Petitioner has to succeed.

13. Accordingly, we partly allow this petition and set aside the impugned order dated 26.11.2010 to the extent it enhances restrictions over and above the order

dated 23.8.2010. It is made clear that observations made in this order will not influence the adjudication in pursuance of show cause notice or debar passing of any fresh order in accordance with law.

