(2013) 06 MAD CK 0024

In the Madras High Court

Case No : Writ Petition No. 29623 of 2012 and M.P. No. 1 of 2012

Unirols Airtex APPELLANT

Vs

Assistant Commr. of C. Ex., Coimbatore RESPONDENT

Date of Decision : 26-06-2013

Acts Referred:

Citation : (2013) 296 ELT 449

Hon'ble Judges : K.K. Sasidharan, J

Bench : Single Bench

Advocate : R. Muthukumaraswamy, for Ramajagadeesan, for the Appellant; S. Thirumavalavan, SCGSC, for the Respondent

Judgement

K.K. Sasidharan, J.—This writ petition is directed against the order dated 26 October 2010 on the file of the third respondent detaining the

goods on the ground of non-payment of duty amount with interest.

Background facts:

The petitioner is engaged in the manufacture of overhead travelling cleaners and accessories suitable for ring frames used in the textile industry. The

petitioner has been remitting the customs duty in accordance with the Central Excise Rules. Under Rule 8 of the Central Excise Rules, the duty on

the goods removed from the factory during the month, shall be paid by the Fifth day of the following month. However, due to financial crisis there

was some delay in payment of Central Excise duty on monthly basis during the period from September 2011 to June 2012. The belated payment

was made with interest for the delayed period. The petitioner utilised the eligible Cenvat credit of duty paid on the inputs and other eligible credits

used in the manufacture of final products. However, the respondents failed to give credit to the duty paid through the eligible Cenvat credit and the

same reflected in the accounts as non-payment. The second respondent verified the payments made by the petitioner and called upon to pay a sum

of Rs. 53,62,822/- for the relevant period, failing which it was indicated that action would be taken for recovery of the amount u/s 11 of the

Central Excise Act, 1944 read with Section 142 of the Customs Act, 1962. According to the petitioner, the entire duty amount was paid with

interest, of course by using part of the Cenvat credit of duty paid on the inputs and other eligible credits used in the manufacture of final products.

2. It is the grievance of the petitioner that while passing the order, explanation appended to Rule 8(3A) of the Central Excise Rules, 2002 was not

considered by the second respondent. The petitioner, therefore, wanted the second respondent to confirm the payment made by using Cenvat

credit of duty and to relieve from payment of further duty and interest end a direction to release the goods by the third respondent.

Defence:

3. The second respondent filed a counter affidavit contending that the petitioner failed to discharge the entire duty amount with interest on or before

the cut off period. The petitioner also used Cenvat credit for discharging the duty which is not permissible by law. According to the second

respondent, Cenvat credit can be used for payment only after the outstanding amount is paid along with interest and therefore, there is no question

of recognising the payment made by the petitioner by using Cenvat credit.

Rival Contentions:

4. The learned Senior Counsel for the petitioner contended that the entire amount was paid with interest before the cut off date. However, while

paying the duty amount, the petitioner also used the Cenvat credit which was there on its credit. The learned Senior Counsel by placing reliance on

explanation to Rule 8(3A) of the Central Excise Rules, 2002 and the judgment in M/s. Techno Rubber and Plastics rep. by its Proprietor v.

Customs and Central Excise, Chennai (Order dated 29 October, 2011 in W.P. No. 19909 of 2011) contended that the second respondent

omitted to consider the explanation and that was the reason for demanding the entire amount without recognising the payment made by using

Cenvat credit. According to the learned Senior Counsel, under similar circumstances, this Court directed the Customs Department to consider the

applicability of explanation to Rule 8(3A) of the Central Excise Rules, 2002. The department thereafter accepted the position. The petitioner is

similarly situated and as such the payment made partially by using Cenvat credit should be recognised.

5. The learned Senior Standing Counsel for Central Excise justified the computation of arrears made by the second respondent. According to the

learned counsel, the petitioner was expected to pay the entire amount of duty without using Cenvat credit. The learned counsel by placing reliance

on the Explanation to Rule 8(3A) contended that the Rule is very clear that the assessee would not be permitted to pay duty by making use of

Cenvat credit.

Factual Analysis:

6. The petitioner committed default in payment of excise duty. The worksheet produced by the petitioner indicates that the duty was paid

belatedly. The petitioner appears to have paid interest on the delayed payment. The worksheet also indicates that the petitioner used Cenvat credit

for payment of duty amount.

7. The moot question is whether the petitioner was correct in making use of the Cenvat credit for the purpose of discharging the duty liability.

8. The Central Excise Rules, more precisely, Rules 8 deals with the manner of payment of excise duty. Rule 8(3A) reads thus:

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 any 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) 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.

(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.]

9. The petitioner paid the duty amount partly by utilising Cenvat credit. The petitioner is now placing reliance on the explanation appended to sub-

rule (3A) to Rule 8 in support of the contention that payment made by utilising Cenvat credit is a valid payment and the same also should be

recognised for the purpose of computing the total amount paid towards excise duty. The petitioner placed reliance on the judgment of this Court

dated 29 October, 2011 in W.P. No. 19909 of 2011 in support of the contention that this Court has already arrived at a finding that the payment

made by utilizing Cenvat credit should be recognised as a mode of payment of duty.

10. It is true that this Court in Techno Rubber and Plastics was pleased to refer Rule 8(3A) and the explanation appended thereto. The learned

Judge found that the Settlement Commission failed to consider the effect of the explanation appended to Rule 8(3A) and therefore, directed the

authority to consider the matter afresh. The said judgment is not an authority for the proposition that the excise duty can be paid beyond the

statutory period by utilising Cenvat credit. There was no positive finding in the said order. The learned Judge directed the Settlement Commission

to consider the effect of explanation appended to Rule 8(3A) of the Central Excise Rules, 2002 and to pass orders accordingly.

11. Rule 8(3A) categorically states that the assessee shall pay excise duty for each consignment at the time of removal, without utilising the Cenvat

credit till the assessee pays the outstanding amount including interest thereon. The consequence for non-payment of excise duty is also indicated in

the very same section as it provided that in case of failure to pay the amount, it shall be deemed that such goods have been cleared without

payment of duty and the consequence of penalties as provided in the rules would follow. Rule 8(3A) does not permit the assessee to pay the

excise duty by using the Cenvat credit. The provision restrained the assessee from using Cenvat credit till the entire outstanding amount including

interest is paid. The explanation is only for the purpose of making the position clear.

12. There is no question of invoking the Cenvat Credit Rules, 2004 in its entirety except for understanding the meaning of the term ''duty'' or ''duty

of excise. In fact, the rigour of Section 8 operates notwithstanding anything contained in sub-rule (1) and (4) of Rule 3 of Cenvat Credit Rules.

Sub-rule 4(b) of Cenvat Credit Rules permits utilisation of Cenvat credit for payment of duty of excise on any final product. This provision makes

the position very clear 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 Central Excise Rules, 2002.

13. The purpose of explanation that the expression ''duty'' or ''duty of excise'' shall also include the amount payable in terms of the Cenvat Credit

Rules, 2004, would not amount to a permission for utilising the Cenvat credit for paying the excise duty. Rule 8(3A) is very specific when it

provided that the entire duty should be paid without utilising the Cenvat credit. There is no question of utilising the explanation for the purpose of

using the Cenvat credit for paying the outstanding duty amount.

15. The Law is, therefore, clear that the assessee is liable to pay the excise duty in accordance with the Central Excise Rules, 2002 with interest

for the belated period and there is no provision for utilising the Cenvat credit for such belated payment.

15. The fact that the Assessing Authority took a different view in Techno Rubber and Plastics after remand would not stand in the way of this

Court examining the statutory provisions and arriving at a finding with regard to the legislative intention.

16. The second respondent was fully correct in directing the petitioner to pay the entire duty amount with interest without utilising the Cenvat credit.

So long as it is clear that the petitioner has not paid the entire duty amount with interest (without utilising the Cenvat credit), the question of releasing the goods does not arise. Therefore, I do not find any merit in the contention raised by the petitioner. It is open to the petitioner to pay the

entire duty amount demanded by the second respondent with interest and in the event of such payment without availing the Cenvat credit, further

action should be taken by the third respondent to release the goods forthwith.

Result:

In the upshot, I dismiss the writ petition. Consequently, the connected miscellaneous petition is closed. No costs.