(2011) 10 MAD CK 0209

In the Madras High Court

Case No : Writ Petition No. 19909 of 2011 and MP. No. 1 of 2011

M/s. Techno Rubber and Plastics APPELLANT

Vs

Customs and Central Excise Settlement Commission Additional Bench II Floor Narmada Block Customs House 60 Rajaji Salai Chennai 1 and The Commissioner of Central Excise Chennai IV Commissionerate Mhu Complex 692 Anna Salai Nandanam Chennai 35 RESPONDENT

Date of Decision : 29-10-2011

Acts Referred:

- Central Excise Rules, 2002 — Rule 25, 8, 8(3A)
- Central Excise Rules, 2004 — Rule 15
- Central Excises and Salt Act, 1944 — Section 11, 11A, 11AB, 32E(1), 32L(1)
- CENVAT (Credit) Rules, 2004 — Rule 3(1), 3(4), 6(3)
- Constitution of India, 1950 — Article 226

Citation : (2011) 10 MAD CK 0209

Hon'ble Judges : Chitra Venkataraman, J

Bench : Single Bench

Advocate : Mohammed Shaffiq, for the Appellant; P. Mahadevan Senior Central Govt. Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

Honourable Mrs. Justice Chitra Venkataraman

1. By consent of both parties, the writ petition itself is taken up for final hearing. On notice, the Revenue has filed its counter.

2. The petitioner herein seek to issue of a Writ of certiorarified mandamus to quash the order of the first respondent herein viz., Customs & Central Excise Settlement Commission dated 23.6.2011 with direction to the first respondent to hear the matter afresh and on merits and in terms of Rule 8(3A) of the Central Excise Rules, 2002 with its explanation.

3. The petitioner herein is engaged in the manufacture of automobile

components falling under chapter heading "87083900" of the Central Excise Tariff Act, 1985. Admittedly, the petitioner did not pay the duty in respect of its manufacture of automobile components falling between June 2009 and January 2010. The petitioner is stated to have paid the said relevant duty for the above period as follows:

DEFAULT AMOUNT

Month

Duty

EDU CESS

SHE CESS

Total Duty

Inter -est

Total

Paid on

Jun-09

275000

6000

3000

284000

21747

305747

5/2/10

Jul-09

295000

6000

3000

304000

0

304000

5/8/09

Aug-09

255000

5000

2000

262000

560

262560

14/9/2009

Sep-09

268000

4500

2500

275000

1000

276000

20/10/2009

Oct-09

226000

4000

2000

232000

1660

233660

25/11/2009

Nov-09

240000

5000

2500

247500

2292

249792

2/1/10

Dec-09

270000

5500

2500

278000

2871

280871

5/2/10

Jan-10

225000

4500

2500

232000

1740

233740

3/3/10

Balance of interest

1525

1525

2/12/10

Total

2054000

40500

20000

2114500

33395

2147895

4. It is stated that the petitioner defaulted in payment of duty from June 2009 and subsequent months, wherein the duty was paid with interest. The dispute

herein relates to the payment of duty relatable to June 2009, which was paid in February 2010. Considering the default thus committed, the Officer concerned reversed CENVAT credit to the tune of Rs.22,17,863/-relevant to the period from June 2009 to February 2010 as credit not eligible. A notice was issued on 25.8.2010 taking the view that the assessee had utilised CENVAT credit during the period during which the duty should have been paid in terms of Rule 8(3A). As the petitioner had contravened the provisions of Rule 8(3A) and had removed the goods utilising CENVAT credit during the period from 5.8.2009 to 4.2.2010, without payment of duty, the same was liable to be reversed to the tune of Rs.22,17,863/-as per the provisions of sub Rule 4 of Rule 8 read with Section 11A of the Central Excise Act, 1944, apart from that with interest at the appropriate rate till the date of payment of duty u/s 11AB read with Rule 8(3A) of the Central Excise Rules 2002 besides levying penalty under Rule 25 of the Central Excise Rules 2002 and Rule 15 of Central Excise Rules 2004.

5. Immediately on receipt of the said notice, after paying the admitted duty, the petitioner moved the first respondent herein u/s 32E(1) of the Central Excise Act, 1944 seeking immunity from penalty, prosecution etc under the Central Excise Act. The application made by the petitioner was admitted by the first respondent herein by order dated 3.1.2011. After receipt of the report from the Commissioner, considering Rule 8(3A), the first respondent rejected the petition holding that the petitioner had not co-operated towards settlement of the demanded duty through PLA/ Cash and the application was remanded to the original adjudicating authority in terms of Section 32L(1) of Central Excise Act, 1944, for disposal at his end. The said order made by the first respondent is now under

6. A perusal of the order of the first respondent shows that it considered the claim of the petitioner that there had been no defaults exceeding 30 days in paying respective duty amounts during the period July 2009 to January 2010. However the duty relating to June 2009 due on 5.7.2009 for a sum of Rs.2,84,000/-was paid on 5.2.2010 along with the applicable interest. Hence, the denial of CENVAT credit was unsustainable.

7. On a specific query made by the first respondent as to whether the assessee was willing to pay the amount of Rs.22,17,863/-for the period 5.8.2009 to 4.2.2010, the petitioner contended that the question of payment of duty by cash did not arise and the payment through CENVAT credit was correct in law. In the light of the provisions of the Act thus available under Rule 8(3A) of the Act, the petitioner sought for settlement of dispute. In considering the said contention, the first respondent viewed that there was violation of Central Excise Rules 2010 and the applicant''s case comes under Sub Rule 3A of Rule 8 of the said Rule, which reads as under:

If the assessee defaults in payment of duty beyond thirty days from the due date, as prescribed in sub-rule(1), then notwithstanding anything contained in said sub-rule(1) an sub rule(4) of rule 3 of CENVAT Credit Rules, 2004, the assessee shall, pay excise duty for each consignment at the time of removal, without utilizing the CENVAT credit till the date the assessee pays the outstanding amount including interest thereon; and in the event of any failure, it shall be deemed that such goods have been cleared without payment of duty and the consequences and penalties as provided in these rules shall follow".

8. In the light of the above said provision, the first respondent viewed that if the assessee agreed to pay the duty with interest in cash, matching CENVAT credit of Rs.22,17,863/-, the same would automatically get restored to the credit of the assessee. Since the assessee had refused to comply with such demand and not extended any co-operation towards settlement of the case, the first respondent rejected the petition filed by the assessee and remanded the matter to original adjudicating authority in terms of Section 32L(1) of the Central Excise Act, 1944. The first respondent passed corrigendum order on 5.7.2011. However, this does not make material change to the final decision made by it. Aggrieved by the same,the petitioner has come before this Court.

9. Learned counsel appearing for the petitioner herein brought to my attention, Rule 8(3A) and the explanation appended thereto, which reads as follows:

"Rule 8. Manner of Payment - (1) The duty on the goods removed from the factory or the warehouse during a month shall be paid by the 6th day of the following month, if the duty is paid electronically through internet banking and by the 5th day of the following month, in the other case:

Provided that in case of goods removed during the month of March, the duty shall be paid by the 31st day of March:

....

[(3A). If the assessee defaults in payment of duty beyond thirty days from the due date, as prescribed in sub-rule(1), then notwithstanding anything contained in said sub-rule(1) an sub-rule(4) of rule 3 of CENVAT Credit Rules, 2004, the assessee shall, pay excise duty for each consignment at the time of removal, without utilizing the CENVAT credit till the date the assessee pays the outstanding amount including interest thereon; and in the event of any failure, it shall be deemed that such goods have been cleared without payment of duty and the consequences and penalties as provided in these rules shall follow.

(4) The provisions of Section 11 of the Act shall be applicable for recovery of the duty as assessed under rule 6 and the interest under sub-rule (3) in the same manner as they are applicable for recovery of any duty or other sums payable to the Central Government.

Explanation.-For the purposes of this rule, the expressions ''duty'' or ''duty of excise'' shall also include the amount payable in terms of the CENVAT Credit Rules, 2004]" [EMPHASIS SUPPLIED]

10. Placing emphasis on the Explanation to the Rule that the expression of

''duty'' or ''duty of excise'' included the amount payable in terms of CENVAT Credit Rules, 2004, he submitted that the question of construing the assessee as a defaulter in payment of duty beyond 30 days resulting in applicability of Section 8(3A) will not arise. He submitted that although the petitioner did not make a specific reference to the said explanation, yet it made a point that the CENVAT credit to its account also had to be reckoned into the payment of duty. Thus, in the light of the fact that the explanation expands the scope of the expression of ''duty'' or ''duty of excise'' inclusive of the amount payable in terms of CENVAT credit under the said Rule, as relevant in the matter of construing the Rule 8(3A) of the Act, learned counsel for the petitioner has submitted that the claim of the assessee merits reconsideration at the hands of the first respondent herein.

11. A reading of the order shows that even though the assessee had not made a direct reference to the Explanation appended to Rule 8(3A) of the Act in support of its contention, yet, in paragraph 7.2, the first respondent recorded the submission of the petitioner as to the payment made through CENVAT credit as permissible in law.

12. A reading of the first respondent''s order in paragraph 7.1 shows that it considered claim of the petitioner by applying Rule 8(3A) only. The Explanation appended thereto in Rule 8(3A) under the Notification No. 8/2007 - C.E. (N.T) dated 1.3.2007 with effect from the date of insertion in the rules however has not been considered at all.

13. The Revenue questioned the maintainability of the writ petition as against the order of the first respondent. In the decision of the Apex Court reported in Jyotendrasinhji Vs. S.I. Tripathi and others, , the Apex Court pointed out that where the statutory authority (in that decision the Settlement Commission) passed an order ignoring the provisions of law, thereby a prejudice is caused to the applicant, the same is liable to be interfered within the petition filed under Article 226 of the Constitution of India.

14. Considering the fact that the first respondent had not considered the claim of the petitioner in the light of the provisions of law thus available, in fitness of things, this Court feels that the contention of the petitioner merits acceptance. Hence, the objection of the Revenue on the maintainability of the writ petition stands rejected.

15. In the light of the above aspect, the proper course herein would be to set aside the order of the first respondent and restore the matter to the first respondent for fresh consideration of the claim of the petitioner herein in terms of Rule 8(3A) with its Explanation appended thereto.

16. Accordingly, the writ petition is allowed. No costs. The order of the first respondent is quashed, thereby, the first respondent is directed to consider the case of the petitioner afresh and pass an order in terms of rule 8(3A) with its explanation appended thereto.

17. It is open to the petitioner to give such other submissions as are available under the law before the first respondent and if any such submission is taken afresh, the first respondent shall consider the same in accordance with the provisions of the Rule 8(3A) with its explanation appended thereto.