(2014) 10 MAD CK 0199

In the Madras High Court

Case No : Writ Petition No. 11266 of 2014

Saehan Stamping Pvt. Ltd. APPELLANT

Vs

The Commissioner of Central Excise RESPONDENT

Date of Decision : 15-10-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11, 12, 8(1)
Customs Act, 1962 — Section 142

Citation : (2015) 315 ELT 362 : (2014) 48 GST 724

Hon'ble Judges : T.S. Sivagnanam, J

Bench : Single Bench

Judgement

T.S. Sivagnanam, J.—By consent of the learned counsel on either side, the writ petition itself is taken up for final disposal.

2. Heard Mr. M.Venkatachalapathy, learned Senior Counsel for Mr. S.Gurumoorthy, learned counsel appearing for the petitioner and Mr. P.Mahadevan, learned Standing Counsel for the respondents.

3. The petitioner has filed this writ petition, challenging the order passed by the 2nd respondent dated 21.03.2014. By the said proceedings, the 2nd respondent has pointed out that the petitioner has not paid the duty and the applicable Education Cess and Secondary Higher Education Cess within the due date as stipulated under Rule 8(1) of Central Excise Rules, 2002 for the goods manufactured and cleared from your factory during the period from 01.04.2013 to 28.02.2014. By placing Rule 8(3A) of Central Excise Rules, 2002, it was stated that since the petitioner has not paid the duty even after the lapse of 30 days from the stipulated due date for payment of duty, the petitioner is not eligible to utilize the Cenvat Credit for payment of duty.

4. On perusal of ERI returns, it was pointed out that the petitioner utilized Cenvat Credit of Rs. 2,17,25,877/- for the payment of Excise duty for the period from April, 2013 to February, 2014, which is in contravention of Rule 8(3A) of Central Excise Rules, 2002. Therefore, the petitioner was directed to pay the said

amount in cash along with appropriate interest latest by 28.03.2014, failing which recovery action under Section 11 of the Central Excise Act, 1944, would be taken.

5. The petitioner submitted a representation dated 27.03.2014, stating that they have sufficient balance in the Cenvat account for payment of BED dues and the same was adjusted from Cenvat account. It was further submitted that there are several decisions of CESTAT, holding that credit would be utilized for payment of Education Cess. Therefore, it was stated that they have not violated any of the provisions of Rule 8(1) or Rule 8(3) or Rule 8(3A) and hence, the proposed recovery action contemplated under Section 11 of the Central Excise Act, 1944 is not warranted. The petitioner stated that they may be issued show cause notice by affording an opportunity to submit its reply and the matter may be adjudicated.

6. The respondent in reply to the said communication, by proceedings dated 29.03.2014, submitted that since duty was not paid within the due date as stipulated under Section 8(1) of the Act, the petitioner is not eligible to utilize Cenvat credit. Furthermore, it was submitted that this Court in the case of Unirols Airtex Vs. Assistant Commr. of C. Ex., Coimbatore, has held that Cenvat credit cannot be used as a matter of right for payment of duty of excise, in case the assessee defaults in payment of duty before the cut off period under Rule 8(3A) of the Central Excise Rules, 2002 and the said Rules restrain the assessee from using Cenvat credit till the entire outstanding amount including interest is paid. Therefore, the plea raised by the petitioner was rejected.

7. Even thereafter, the petitioner did not effect payment and therefore, amounts were recovered from the suppliers of the petitioner, who are liable to pay to the petitioner. It is submitted by the learned Senior Counsel for the petitioner that in that process more than Rs. 77 lakhs has been recovered by the respondents as against the total demand of Rs. 2,17,25,877/-. Learned Senior Counsel for the petitioner submitted that sufficient time may be granted to the petitioner to effect payment, since they have sufficient credit. However, availability of credit alone is not a factor for the purpose of availing Cenvat credit. In terms of Rule 8(1) of the Central Excise Rules, 2002, the duty liability for any month has to be paid on or before 6th in case of online payment or 5th of the succeeding month. In terms of sub rule (3A) thereof, if there is any failure to pay the duty within the due date and if the duty is not paid even after 30 days from the due date, the consequences under the said rule, namely, forfeiture of facility to utilise Cenvat credit and daily payment of duty in cash would follow. Thus, the Rules operate in such a manner that after 30 days of the default, the Deputy Commissioner is obligated to proceed against the assessee to recover the arrears in terms of Section 11 of the Central Excise Act, r/w Section 142 of the Customs Act, 1962, made applicable to Central Excise dues in terms of Notification No. 68/63 CE dated 04.05.1963 as amended from time to time issued under Section 12 of the Central Excise Act.

8. The petitioner admittedly does not dispute the fact that they have defaulted in payment beyond 30 days. In such circumstances, action initiated by the respondent cannot be faulted with. However, it is stated that the assessee has given the statement to the investigating officer on 07.03.2014, which is contrary to the contention now raised before this Court in this writ petition. Therefore, the respondent would justify the action that based on the assessee''s demand alone, they have initiated action. As pointed out earlier, there is no discretion vested with the authority to allow the petitioner to avail Cenvat credit till they clear dues. Once they clear dues, admittedly, the benefit is accrued to the petitioner, if there is no other legal impediment for doing so. Therefore, the writ petition will have to be dismissed.

9. At this juncture, learned Senior Counsel for the petitioner submitted that already Rs. 77 lakhs has been recovered from the petitioner and therefore, the petitioner may be given an opportunity to approach the respondent with the request to pay the remaining amount in installments or by granting reasonable time and in the meantime, no coercive steps should be initiated against the petitioner.

10. Accordingly, while dismissing the writ petition, liberty is granted to the petitioner to submit a representation to the 2nd respondent within a period of 10 days from the date of receipt of a copy of this order, requesting for time by duly indicating as to what date the balance amount will be paid. If any such representation is submitted, the 2nd respondent shall consider the same in accordance with law within a period of two weeks from the date of receipt of such representation. Till then, no coercive steps shall be taken against the petitioner by the 2nd respondent. No costs. Consequently, connected miscellaneous petition is closed.