(2015) 04 KAR CK 0006

In the Karnataka High Court

Case No : Writ Petition Nos. 1438 and 13104 of 2015 (T-TAR)

Shreematha Precision Components — APPELLANT

Vs

Commr. of C. Ex., Bangalore-III — RESPONDENT

Date of Decision : 22-04-2015

Acts Referred:
Central Excises and Salt Act, 1944 — Section 11, 11A, 11B

Citation : (2015) 325 ELT 529

Hon'ble Judges : Aravind Kumar, J.

Bench : Single Bench

Advocate : H.Y. Raju and K.N. Arvinda Navada, Advocates, for the Appellant; Jeevan J. Neeralgi, Standing Counsel and T.M. Venkata Reddy, Advocate, for the Respondent

Judgement

Aravind Kumar, J.—By consent of learned Advocates appearing for the parties, both writ petitions are taken up for final disposal. Heard Sriyuth H.Y. Raju learned Advocate appearing on behalf of the petitioners'' counsel and Sriyuths Jeevan J. Neeralagi and T.M. Venkat Reddy, learned Central Government Counsel appearing for respondents.

2. The short point that arises for consideration in these writ petitions relates to interpretation of Rule 8(3A) of Central Excise Rules, 2002.

Factual Matrix:

Re. W.P. No. 1438/2015:

3. Petitioner had filed quarterly returns in ER. 3 indicating the value of clearance, Central Excise duty payable and duty actually paid in cash and what is available by way of debit in the Cenvat credit with the petitioner for the period from January, 2011 to March, 2011 and indicating the vendor that duty payable was Rs. 6,79,334/- and the duty was shown as having been paid by way of debit in Cenvat credit Rs. 2,60,423/- and by way of cash Rs. 4,18,911/-. Petitioner stated that though the duty liability for the quarter ending March, 2011 has been paid

on 26-5-2011 and interest having been paid on 29-5-2012, it was held by the authorities that in terms of sub-rule (3A) of Rule 8 of Central Excise Rules, 2002, petitioner has defaulted in payment of duty, namely paid duty beyond 30 days from the due date and as such, notwithstanding anything contained in sub-rule (1) or sub-rule (4) of Rule 3 of Cenvat Credit Rules, 2004, petitioner is required to pay excise duty for each consignment at the time of removal, without utilizing the Cenvat credit till the date petitioner pays the outstanding amount including the interest thereon. As such, it was held that petitioner is deemed to have cleared the goods without payment of duty and thereby the impugned notices came to be issued.

Re. W.P. 13104/2015:

4. In the quarterly returns ER. 1 for the period January, 2013 to March, 2013 the respondent authorities have stated that petitioner has failed to pay the Central Excise duty amounting to Rs. 87,067/- by 5-5-2014 on the goods cleared during the said month and same had been paid only on 26-7-2014 and thereby, petitioner has committed default by contravening the provisions of Rule 8(3) of the Central Excise Rules, 2002. By the impugned recovery notice dated 2-12-2014 (Annexure-A) and recovery notice dated 30-12-2014 (Annexure-B) respondent authorities have stated that petitioner has defaulted in payment of duty, namely has paid duty beyond the prescribed 30 days period. As such, Revenue contended that petitioner is required to pay excise duty for each consignment at the time of removal, without utilizing the Cenvat credit till the outstanding amount including the interest is paid. It is also indicated in the impugned notices that for the months of May, 2014, June, 2014 and July, 2014 petitioner has utilized Cenvat credit for payment of Central Excise duty for the respective months, without paying the duty in cash on consignment basis in contravention of the provisions of Rule 8(3A) of Central Excise Rules, 2002. It is also indicated in the said impugned notices that Central Excise duty has been paid beyond the prescribed period. As such, petitioner has been directed to pay the defaulted amount of Rs. 8,83,666/- with interest at 18% p.a.

Petitioner in both the cases have been directed to pay the said amount and failure to pay the said amount, respondent authority has stated that proceedings will be initiated under Section 11 of the Central Excise Act, 1944 to recover the same. Hence, calling in question said notices these two writ petitions have been filed.

5. It is the contention of learned counsel for the petitioners that when either Cenvat credit payment was utilized wrongly or has been erroneously refunded, respondent authorities would be entitled to recover the same after the issuance of notice under Rule 14 of Cenvat Credit Rules, 2004 and without adopting said course, recovery proceedings could not have been initiated and as such impugned notices are liable to be quashed. He would rely on the judgment of Gujarat High Court in the case of Indsur Global Ltd. Vs. Union of India, , whereunder Rule 8(3A) of Cenvat Credit Rules, 2004, has been struck down as

ultra vires of the Constitution.

6. Per contra, learned standing panel counsel appearing for the respondents would contend that when Cenvat credit has been obtained beyond the prescribed period and when there is violation of sub-rule (1) or sub-rule (4) of Rule 3 of Cenvat Credit Rules, 2004, it is deemed that there is no Cenvat credit having been obtained by the petitioners. As such, sub-rule (3A) of Rule 8 would be attracted and those consignments which had been removed by utilizing Cenvat credit would be treated as consignments having been removed without utilizing Cenvat credit and thereby petitioners would be liable to pay the excise duty by cash including the interest from the date of removal of such goods.

7. In order to appreciate the contentions raised by the respective learned Advocates, it would be necessary to extract Rule 8(3A) of Central Excise Rules, 2002, which Rule has been relied upon by both the parties. Same reads as under:--

"8. Manner of Payment.-

(1) x x x x

(2) x x x x

(3) x x x x

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) and 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. A perusal of the above Rule would clearly indicate that in the event of assessee committing default in payment of duty beyond 30 days from the due date as prescribed under sub-rule (1), then notwithstanding anything contained in sub-rule (1) or sub-rule (4) of Rule 3 of Cenvat Credit Rules, 2004, such assessee would be required to pay excise duty for each consignment at the time of removal, without utilizing the Cenvat credit till the date the assessee pays the amount including the interest thereon. As otherwise, such clearance would be deemed as one cleared without payment of duty and the consequence of penalties as prescribed under the Rules would follow.

9. In order to press into service sub-rule (3A), Cenvat Credit Rules, 2004, Rule 14 of Cenvat Credit Rules, 2004 will have to be looked into. It reads as under:

"Rule 14. Recovery of Cenvat credit wrongly taken or erroneously re-funded.-

Where the Cenvat credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest shall be recovered from the manufacturer or the provider of the output service and the provisions of Sections 11A and 11AB of the Excise Act or Sections 73 and 75 of the Finance Act, shall apply mutatis mutandis for effecting such recoveries."

A bare reading of Rule 14 would indicate that where the assessee has taken or utilized wrongly or has been erroneously refunded the Cenvat credit, then authorities would be entitled to recover the same from the manufacturer or the provider of the output service and provisions of Sections 11A and 11AB of Central Excise Act or Sections 73 and 75 of the Finance Act would apply mutatis mutandis for effecting such recoveries. Thus, before initiating recovery proceedings, it would be incumbent upon the authorities to issue notice to the petitioners under Section 11A of the Act for having either utilized the Cenvat credit wrongly for bringing such action within the scope of sub-rule (3A) or to construe such transaction as having cleared the goods without payment of duty or in other words, such belated utilization of Cenvat credit for payment of Central Excise duty to be construed as one in contravention of sub-rule (3A) of Rule 8. The audi alteram partem principle would be squarely applicable in case of such recoveries and particularly, when it is alleged that Cenvat credit has been utilized beyond the prescribed period. In that view of the matter, this Court is of the view that impugned notices cannot be sustained as it is contrary to Rule 14 of Cenvat Credit Rules, 2004, and in violation of natural justice.

For the reasons aforestated, I proceed to pass the following:

I. Writ petitions are hereby allowed.

II. Impugned recovery notices bearing OC. No. 419/2013, dated 27-9-2013 and OC. No. 437/2014, dated 7-10-2014 in WP. No. 1438/2015 and recovery notices bearing OC. Nos. 563/2014, dated 2-12-2014 and 606/2013, dated 30-12-2013 and demand notice bearing C. No. IV/16/127/2015.Ken, dated 9-3-2015 in W.P. No. 13104/2015 are hereby quashed.

III. Respondents are permitted to issue notice to the petitioners and thereafter proceed to recover the amounts alleged to be due in accordance with Sections 11 , 11A and 11B of the Central Excise Act, 1944 r/w. Rule 14 of Cenvat Credit Rules, 2004.

