(2014) 06 GUJ CK 0051

In the Gujarat High Court

Case No : Special Civil Application No. 19764 of 2007

Saurashtra Ferrous (P.) Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 18-06-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 3, 5A
Constitution of India, 1950 — Article 14, 19(1)(g), 226, 265

Citation : (2014) 47 GST 731

Hon'ble Judges : Mukesh R. Shah, J;Kaushal Jayendra Thaker, J

Bench : Division Bench

Advocate : Gargi Vyas, Advocate for the Appellant; Jaymin Gandhi, Govt. Pleader, Darshan M. Parikh and Rituraj M. Meena, Advocate for the Respondent

Judgement

Mukesh R. Shah, J.—By way of this petition under Article 226 of the Constitution of India, the petitioners have prayed for the following reliefs: "(a) that this Hon''ble Court be pleased to declare that the impugned Circular dated 25th April, 2006 (Annexure-G hereto) issued by CBEC is null and void and ultra vires Article 14, Article 19(1)(g) and Article 265 of the Constitution of India read with Section 3 and Section 5A of the Central Excise Act, 1944;

(b) that this Hon''ble Court be pleased to issue a Writ of Certiorari, or a Writ in the nature of Certiorari, or any other appropriate Writ, Order or direction, calling for the papers and proceedings pertaining to the case, and after going into the legality, validity and propriety thereof, to quash and set aside the impugned action on the part of the Committee consisting of Respondent Nos. 2 and 3 rejecting the Application for issue of Certificate under the said Notification as communicated to the Petitioners vide letter dated 12th April, 2007 (Annexure-M hereto);

(c) that this Hon''ble Court be pleased to issue a Writ of Mandamus, or a Writ in the nature of Mandamus, or any other appropriate Writ, Order or direction, directing the Respondents by themselves, their servants and agents:--

(i) to forthwith withdraw the said impugned communication dated 12th April, 2007 (Annexure-M hereto);

(ii) to issue Certificate to the Company in terms of Condition 3(ii) of the said Notification;

(iii) to allow the Company to avail the benefit of the said Notification (Annexure-A hereto) in respect of all clearances of excisable goods from the new unit set up by the Company in Kutchh at the address mentioned hereinabove by availing the exemption in terms of the said Notification until 30th December, 2010 or such other period as may be extended by the Central Government from time to time; and

(iv) to forthwith refund to the Company a sum of Rs. 8.20 crore being the amount paid by the Company over and above the CENVAT Credit utilized by the Company in terms of the said Notification (Annexure-A hereto) together with interest thereon @ 12% per annum from the due date of the refund in terms of the said Notification until payment thereof to the company."

The facts leading to the present Special Civil Application and so stated in the petition by the petitioners are as under; 2. It is the case on behalf of the petitioners that in light of the Notification No. 39/2001-CE, dated 31.07.2001, granting exemption to excisable goods cleared from its unit in Kachchh, the petitioners decided to set-up a plant and machinery/Unit of the factory for two different products, i.e. (1) cast iron articles and (2) Pig Iron. It is the case on behalf of the petitioners that with respect to both the aforesaid products, so far as manufacturing of aforesaid two products is concerned, they have invested a huge amount and installed plant and machinery valued at Rs. 24.30 crores. It appears and it is an admitted position that the plant and machinery so installed and commissioned for manufacturing of cast iron articles by making investment of Rs. 92 lacs and started manufacturing of cast iron articles, i.e. first commercial production for cast iron was done prior to 31.12.2005. However, the entire plant and machineries for production/manufacturing of Pig Iron was not commissioned and installed (Fully) prior to 31.12.2005, and therefore, naturally the petitioners could not have commenced the production/manufacturing of Pig Iron. It is not in dispute that the plant and machineries for both the products, i.e. cast iron articles and the Pig Iron are different. That the petitioners claimed exemption on commercial production of cast iron articles and Pig Iron, as contained in the Notification No. 39/2001-CE, dated 31.07.2001, which has been denied, and therefore, the petitioners have preferred the present Special Civil Application under Article 226 of the Constitution of India.

3. Ms. Gargi Vyas, learned Advocate appearing on behalf of the petitioners, has vehemently submitted that as the petitioners made investment of approximately Rs. 24.30 crores by installing plant and machineries, as on 29.12.2005, i.e. prior to 31.12.2005, the petitioners are entitled to the exemption/benefits, as contained in the Notification No. 39/2001-CE, on the commercial production out

of the investment made for the aforesaid plant and machineries. It is submitted that, as such, the petitioners have fully commissioned and installed the plant and machineries and have started manufacturing/production of cast iron articles prior to 31.12.2005. It is, therefore, submitted that considering the aggregate investment made by the petitioners with respect to both the products, i.e. cast iron and Pig Iron, and as the investment was more than Rs. 20 crore, i.e. in the present case Rs. 24.30 crores, the petitioners were entitled to exemption/ benefits contained in the Notification No. 39/2001-CE, for a period of five years from the date of first commercial production. It is submitted that, therefore, denial of the exemption/benefits contained in the Notification No. 39/2001-CE, by the Respondent is absolutely illegal, arbitrary and contrary to the aforesaid Notification. It is submitted that even with respect to the manufacturing of cast iron articles, the petitioners have been denied the exemption/benefits under the Notification No. 39/2001-CE, though, with respect to the said products plants and machineries were installed and the Unit was commissioned (Fully) prior to 31.12.2005 and even the first commercial production was also prior to 31.12.2005. It is, further, submitted that even the clarification circular, dated 25.04.2006, issued by the Director (TRU), Ministry of Finance, clarifying that when the commercial production of a particular kind of a specified goods has not commenced before 31.12.2005, then, the exemption/benefit of the Notification No. 39/2001-CE would not be available to such goods, is contrary to the object and purpose of the original scheme, and therefore, same is ultra vires to the Notification No. 39/2001-CE, and the Scheme contained in the said Notification. It is, then, submitted that, as such, there is no such requirement of commercial production prior to 31.12.2005 in the original Scheme contained in the Notification No. 39/2001-CE. Making the above submissions, it is requested that the present Special Civil Application be allowed and the reliefs, as prayed for, be granted.

4. The present petition is opposed by Shri Darshan Parikh, learned Advocate appearing on behalf of Respondent No. 2, and Mr. Jaymin Gandhi, learned AGP appearing on behalf of Respondent No. 4 submitting that, as such, the controversy involved/issue raised in this petition is squarely covered by a decision of the Division Bench of this Court dated 05.12.2013 in the case of Plastene India Ltd. v. Union of India, passed in Special Civil Application No. 13627/2013. It is, further, submitted that even the controversy raised in the present Special Civil Application would also be covered by a decision of another Division Bench of this Court dated 15.04.2011 in the case of Jaiprakash Associates Ltd v. State of Gujarat, passed in Special Civil Application 11278/10.

5. It is, further, submitted by Shri Parikh and even it is fairly admitted by Ms. Vyas, learned Advocate appearing on behalf of the petitioners, that in the present case the production of Pig Iron did not commence and that the unit/plant and the machineries were not installed (Fully) prior to 31.12.2005. It is submitted that therefore the petitioners cannot claim the exemption/benefits with respect to production/manufacture of goods, i.e. Pig Iron, on the basis that

the entire unit/plant and machineries was commissioned prior to 31.12.2005 for production/manufacture of cast iron. It is, thus, submitted that the petitioners shall not be entitled to the exemption/benefits, as contained in Para-2 of the Notification No. 39/2001-CE.

6. Now, so far as challenge to the clarification contained in the Circular No. F. No. 332/07/2006-TRU, dated 25.04.2006, issued by the Director (TRU), clarifying that if the commercial production of a particular kind of specified goods is not commenced on, or before, 31.12.2005, there again the benefit of the Notification No. 39/2001 would not be available to such goods, it is submitted that in the present case, such a situation does not arise. It is submitted that in the present case, as such, the unit/plant and the machineries for the production of Pig Iron was not commissioned and or installed (Fully) prior to 31.12.2005. It is submitted that the aforesaid clarification shall be applicable only in a case, where, the Unit has been commissioned and the plant and machineries have been installed prior to 31.12.2005 and that for whatever reasons, there was no commercial production prior to 31.12.2005. It is submitted that therefore the challenge to the aforesaid clarification would be academic so far as the present petition is concerned. It is, further, submitted that even otherwise, it is a Circular issued in the nature of clarification and what is required to be considered is whether the petitioners would be entitled to the exemption/benefit under Notification No. 39/2001 or not? It is, therefore, submitted that on the facts stated herein above, the petitioners shall not be entitled to the exemption/ benefits under Notification No. 39/2001 . However, when the attention of Shri. Parikh, learned Advocate appearing on behalf of Respondent No. 2, was drawn to the fact that with respect to the cast iron articles, the unit/plant and machineries were installed and commissioned (Fully) and even commercial production had also commenced prior to 31.12.2005, in that case, how exemption/benefits under the Notification No. 39/2001 can be denied to the petitioners on the production/manufacture of cast iron articles for a period of five years from the date of the commencement of the first commercial production, he is not in a position to satisfy the Court. He has stated that as there are no specific pleadings with respect to the same, he is unable to answer the same. Making the above submissions and relying upon the decisions, as stated above, it is requested that the present Special Civil Application be dismissed.

7. Heard learned Advocates for the respective parties, at length. At the outset, it is required to be noted that the petitioners are denied the benefits contained in the Notification No. 39/2001, dated 31.07.2001, on the manufacture of cast iron articles and Pig Iron. It is an admitted position, so far as the Unit/plant and machineries for manufacture of cast iron articles, with an investment of Rs. 92 lacs, was made prior to 31.12.2005. It also appears that even the commencement of commercial production in that Unit for manufacture of cast iron articles was also done prior to 31.12.2005. It is also an admitted position and or not disputed by the learned Advocate for the petitioner that the Unit/plant and machineries were not commissioned and or set-up for manufacture of Pig

Iron prior to 31.12.2005, and therefore, as such, no commercial production of Pig Iron could have been done prior to 31.12.2005. It also emerges that the entire Unit/plant and machineries were fully commissioned and set-up for manufacture of Pig Iron after 31.12.2005, and therefore, even the commencement of commercial production of such Unit of Pig Iron was after 31.12.2005. In the above back-drop, the question which is posed for the consideration of this Court is, as to whether the petitioner shall be entitled to the exemption/benefits under the Notification No. 39/2001 on manufacture/ production of cast iron articles and Pig Iron or not?

8. As such, the identical question came to be considered by the Division Bench of this Court in the case of Plastene India Ltd (supra) and considering the very Scheme and the Notification No. 39/2001, this Court has held and observed as under:

"[5.2] Now, so far as the reliance placed upon the Circular No. 110/21/2006CX.3 dated 10.07.2008 by the petitioners is concerned, it is absolutely misplaced. Under the aforesaid clarificatory circular, it is mentioned that in case a unit introduces the new product manufactured from raw material by installing fresh plant and machinery after the cutoff date i.e. 31.12.2005, in such a situation, exemption would not be available to the said new product and the said new product would be cleared on payment of duty as applicable and separate records will be required to be maintained to distinguish production of these products from the products which are eligible for exemption. It also further clarifies that where a unit starts producing some products [after the cutoff date] using the plant and machinery installed up to cutoff date and without any addition to the plant and machinery, in that case, the unit would be eligible for the benefit of exemption notification because the plant and machinery used for manufacturing has remained the same. In the present case, admittedly, there is no new product by installing fresh plant, machinery or capital goods after the cutoff date i.e. 31.12.2005. The same product is manufactured/continued to be manufactured however, some additional machineries have been installed...."

9. Considering the aforesaid decision and even the original Scheme contained in Notification No. 39/201, dated 31.07.2001, and the purpose and object of granting the benefit to the industries to be established in the Kachchh District, at the relevant point of time, it can safely be concluded that so far as the exemption/benefits contained in the Notification No. 39/2001 are concerned, same shall not be available to the petitioner with respect to the production of Pig Iron, as admittedly, the plant/Unit and machinery for production of Pig Iron were not commissioned/installed (Fully) prior to 31.12.2005. Under the circumstances, no error or illegality has been committed by the concerned Respondents in denying the exemption/benefit of Scheme contained in the Notification No. 39/2001, with respect to the production of Pig Iron.

10. Now, so far as the non-granting of the exemption/benefits contained in the Notification No. 39/2001, on production/manufacturing of cast iron articles is

concerned, it is not clear as to whether on production/manufacture of cast iron articles on the unit/plant and machineries fully installed and commissioned prior to 31.12.2005, the petitioners have been denied the said benefits or not? However, considering the decision of the Division Bench of this Court, if, the unit/plant and machineries have been commissioned/installed (Fully) prior to 31.12.2005, the petitioner may be entitled to the benefits contained in the aforesaid Notification, on manufacture/production of cast iron articles for a period of five years from the date of commencement of the first commercial production of such goods on such unit. Under the circumstances, the concerned Respondent are required to consider the case of the petitioner for grant of the benefit under the Notification No. 39/2001 with respect to the production/manufacture of cast iron articles, considering the observations made herein above and the decision of this Court in the case of Plastene India Ltd (supra).

11. Now, so far as challenge to the clarificatory Circular, dated 25.04.2006, issued by the Director (TRU), clarifying that, if, the commercial production of a particular kind of specified goods has not commenced prior to 31.12.2005, there again the benefit of such notification would not be available to the such goods, is concerned, so far as the claim of the petitioner with respect to the Pig Iron is concerned, as stated and observed herein above, said situation may not arise, as industrial Unit was not commissioned and the plant and machineries were not installed (Fully) prior to 31.12.2005. So far as the grant of benefits with respect to the same Scheme contained in the Notification No. 39/2001 on manufacturing/production of cast iron is concerned, as stated above, the matter is required to be considered by the appropriate authority in light of the observations made herein above as well as the observations made by the Division Bench of this Court in the case Plastene India Ltd (supra). In view of the above and for the reasons stated herein above, present Special Civil Application is DISMISSED so far as the claim of the petitioner for grant of exemption/benefit of the Notification No. 39/2001 , dated 31.07.2001, with respect to the production of Pig Iron is concerned. However, so far as the claim of the petitioner for grant of exemption/benefit of the Notification No. 39/2001 with respect to the production of cast iron articles is concerned, the concerned appropriate authority is hereby directed to consider the case of the petitioners (if not considered so far), considering the observations made herein above and the observations made by the Division Bench of this Court in Plastene India Ltd. (supra) and if ultimately, it is found that the Unit/plant and machinery for production of cast iron articles was commissioned and installed (Fully) prior to 31.12.2005, the case of the petitioners be considered for grant of exemption/benefit for a period of five years from the date of the commencement of the commercial production of cast iron articles by such an Unit. Aforesaid exercise shall be completed within a period of FOUR MONTHS from the date of the receipt of this order. The present Special Civil Application is DISMISSED, accordingly. Rule is discharged. No order as to costs.