(2010) 01 DEL CK 0217

In the Delhi High Court

Case No : Writ Petition (C) 14152 of 2009 and CM 16314 of 2009

Vinay Wires and Poly Products Pvt. Ltd. APPELLANT

Vs

Member (Central Excise) Central Board of Excise and Customs and Another RESPONDENT

Date of Decision : 22-01-2010

Acts Referred:

Citation : (2010) 172 ECR 171 : (2010) 252 ELT 10 : (2010) 4 ILR Delhi 70 : (2010) 7 RCR(Criminal) 579

Hon'ble Judges : Siddharth Mridul, J;Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : Pradeep Jain, for the Appellant; Mukesh Anand, Sailesh Tiwari and R.L. Thapliyal, DGCEI (SIO), for the Respondent

Judgement

Badar Durrez Ahmed, J.—In this writ petition, quashing of order No. 51/2009-M (CX)/DA dated 16.12.2009 passed by the Member (Central Excise), Central Board of Excise and Customs, is prayed for. The impugned order imposes the following restrictions on the petitioner:

i. The facility of monthly payment of excise duty by the assessees i.e, M/s. Vinay Wires and Poly Products Pvt. Ltd., Unit I and II, Kanpur, as provided under Rule 8(1) of the Central Excise Rules, 2002 is ordered to be withdrawn and they are required to pay excise duty for each consignment at the time of removal of the goods with effect from 21.12.2009 to 30.06.2010.

ii. Payment of excise duty by utilization of CENVAT credit as provided under Rule 3(4) of the CENVAT Credit Rules, 2004, is ordered to be stopped with effect from 21.12.2009 to 30.06.2010. During this period, the assessees are required to pay excise duty without utilizing CENVAT credit. However, the assessees are permitted to take CENVAT credit on goods received at the respective factories during this period, which can be utilized for payment of duty on goods cleared from the respective factories after the aforesaid period is over.

iii. The assessees will maintain records of receipt, disposal, consumption and inventory of the principal inputs on which Cenvat credit has not been taken with effect from 21.12.2009 to 31.05.2010 in both the factories separately.

iv. The assessees will intimate the jurisdictional Superintendent of Central Excise within twenty four hours of the receipt of principal inputs in each of the factories on which Cenvat credit has or has not been taken and the same should be kept available for verification for the next 48 hours. This restriction will be applicable for the period from 21.12.2009 to 31.05.2010.

2. The plea taken by the learned Counsel for the petitioner is that the impugned order has been passed without giving a proper opportunity of hearing to the petitioner and in particular without supplying any of the relied upon documents to the petitioner despite the fact that the petitioner had specifically requested for the same.

3. Prior to examining the facts of the case, we may notice that the impugned order has been passed under powers given by notification No. 32/2006-CE (NT) (hereinafter referred to as the =said notification'') which, in turn, was issued under Rule 12CC of the Central Excise Rules, 2002 read with Rule 12AA of CENVAT Credit Rules, 2004. First of all, we may notice the provisions of the said Rule 12CC. The same read as under:

RULE 12CC. Power to impose restrictions in certain types of cases.- Notwithstanding anything contained in these rules, where the Central Government, having regard to the extent of evasion of duty, nature and type of offences or such other factors as may be relevant, is of the opinion that in order to prevent evasion of, and default in payment of, excise duty, it is necessary in the public interest to provide for certain measures including restrictions on a manufacturer, first stage and second stage dealer or an exporter, may by a notification in the Official Gazette, specify nature of restrictions including suspension of registration in case of a dealer, types of facilities to be withdrawn and procedure for issue of such order by an officer authorized by the Board.

4. A plain reading of the said rule indicates that the Central Government has been empowered to issue a notification in the official gazette specifying the nature of restrictions, including the suspension of registration in the case of a dealer, types of facilities to be withdrawn and ''procedure for issue of such order'' by an officer authorized by the Board. There is no doubt that by virtue of the said Rule 12CC, the Central Government is empowered to specify, inter alia, the types of facilities to be withdrawn in case it is of the opinion that it would be necessary to do so in order to prevent evasion of and default in payment of excise duty and that the same would be necessary in public interest. However, the said Rule 12CC requires that the Central Government shall do so by way of a notification in the official gazette indicating, inter alia, the nature of restrictions and the procedure for issuance of such an order.

5. Rule 12AA of the CENVAT Credit Rules, 2004 is in identical terms with regard

to cenvat credits. In pursuance of the power given under Rule 12CC of the Central Excise Rules, 2002 and Rule 12AA of CENVAT Credit Rules, 2004, the Central Government issued the said notification on 30.12.2006. The relevant portions of the said notification are as under:

Notification No. 32/2006 - Central Excise (N.T.) G.S.R. (E).- In pursuance of Rule 12CC of the Central Excise Rules, 2002, and Rule 12AA of the CENVAT Credit Rules, 2004, the Central Government, hereby declares that where a manufacturer, first stage or second stage dealer, or an exporter including a merchant exporter is prima facie found to be knowingly involved in any of the following,-

(a) removal of goods without the cover of an invoice and without payment of duty;

(b) removal of goods without declaring the correct value for payment of duty, where a portion of sale price, in excess of invoice price, is received by him or on his behalf but not accounted for in the books of account;

(c) taking of CENVAT Credit without the receipt of goods specified in the document based on which the said credit has been taken;

(d) taking of CENVAT Credit on invoices or other documents which a person has reasons to believe as not genuine;

(e) issue of excise duty invoice without delivery of goods specified in the said invoice;

(f) claiming of refund or rebate based on the excise duty paid invoice or other documents which a person has reason to believe as not genuine, an officer authorized by the Board may order for withdrawal of facilities or impose certain restrictions as specified in para 2 of this Notification.

2. Facilities to be withdrawn and imposition of restrictions:

(1) Where a manufacturer is prima facie found to be knowingly involved in committing the offences as specified in para 1, the following restrictions may be imposed on the facilities, namely:

(i) the facility of monthly payment of duties may be withdrawn and the assessee shall be required to pay excise duty for each consignment at the time of removal of goods;

(ii) payment of duty by utilisation of CENVAT credit may be restricted and the assessee shall be required to pay excise duty without utilising the CENVAT credit:

Provided that where a person is found to be knowingly involved in committing any one or more type of offences as specified in para 1 for the second time or subsequently, every removal of goods from his factory may be ordered to be under an invoice which shall be countersigned by the Inspector of Central Excise or the Superintendent of Central Excise before the said goods are removed from the factory or warehouse.

Explanation I.- It is clarified that a person against whom the order under sub-para (3) of para 4 has been passed may continue to take CENVAT credit; however, he would not be able to utilize the credit for payment of duty during the period specified in the said order.

Explanation II.- For second time or subsequent offence, the restriction specified in Clauses (i) and (ii) may also be imposed.

(2) Where a first stage or second stage dealer is found to be knowingly involved in committing the type of offence specified at Clauses (d) or (e) of para 1, the registration granted under Rule 9 of the Central Excise Rules 2002 may be suspended for a specified period.

Explanation.- During the period of suspension, the said dealer shall not issue any Central Excise Invoice. However, he may continue his business and issue sales invoices without showing excise duty in the invoice and no CENVAT credit shall be admissible to the recipient of goods under such invoice.

(3) xxxx xxxx xxxx xxxx 4. Procedure.- (1) The Commissioner of Central Excise or Additional Director General of Central Excise Intelligence, as the case may be, after examination of records and other evidence, and after satisfying himself that the person has knowingly committed the offence as specified in para 1, may forward a proposal to the Chief Commissioner or Director General of Central Excise Intelligence, as the case may be, specifying the facilities to be withdrawn and restriction to be imposed and the period of such withdrawal or restrictions, within 30 days of the detection of the case, as far as possible.

(2) The Chief Commissioner of Central Excise or Director General of Central Excise Intelligence, as the case may be, shall examine the said proposal and after satisfying himself that the records and evidence relied upon in the said proposal are sufficient to form a reasonable belief that a person has knowingly committed the offences specified in para 1, may forward the proposal along with his recommendations to the Board. However, the Chief Commissioner of Central Excise or Director General of Central Excise Intelligence, before forwarding his recommendations, shall give an opportunity of being heard to the person against whom the proceedings have been initiated and shall take into account any representation made by such person before he forwards his recommendations to the Board.

(3) An officer authorized by the Board shall examine the recommendations received from the Chief Commissioner of Central Excise or Director General of Central Excise Intelligence and issue an order specifying the type of facilities to be withdrawn or type of restrictions imposed, along with the period for which said facilities will not be available or the period for which the restrictions shall be operative. F. No. 224/40/2006-CX.6.

We may also point out that by virtue of Notification No. 1/2007-CE (NT) dated

19.01.2007, the Central Board of Excise and Customs authorized the Member (Central Excise), Central Board of Excise and Customs to issue orders in terms of the said notification.

6. From a reading of the said notifications, it is clear that before the Chief Commissioner of Central Excise or the Director General of Central Excise Intelligence, as the case may be, forwards his recommendations, he is required to give ''an opportunity of being heard'' to the person against whom the proceedings have been initiated and is required to take into account any ''representation'' made by such person before he forwards his recommendations to the Board.

7. In this backdrop the facts of the present case may be seen. It appears that certain searches were conducted on 30.06.2009 in the factory premises of the petitioner company. Pursuant thereto, a show cause notice dated 03.09.2009, purportedly in terms of paragraph 4 of the said notification, was issued to the petitioner. The relevant portion of the said notice reads as under:

NOTICE IN TERMS OF PARA 4 OF NOTIFN. No. 32/2008-CE(NT) DT. 30.12.2006

Whereas consequent to searches conducted on 30.06.2009 in your factory premises, DGCEI (Hqrs.) during investigations have prima facie found that you were found engaged in clandestine clearances of your finished goods i.e. plain ply film and others falling under chapter 39 without reflecting the same in the statutory books of accounts and without payment of Central Excise duty as leviable. During the course of search at your factory premises and other related premises, various incriminating documents such as parallel invoices, private records containing details of sale of finished goods not reflected in the invoices issued by the company for the period from June 2005 to June 2009 were recovered. Comparison of these figures with daily stock account maintained by you evidences the clandestine clearances of the excisable goods from your premises, without payment of duty and education cess. Statements of Shri Vinay Kannodia, Director of the Company, Shri C. N. Malviya, Manager of the Company, Shri Siddharth Dixit, Marketing Agent of the Company, Shri Ajay Kumar Dwivedi, Head (operations) and Shri Ravi Kant Tripathi, accountant of the Company have been recorded under which they have admitted the clandestine clearances of goods without payment of duty. Accordingly, a proposal to withdraw the facility of monthly payment of duty and to restrict the payment of duty through Cenvat Credit and maintenance of records of receipt, disposal consumption and inventory of the principal inputs on which Cenvat credit has not been taken as per the provisions of Notification No. 32/ 2006-CE(NT) dated 30.12.2006 has been received from ADG, DGCEI (Hqrs.), New Delhi.

2. Now, therefore, you are hereby called upon to make representation, if any, within seven days of the receipt of this notice as to why the restrictions as mentioned above should not be imposed in respect of the goods cleared from your factory. You are also given an opportunity to appear before the

undersigned, if you so desire, to explain your case on 11.09.2009 at 11.30 hours at Directorate General of Central Excise Intelligence, West Block VIII, Wing No. VI, R. K. Puram, New Delhi.

3. Please note that if no representation or submission is made by you or if you do not appear before the undersigned on the stipulated date, the matter will be decided ex-parte on the basis of facts available on record.

Sd/-

(A.C. Buck).

8. It is apparent from a reading of the said notice that the issuing authority is said to have various incriminating documents such as parallel invoices, private records containing details of sale of finished goods not reflected in the invoices issued by the company for the period from June 2005 to June 2009. It is also apparent that the notice issuing authority had also made a comparison of these figures with the daily stock account maintained by the petitioner and it is on the basis of these documents and comparisons that the noticee was put to notice that there was evidence of clandestine clearance of the excisable goods from the notice''s premises without payment of duty and education cess. Apart from this, the notice also has reference to statements of Sh Vinay Kannodia, Sh C.N. Malviya, Sh Siddharth Dixit, Sh Ajay Kumar Dwivedi and Sh Ravi Kant Tripathi wherein the said persons are said to have admitted the clandestine clearance of goods without payment of duty. Therefore, it is clear that the notice issuing authority had the aforesaid documents available with him. The personal hearing was fixed for 11.09.2009 and on that date itself the petitioner submitted a reply calling for supply of the relied upon documents so that the petitioner would be in a position to give a suitable and effective representation/ explanation to the allegations made against it. The reply submitted by the petitioner reads as under:

Dated: 11th September, 2009

To

The Director General,

Director General of Central Excise Intelligence,

West Block No. VIII, Wing No. 6, R. K. Puram,

New Delhi-110022.

Sir,

Sub: Notice in terms of para-4 of Notification No. 32/ 2006- CE(NT), Dated 30.12.2006.

Please refer to notice F. No. 574/CE/107/09/INV, dated 3.9.2009, issued to M/s Vinay Wires and Poly Products Pvt. Ltd, Unit-I & II, B-4, Site No. 2, Rania, Kanpur Dehat, Kanpur, under para-4 of Notification No. 32/2006-CE(NT), dated

30.12.2006 proposing therein taking of the following deterrent action:

(i) to withdraw the facility of monthly payment of duty;

(ii) to restrict payment of duty through CENVAT credit; and

(iii) maintenance of records of receipt, disposal, consumption and inventory of the principal inputs on which CENVAT credit has not been taken.

We have been engaged by the notice to represent their case before the Director General, Directorate of Central Excise Intelligence. Requisite Vakalatnama is enclosed herewith.

The aforesaid deterrent action has been proposed to be taken under notification No. 32/2006-CE(NT), dated 30.12.2006, on the basis of alleged recovery of parallel invoices and private records, alleged to be containing details of sales of finished goods without payment of duty from June, 2005 to June, 2009. Besides, reliance is proposed to be placed on statements of the following persons who are alleged to have admitted clandestine removal of goods without payment of duty:

(i) Mr. Vinay Kannodia, Director of the noticee Company;

(ii) Mr. C. N. Malviya, Manager of the noticee Company;

(iii) Mr. Siddharth Dixit, Marketing Agent of the noticee Company;

(iv) Mr. Ajay Kumar Dwivedi, Head (Operations); and

(v) Mr. Ravi Kant Tripathi, Accountant of the noticee Company

At the outset it is submitted that the notice has not removed any final products without payment of duty and as such no deterrent action, as proposed in the notice, is liable to be taken against him. All the charges, leveled in the notice, are denied.

However, at this stage, the noticee would like to state that none of the documents, sought to be relied upon for taking the proposed deterrent action, has been made available to the notice. In the absence of relied upon documents, it is not feasible to set forth an effective defence. Non-supply of relied upon documents is against the principles of natural justice.

It is therefore, requested that copies of all the documents, sought to be relied upon, may be furnished to the noticee so as to enable him to set forth an effective defence in his favour. It is further requested that the notice may be given reasonable time, say one month, to file suitable and effective explanation to the allegations made, after furnishing copies of relied upon documents.

No action may please be taken before supply of relied upon documents in keeping with the requirements of the rules of natural justice.

Noticee would like to be heard before the case is decided.

Thanking you,

Yours sincerely,

Sd/-

(Dr Prabhat Kumar).

However, the documents were not supplied to the petitioner and the hearing was concluded on 11.09.2009 itself and no further hearing was given to the petitioner. The fact that the documents were not supplied to the petitioner is admitted in the impugned order itself in paragraph 5 thereof, which reads as under:

5. The personal hearing before the Director General was attended by Sh. Prabhat Kumar, advocate of the assessee on 11.09.2009. The advocate filed written submissions dated 11.09.2009. It was inter alia submitted that intimation letter for the hearing did not give the details on the basis of which charges are being made. It was stated that in the absence of relied upon documents, it was not feasible to set forth an effective defence. He requested for a reasonable time of about one month to file suitable and effective explanation to the allegations made after furnishing copies of relied upon documents and requested that the matter may be kept in abeyance in keeping with the principles of natural justice; that in the absence of relied upon documents, it was not feasible to give effective defence. The Director General, however, in the facts and evidences of the case did not deem it fit to keep the matter in abeyance and forwarded the said proposals with his recommendation.

9. The position, therefore, on facts is that a notice was issued to the petitioner calling upon him to explain as to why the restrictions should not be imposed on the petitioner in terms of the said notification. The petitioner sought the supply of the documents which were relied upon by the Director General of Central Excise Intelligence so as to enable the petitioner to make an effective and complete representation. It is also an admitted position that apart from the notice dated 03.09.2009 no other document was supplied to the petitioner. The hearing that was said to have been conducted on 11.09.2009 was in the absence of such documents being made available to the petitioner.

10. The learned Counsel for the petitioner placed reliance on a decision of the Supreme Court in the case of Kothari Filaments and Another Vs. Commissioner of Customs (Port) Kolkata and Others, and in particular on paragraph 16 thereof which reads as under:

16. The Act does not prohibit application of the principles of natural justice. The Commissioner of Customs either could not have passed the order on the basis of the materials which were known only to them, copies whereof were not supplied or inspection thereto had not been given. He, thus, could not have adverted to the report of the overseas enquiries. A person charged with mis-declaration is entitled to know the ground on the basis whereof he would be penalized. He may

have an answer to the charges or may not have. But there cannot be any doubt whatsoever that in law he is entitled to a proper hearing which would include supply of the documents. Only on knowing the contents of the documents, he could furnish an effective reply.

It appears that in the decision before the Supreme Court, the principles of natural justice has not been specifically spelt out in the relevant provisions but the Supreme Court took the view that Act did not prohibit application of principles of natural justice and thereafter went on to apply the same. However, in the present case, the principles of natural justice are specifically spelt out in paragraph 4 of the said notification itself, where the requirement of granting an opportunity to being heard has been clearly indicated and also that the notice''s representation should be duly considered before a recommendation is forwarded to the Central Board of Excise and Customs. In the present case, we find that, despite the petitioner having requested for the documents which were relied upon by the said Director General, the same were not supplied to the petitioner.

11. The learned Counsel for the respondent submitted that the non-supply of such documents would not be fatal inasmuch as these are not adjudication proceedings. We do not agree with this submission of the learned Counsel for the respondent for the simple reason that the said notification itself stipulates that the noticee has to be given an opportunity of being heard and that his representation must be considered before the recommendation is made to the Director General. Opportunity of hearing means an effective opportunity of hearing and in this case it means that the petitioner ought to have been supplied with the documents so that he could have made an effective representation against the contemplated action.

12. In view of the foregoing, we are of the opinion that the impugned order has been passed without following the procedure prescribed in paragraph 4 of the said notification inasmuch as the petitioner has not been given an opportunity of hearing in the true sense. Consequently, we set aside the impugned order. Although we have set aside the impugned order, the respondent would be at liberty to proceed with the initial notice dated 03.09.2009, provided they supply copies of the relied upon documents to the petitioner within four weeks. Thereafter, the petitioner would have an opportunity of making a representation within four weeks. The Director General would proceed thereafter in accordance with law.

The writ petition stands disposed of.

Dasti.

