(2014) 02 MAD CK 0103

In the Madras High Court

Case No : W.A. (MD) No. 339 of 2014 and M.P. (MD) No. 2 of 2014

Sanmar Foundaries Ltd. APPELLANT

Vs

Commissioner of Central Excise and Customs RESPONDENT

Date of Decision : 27-02-2014

Acts Referred:
Constitution of India, 1950 — Article 265

Citation : (2014) 26 GSTR 225

Hon'ble Judges : V.M. Velumani, J;R. Sudhakar, J

Bench : Division Bench

Judgement

R. Sudhakar, J.—The short-question that arises for consideration in this writ appeal is whether the authority can collect the amount without authority of law. Before we go into the issue in question, it is prudent to extract article 265 of the Constitution of India, which reads as follows:

265. Taxes not to be imposed save by authority of law.--No tax shall be levied or collected except by authority of law.

2. There are various decisions of courts to the effect that no authority shall collect the tax by force or coercion or without following the procedure established under law. A few decisions are as follows:

1. Chitra Builders (P) Ltd. Vs. Additional Commissioner of Customs, Central Excise and Service Tax and Another, ;

2. Naresh Kumar and Co. v. Union of India [2011] 7 GSTR 140 (Cal.) : [2010] 19 STR 161 (Cal.);

3. Century Metal Recycling Pvt. Ltd. Vs. Union of India (UOI) and Others, ;

4. National Organic Chemical Industries Ltd. and Mr. N.C. Majumdar Vs. Union of India (UOI) and Superintendent of Central Excise, Range III, Belapur Division, ;

5. Century Knitters (India) Ltd. Vs. Union of India, ;

6. Sanghi Polyesters Limited Vs. The Superintendent of Central Excise and Another, ; and

7. Bhagwati International Vs. Union of India (UOI),

3. Since the issue is purely a question of law, we are not inclined to extend time to the respondents, as the pleadings are completed and counter affidavit has been filed in the writ petition.

4. The facts, in a nutshell, are as follows: The appellant is a manufacturer of stainless steel castings (rough) and non-alloy steel castings (rough) falling under Central Excise Tariff Items 7325 99 30 and 7325 99 99 respectively of the First Schedule to the Central Excise Tariff Act, 1985. The appellant is clearing their finished goods and input services both for home consumption and for export, on payment of duties under personal ledger account or by way of debit in their Cenvat credit account.

5. The officers attached to Central Excise Anti-Evasion Wing of Tiruchirapalli Central Excise Commissionerate had verified the input documents and Cenvat credit records of the appellant for the period 2007-2008 to 2012-13. On a preliminary investigation by the respondents, it came to light that the appellant had illegally availed of input credit, based on the invoices, showing the purchase of materials like re-rollable scrap/defective HR steel plates, secondary HR steel plates, secondary/defective MS/GI coils/sheets, etc.

6. It is the case of the appellant that during the course of investigation, they were forced to pay a sum of Rs. 7.53 crores, on various dates, as demand of duty. The appellant also paid the said sum under protest. It is the further case of the appellant that even before the investigation could be completed or before issuance of a show-cause notice, the authorities forced the appellant to pay the amount by coercion. Since the authorities proceeded with the demand of duty, without following the procedure contemplated under law, the appellant was constrained to approach this court by way of a writ petition in W.P. (MD) No. 2026 of 2013 seeking issuance of a writ of mandamus to direct the respondents therein to refund the amount illegally collected by the respondents to the tune of Rs. 7.53 crores together with interest.

7. A counter-affidavit had been filed by the Assistant Commissioner of Central Excise, Tiruchirapalli, denying the allegation of the appellant that the amount was collected by force. According to them, it was paid voluntarily by the appellant. It is stated that the appellant has wrongly availed of the Cenvat benefit. The said issue is on the merits of the case.

8. The issue that arose for consideration before the learned single judge was whether the amount paid by the appellant/petitioner without there being any adjudication would be justified?

9. It is relevant to extract paragraph 6 of the order impugned for better understanding of the case:

6. Admittedly, the petitioner has paid Rs. 7.53 crores. It is the case of the petitioner that out of compulsion and force, the said amount was paid, however, under protest. According to the respondents, the amount was paid by the petitioner during the investigation voluntarily. This question is a disputed question of fact which cannot be gone into by this court. The fact remains that the investigation is still under progress and there is no final adjudication passed by the quasi-judicial authority. In such view of the matter, it is not at all possible for this court to issue a direction to the respondents to return the amount, when this court is not able to accept the case of the petitioner that the amount was paid under duress.

10. In the above said order, it is clearly stated that the amount was collected from the appellant in the course of investigation by force, as per assessee''s statement. Whereas, the respondents state that the amount was paid voluntarily. The learned single judge holding that it is a question of fact and that the court is not inclined to go into the question, declined interference. The learned single judge further proceeded to issue certain directions to the authorities, which are found in paragraph 9 of the said order, which reads as follows:

9. In view of the above, this writ petition is disposed of with the following directions:

(a) the investigating authority shall complete the investigation and thereafter, show-cause notice shall be issued by the quasi-judicial authority, viz., the first respondent herein, on or before November 30, 2013.

(b) The petitioner shall, thereafter, submit objections, if any, along with the documents within five days.

(c) It is further directed that after the submission of the objections and the documents, by the petitioner, the quasi-judicial authority shall afford sufficient opportunity to the petitioner and pass final adjudication order within a period of one month thereafter.

(d) It is further directed that subject to the outcome of the final order, the above said sum of Rs. 7.53 crores paid by the petitioner shall be either refunded or adjusted towards the duty, however, subject to the appeal remedy.

11. A reading of the above-said paragraph would reveal that the learned single judge has declined to refund the amount. As against the same, the present appeal is filed.

12. The issue raised by the appellant/petitioner is that no amount should be collected by the respondents without any authority of law. Various High Courts have clearly held that the amount should not be collected without a proper demand, an assessment order passed by the authority concerned and/or without following the procedures established by law. It is pleaded that at the time of investigation, the amount was collected by force and coercion and denied by the Department as one paid voluntarily. We find that the documents evidencing

payment do not establish a case of voluntary payment. The objection letters consequent to the payment under protest clearly establish undue pressure was exerted during investigation to pay the amount.

13. In this connection, the learned counsel for the appellant/petitioner would draw the attention of this court to a letter dated January 16, 2013 to the Commissioner of Central Excise, Tiruchirapalli 1. The relevant portion of the said letter, reads as follows:

... The Joint Commissioner, Mr. A. Cletus, threatened to arrest our officers, summon our Directors for interrogation and bring negative publicity to our company, if we did not accede to his illegal demands. Our officials were humiliated by the said Joint Commissioner and by the Superintendents and Inspectors of Central Excise, who accompanied him. We succumbed to the pressures and being anxious to safeguard the hard earned reputation of the company we were forced to pay the following sums under duress, although we were well aware that the said sums were not due to the Department and were anyhow not recoverable in this manner:

These amounts have been collected without even raising a written demand, leave alone a show-cause notice and adjudication of dues ...

Hence, we request you to kindly arrange to refund the sum of Rs. 7.53 crores along with interest, within three days from the date of receipt of this letter, failing which we would be forced to take appropriate legal recourse.

14. The letter dated January 16, 2013 clearly establishes that the sum of Rs. 7.53 crores was paid during a short span of time, particularly when the investigation was going on and more particularly, when the verification of records was under process. There is not even a letter from the Department to the appellant/petition as to the basis on which a sum of Rs. 7.53 crores is demanded. This shows that without any basis, the assessee has been called upon to deposit amounts. In this letter, a specific complaint has been made by the appellant/petitioner that fearing arrest of directors and since they were subjected to humiliation by the investigation officers, the appellant/petitioner succumbed to pressure and in order to safeguard their reputation, made this payment under duress knowing fully well that such amount is not due to the Department. A specific plea has been made that the amount has been collected without even raising a written demand or issuing a show-cause notice. The Department was put on notice that without adjudication demand is being made. All these would clearly go to show that the payment of the above stated amount by the appellant/petitioner bereft of proper calculation and demand by the Department could not be termed as voluntary. At this juncture, it is apposite to refer to the decision of a Constitutional Bench of the Supreme Court in Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, , wherein it was held as under (page 567 of 111 STC):

The constitutional embargo is on both the levy and collection of tax without authority of law. It has been repeatedly asserted by the courts that every taxing law has three parts. First is charge, the second is computation which results in a demand of tax and the third is recovery of the tax so computed. The Constitution has enjoined that there must be a valid levy. The word ''levy'' has also been understood in a broad sense in various cases to include not only the imposition of the charge but also the whole process up to raising of the demand. The Constitution guarantees that not only the levy should be lawful but also collection of tax must also be done with the authority of law. The State is not permitted to exact any tax from a citizen without the authority of law and without following the procedure laid down by law. This guarantee has to be strictly enforced not only in the matter of levy but also in the matter of collection.

... there is no merit in the contention that guarantee contained in article 265 of the Constitution must be restricted to direct taxes only... article 265 will have to be given full effect in cases of direct as well as indirect taxation. If any tax has been levied and collected without authority of law, then the State has committed a wrong and that wrong must be undone by the State by returning the tax unlawfully collected to the person from whom it was collected...

Article 265 forbids the State from making an unlawful levy or collecting taxes unlawfully. The bar is absolute. It protects the citizens from any unlawful exaction of tax. So long as article 265 is there, the State cannot be permitted to levy any tax without authority of law and if any tax has been collected unlawfully that must be restored to the person from whom it was collected. If the tax has been collected from any person unlawfully, it is the taxpayer''s money which is in unlawful possession of the State. The State has a constitutional obligation to give back the money to the taxpayer. An act done in violation of constitutional mandate is void and no right flows out of that void act to the State. The State is in unlawful possession of the taxpayer''s property.

15. The further direction of the learned single judge to complete the investigation and to issue show-cause notice on or before a particular date itself cannot be countenanced, because the court should not interfere with the course of investigation and will not issue direction that a show-cause notice should be issued on or before a particular date. It is the prerogative of the investigating authority, namely, the Department, to decide after investigation whether to issue show-cause notice or not. They may at times drop the proceedings. The court should not insist that show-cause notice should be issued. If this direction is found to be at fault there is no question of the appellant/petitioner submitting objections to the show-cause notice. Consequently, no direction can be issued for adjudication within the time frame. Such direction would be opposed to the principles of natural justice and further, it will infringe on the rights of the assessee. In taxing statute, when investigation is going on, it is not for the courts to state as to how the investigation should proceed; when it should conclude; and how the quasi-judicial authority should discharge their functions. These are all matters which have already been prescribed under the Act and the

authority is bound to follow the same. The time limit prescribed by the learned single judge is not in consonance with the provisions of the relevant Act. As a consequence, the direction issued by the learned single judge under paragraph 9(d) of the order to adjust the amount collected would be improper and not in accordance with law. It is only after adjudication and the amount is determined, the question of payment will arise. Even otherwise, if the aggrieved party prefers an appeal, there is a provision for pre-deposit. All these cannot be bypassed by such directions issued by the courts. It will set at naught the statutory prescriptions. We find that such a direction issued by the learned single judge is not in consonance with the statute and that portion of the order also deserves to be set aside. In our considered opinion, the direction of the learned single judge that the amount paid by the appellant shall be either refunded or adjusted towards the duty, subject to the appeal remedy, is misconceived.

16. At this stage, the learned counsel appearing on behalf of the appellant/ petitioner submits that the appellant will not claim interest for the amount if it is returned by the respondent/Department forthwith. The said submission is recorded.

17. The learned counsel for the respondents submit that based on the directions of the learned single judge, a show-cause notice has been issued. We do not restrain the Department in any manner. Once the adjudication is over, the respondents are empowered to demand duty, fine and penalty if imposed and that could be recovered in the manner known to law. By this order, we make it clear that the procedure adopted by the respondents in trying to collect the amount pending investigation is improper and illegal.

18. As we held that the amount collected by the Department is without authority of law and contrary to the constitutional mandate and the statutory provisions, the respondents are liable to return the amount. Accordingly, the respondents are directed to refund the amount of Rs. 7.53 crores to the appellant/petitioner within a period of two weeks from the date of receipt of a copy of this order, however, without interest. If the respondents do not return the amount within the stipulated period, then the appellant is entitled to interest as applicable to case of refund. Accordingly, this writ appeal is allowed. Consequently, the connected miscellaneous petition is closed. No costs.