(2010) 11 P&H CK 0154

In the Punjab And Haryana At Chandigarh

Case No : CWP No. 17480 of 2010 (O and M)

Modulus Prefab Solutions APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

Date of Decision : 15-11-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11AC

Citation : (2010) 11 P&H CK 0154

Hon'ble Judges : Ajay Kumar Mittal, J;Adarsh Kumar Goel, J

Bench : Division Bench

Judgement

Adarsh Kumar Goel, J.—This petition seeks quashing of notification dated 30.12.2006 inserting Rule 12CC in Central Excise Rules, 2002, notification of the same date inserting Rule 12AA in Cenvat Credit Rules, 2004 and further notification dated 30.12.2006 laying down procedure for action as per the said rules. Challenge has also been laid to order dated 23.8.2010 passed by the Member, Central Board of Excise and Customs imposing restrictions as follows:

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4, Old Kasauli Road, Parwanoo (H.P.), as provided under Rule 8(1) of the Central Excise Rules, 2002 is ordered to be withdrawn and they are required to pay excise CWP No. 17480 of 2010 -2 duty for each consignment at the time of removal of the goods with effect from 27.8.10 to 28.1.11.

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.

2. Case of the Petitioner is that it manufactures goods and on clearance thereof, duty is leviable under the Central Excise Act, 1944. There are provisions for monthly payment of excise duty instead of paying duty for each consignment, for Cenvat Credit and other provisions for more convenient method of collection of duty. The impugned provisions have been added to restrict the said facilities on allegation of evasion and misuse of facilities provided under the Rules. On receiving information for evasion of duty by the Petitioner, a show cause notice dated 25.5.2010 was issued u/s 11AC of the Act stating that the Petitioner was availing Cenvat Credit on Galvanized CWP No. 17480 of 2010 -3-Corrugated Sheet without actual receipt and use of the same in the factory premises without use in the manufacture of their final product proposing recovery of about Rs. 70 lacs with interest and penalty. Simultaneously, the proposal was made by the Chief Commissioner, Central Excise proposing action as per impugned rules. The said proposal was duly considered by the Chief Commissioner who after giving opportunity of hearing to the Petitioner made recommendation that action be taken as per impugned rules which led to the passing of the impugned order by the Member of the Board.

3. We have heard learned Counsel for the parties.

4. As regards the validity of the impugned provisions, the matter has been considered by this Court on 5.10.2010 in CWP No. 16796 of 2010 (Saviton Metplast (P) Ltd. v. Union of India and Ors.), wherein it was held that legislature power to levy tax included incidental power to check evasion. The impugned rules were not liable to be struck down. Whether or not existing provisions for recovery of duty, interest and penalty were sufficient to deal with the evasion was a matter which normally could not be interfered with in exercise of power of judicial review. However for exercise of such a drastic power just, fair and reasonable procedure was the requirement of Article 21 of the Constitution which includes compliance with natural justice unless such requirement is expressly or impliedly excluded. It was further held that the power to take decision was conferred on the representative of the Board without providing any opportunity or consideration of view point of the Assessee. In absence of express exclusion, it was held that there was no ground to impliedly exclude opportunity of hearing to the Assessee before adverse recommendation by the Chief Commissioner was accepted. To make such opportunity meaningful, a copy of the recommendation of the Chief Commissioner is required to be furnished to the Assessee. The observations in the said order are as under:

12. There can be no doubt about legislative competence to enact a provision against evasion of tax. In fact, legislative incompetence is not even the case of the Petitioner. Power to levy tax includes all incidental powers to prevent evasion of tax. The said powers may include power to seize and confiscate, power to levy penalty, power to prosecute or such other provision as may have nexus with the evasion of duty.

19. As per impugned procedure, hearing by Board is neither provided nor excluded and in such a situation, there is no reason to exclude applicability to requirement to give hearing. Hearing by Chief Commissioner has been provided before adverse recommendation is made. This does not mean that Board has to take decision without opportunity to the affected party affected by acceptance of recommendation. To make hearing effective, a copy of recommendation must be furnished to the affected party on the analogy of judgment in Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc., . Personal hearing is not a must. Madhya Pradesh Industries Ltd. Vs. Union of India and Others (UOI), . Thus, read, the procedure has to be upheld. The question is answered accordingly.

5. In the present case, admittedly the Board has taken its decision without considering the view point of the Petitioner. The Petitioner having not been furnished a copy of recommendation of the Chief Commissioner had no effective opportunity to meet the findings under requisition. The petition has, thus, to be allowed.

6. Learned Counsel for the revenue submits that this Court may relegate the Petitioner to the remedy of filing review petition even though there is no provision for doing so. Reliance has been placed on the judgment of Madras High Court in Reil Electricals India Ltd. Vs. Member of C.B.E. and C, .

7. We are unable to accept the submission. In the judgment relied upon, the contention that there was no power to review and that there was denial of opportunity of being heard before the Board have not been examined.

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.

9. The writ petition is disposed of accordingly.