Neutral Citation No. - 2024:AHC:70906-DB

Court No. - 39

Case :- CENTRAL EXCISE REFERENCE No. - 7 of 2011

Applicant :- M/S.Raman Ispat Pvt. Ltd.
Opposite Party :- Cce Meerut
Counsel for Applicant :- A.P.Mathur
Counsel for Opposite Party :- C.S.C.,Parv Agarwal

Hon'ble Saumitra Dayal Singh,J.
Hon'ble Donadi Ramesh,J.

1. Heard Shri A.P. Mathur, learned counsel for the assessee and Shri Parv Agarwal, learned counsel for the revenue.

2. The present reference arose from the original order of the Customs, Excise & Gold (Control) Appellate Tribunal, dated 14.02.2003. By that order, the Tribunal dismissed the appeal filed by the present applicant and thus rejected the claim that the applicant was entitled to pay Central Excise duty under Section 3A(4) of the Central Excise Act, 1944 (hereinafter referred to as the 'Act').

3. Upon order dated 12.5.2010 passed by this Court in Central Excise Reference Application Defective No. 16 of 2003, the Tribunal has drawn a statement of fact on the following question of law :

> *"Whether the declaration made in the year 1997-98 can be treated as the declaration for the year 1998-99 under Section 3A of the Central Excise Act read with Rule 96ZO(3) of the Central Excise Rules, 1944".*

4. Vide Finance Act, 1997, the Parliament introduced Section 3A of the Act. It reads as below :

> *"**Section 3A. Power of Central Government to charge Excise duty on the basis of capacity of production in respect of notified goods.**-(1) Notwithstanding anything contained in section 3, where the Central Government, having regard to the nature of the*

process of manufacture or production of excisable goods of any specified description, the extent of evasion of duty in regard to such goods or such other factors as may be relevant, is of the opinion that it is necessary to safeguard the interest of revenue, specify, by notification in the Official Gazette, such goods as notified goods and there shall be levied and collected duty of excise on such goods in accordance with the provisions of this section.

(2) Where a notification is issued under sub-section (1), the Central Government may, by rules, provide for determination of the annual capacity of production, or such factor or factors relevant to the annual capacity of production of the factory in which such goods are produced, by the Commissioner of Central Excise and such annual capacity of production shall be deemed to be the annual production of such goods by such factory :

Provided that where a factory producing notified goods is in operation only during a part of the year, the production thereof shall be calculated on proportionate basis of the annual capacity of production.

(3) The duty of excise on notified goods shall be levied, at such rate as the Central Government may by notification in the Official Gazette specify, and collected in such manner as may be prescribed:

Provided that, where a factory producing notified goods did not produce the notified goods during any continuous period of not less than seven days, duty calculated on a proportionate basis shall be abated in respect of such period if the manufacturer of such goods fulfills such conditions as may be prescribed.

(4) Where an assessee claims that the actual production of notified goods in his factory is lower than the production determined under sub-section (2), the Commissioner of Central Excise shall, after giving an opportunity to the assessee to produce evidence in support of his claim, determine the actual production and redetermine the amount of duty payable by the assessee with reference to such actual production at the rate specified in sub-section (3).

(5) Where the Commissioner of Central Excise determines the actual production under sub-section (4), the amount of duty already paid, if any, shall be adjusted against the duty so redetermined and if the duty already paid falls short of, or is in excess of, the duty so redetermined, the assessee shall pay the deficiency or be entitled to a refund, as the case may be.

(6) The provisions of this section shall not apply to goods produced or manufactured, -

(i) in a free trade zone and brought to any other place in India; or

(ii) by a hundred per cent export-oriented undertaking and allowed to be sold in India.

Explanation 1. - For the removal of doubts, it is hereby clarified that for the purposes of section 3 of the Customs Tariff Act, 1975 (51 of 1975), the duty of excise leviable on the notified goods shall be deemed to be the duty of excise leviable on such goods under the [1][the First Schedule and the Second Schedule] to the Central Excise Tariff Act, 1985 (5 of 1986), read with any notification for the time being in force.

Explanation 2. - For the purposes of this section the expressions "free trade zone" and "hundred per cent export-oriented undertaking" shall have the meanings assigned to them in section 3.]"

5. Undoubtedly, the Central Government introduced Rule 96ZO(3) of the Central Excise Rules, 1944 (hereinafter referred to as the 'Rules') by Notification No. 44/97, dated 30.8.1997 w.e.f. 1.9.997. For ready reference, the said rule reads as below :

"[(3) Notwithstanding anything contained elsewhere in these rules, if a manufacturer having a total furnace capacity of 3 metric tonnes installed in his factory so desires, he may, from the first day of September, 1997 to the 31st day of March, 1998 or any other financial year, as the case may be, pay a sum of rupees five lakhs per month in two equal instalments, the first instalment latest by the 15th day of each month, and the second instalment latest by the last day of each month, and the amounts so paid shall be deemed to be full and final discharge of his duty liability for the period from the 1st day of September, 1997 to the 31st day of March, 1998, or any other financial year, as the case may be, subject to the condition that the manufacturer shall not avail of the benefit, if any, under sub-section (4) of the section 3A of the Central Excise Act, 1944 (1 of 1944):

Provided further that if the capacity of the furnaces installed in a factory is more than or less than 3 metric tonnes, or there is any change in the total capacity, the manufacturer shall pay the amount, calculated pro rata:"

6. Thereafter, w.e.f. 1.5.1998, second proviso to the above

1Substituted by clause 119 of the Finance Bill, 1999 (22 of 1999)

provision was substituted. It reads as below :

> *"[Provided also that where a manufacturer fails to pay the whole of the amount payable for any month by the 15th day or the last day of such month, as the case may be, he shall be liable to, -*
>
> *(i) pay the outstanding amount of duty along with interest thereon at the rate of eighteen per cent. per annum, calculated for the period from the 16th day of such month or the 1st day of next month, as the case may be, till the date of actual payment of the outstanding amount; and*
>
> *(ii) a penalty equal to such outstanding amount of duty or five thousand rupees, whichever is greater.]"*

7. Also, 3rd proviso was added to that provision. It reads as below :

> *"[Provided that if the manufacturer fails to pay the total amount of the duty payable for each of the months from September, 1997 to March, 1998 by the 30th day of April, 1998, he shall also be liable to pay a penalty equal to the outstanding amount of duty as on 30th day of April, 1998 or five thousand rupees, whichever is greater.]*
>
> *Explanation :- For removal of doubts it is hereby clarified that sub-rule (3) does not apply to an induction furnace unit which ordinarily produces castings or stainless steel products but may also incidentally produce non-alloy steel ingots and billets.]."*

8. Vide his application dated 7.8.1997, the applicant opted under Rule 96ZO(3) of the Rules. It paid the compounded Central Excise duty accordingly, for the period 1.9.1997 to 31.3.1998. With respect to that period, there is no dispute between the parties.

9. At the beginning of the next Financial Year 1998-99, it is also admitted between the parties that the petitioner did not make any fresh application to either remain/continue under the scheme of compounding in terms of Rule 96ZO(3) of the Rules nor it made any application to withdraw from that scheme. In fact, the petitioner made no application in that regard till June, 1998. For the first time, on 15.6.1998, the applicant wrote to the jurisdictional authority expressing its intent to pay duty on actual production basis. At the same time, it is admitted to the applicant that it paid duty in terms of

Rule 96ZO(3) of the Rules for the month of April, 1998.

10. In such facts, Shri Mathur would contend that the option to pay excise duty on compounded basis had to be exercised for every financial year. Merely because the applicant had made that application for the part of the Financial Year 1997-98, that option exercised could not be applied against the applicant's wishes for the Financial Year 1998-1999. In absence of any declaration made by the applicant for the next Financial Year 1998-1999, and in absence of any option exercised in that regard, the conclusion drawn by the revenue authorities as confirmed by the Tribunal, is wholly unfounded. The optional procedure to levy excise duty could not be extended beyond the option exercised by the applicant.

11. On the other hand, learned counsel for the revenue would submit, option once exercised in a financial year could not be withdrawn. Thus, in the first place, the option exercised by the applicant for the Financial Year 1997-98 could not have been withdrawn before 31.3.1998. In fact, there is no dispute as to that for the Financial Year 1998-99. Since the applicant did not make any application to withdraw from the compounding scheme under Rule 96ZO(3) of the Rules, the applicant continued under the said scheme in terms of the declaration made under Rule 96ZO(3) of the Rules. Further, it has been contended, the applicant treated itself to be under the benefit of the compounding scheme. It having deposited the compounding fee for the month of April, 1998, the applicant clearly indicated to the revenue authorities to remain under the said scheme for the Financial Year 1998-99 as well. Having thus indicated to the revenue authorities its intent to remain under the compounding scheme and having paid the compounding duty for the month of April, 1998, it never became open to the applicant to withdraw from that

scheme in the middle of the financial year. The application moved by the applicant to be charged to duty on actual production basis, on 15.6.1998, was rightly rejected in terms of Rule 96ZO(3) of the Rules. He has placed reliance on a decision of the Supreme Court in **Union of India Vs. Supreme Steels and General Mills, 2001 (133) E.L.T. 513 (S.C.)**.

12. Having heard learned counsel for the parties and having perused the record, in the first place, it has to be recognised that normally or the conventionally levy of excise duty arises on actual production/removal basis. Second, the lump sum method introduced by Finance Act, 1997 by introducing Section 3A of the Act and upon introduction of Rule 96ZO(3) of the Rules, the alternative method of assessment for payment of excise duty on compounded basis was legislatively recognised. In principle, there is no defect in the scheme. It was otherwise open to the legislature to devise an alternative method. Insofar as the compounded duty became payable on agreement basis i.e. upon offer made by the assessee/manufacturer and its acceptance by the revenue authorities, on principle, the same was wholly valid and enforceable in law.

13. Here, it may only be noted, payment of tax liability on compounded basis is a well recognised principle in tax jurisprudence and there is no dispute to the same.

14. Next, coming to the exact provisions involved in the present case, Rule 96ZO(3) of the Rules, in **Commissioner of C. Ex. & Customs Vs. Venus Castings (P) Ltd., 2000 (117) E.L.T. 273 (S.C.)**, it was observed as below :

> *"**10.** The schemes contained in Section 3-A(4) of the Act and Rule 96-ZO(3) or Rule 96-ZP(3) of the Excise Rules are two alternative procedures to be adopted at the option of the assessee. Thus the*

two procedures do not clash with each other. If the assessee opts for the procedure under Rule 96-ZO(1) he may opt out of the procedure under Rule 96-ZO(3) for a subsequent period and seek the determination of the annual capacity of production. An assessee cannot have a hybrid procedure of combining (sic) the procedure under Rule 96-ZO(1) to which Section 3-A(4) of the Act is attracted. The claim by the respondents is a hybrid procedure of taking advantage of the payment of lump sum on the basis of the total furnace capacity and not on the basis of the actual capacity of production. Such a procedure cannot be adopted at all, for the two procedures are alternative schemes of payment of tax.

11. *The learned counsel for the respondent contended that Rule 96-ZO(3) is contrary to Section 3-A(4) of the Act and, therefore, should be held to be ultra vires or the relevant rules should be read in such a manner so as to allow the procedure prescribed under the provisions of Section 3-A(4) to be followed. Section 3-A of the Act provides for levy and collection of the tax arising under the Act in such manner and at such rate as may be prescribed by the Rules. Section 3-A provides a special procedure in respect of the power of the Central Government to charge excise duty on the basis of capacity of production in respect of notified goods. If such interpretation is not accepted, it is contended, that the levy of tax is in the nature of a licence fee and not on the production of goods at all. Schemes of composition are available in several other enactments including the Sales Tax Act and the Entertainment Tax. (See State of Kerala v. Builders Assn. of India [(1997) 2 SCC 183] .) In this context, the learned counsel for the respondents referred to several decisions. However, in our opinion, all these decisions either arising under the Income Tax Act in relation to special mode of collection of tax or excise duty on timber dealers or other enactments have no relevance. What can be seen is that the charge under the section is clearly on production of goods but the measure of tax is dependent on either actual production of goods or on some other basis. The incidence of tax is, therefore, on the production of goods. It cannot be said that collection of tax based on the annual furnace capacity is not relatable to the production of goods and does not carry the purpose of the Act. In holding a relevant rule to be ultra vires it becomes necessary to take into consideration the purpose of the enactment as a whole, starting from the preamble to the last provision thereto. If the entire enactment read as a whole indicates the purpose and that purpose is carried out by the rules, the same cannot be stated to be ultra vires of the provisions of the enactment. Therefore, it is made clear that the manufacturers, if they have availed of the procedure under Rule 96-ZO(3) at their option, cannot claim the benefit of determination of production capacity under Section 3-A(4) of the Act which is specifically excluded. We find that the view taken by the Andhra Pradesh High Court in Sathavahana Steels & Alloys (P) Ltd. v. Govt. of India [(1999) 114 ELT 787 (AP)] and a similar view expressed by the Division Bench of the Allahabad High Court*

in Civil Miscellaneous Writ Petition No. 1127 of 1999 Jalan Castings (P) Ltd. v. CCE [CMWP No. 1127 of 1999 (All)] disposed of on 28-2-2000 is reasonable and correct. We overrule the view taken by the Allahabad High Court in Pravesh Castings (P) Ltd. v. CCE [(2000) 36 RLT 239 (All)] .

12. *On the reasoning adopted by us and bearing in mind that in taxation measures composition schemes are not unknown and when such scheme is availed of by the assessee it is not at all permissible for him to turn around and ask for regular assessment, we think, there is no substance in the contention urged on behalf of the respondents."*

15. That view was further followed in **Supreme Steels and General Mills (supra)**. Therefore, there is no room to entertain a doubt that option to pay Central Excise duty on compounded basis once exercised for the financial year may not be withdrawn by an assessee/manufacturer during that Financial Year.

16. What survives for our consideration is, whether the present applicant had withdrawn its offer at the beginning of the Financial Year 1998-99. As noted above, there is no written communication made by the applicant in that regard. The first communication that the applicant wrote to the revenue authorities is dated 15.6.1998 when it indicated its intent to discharge duty liability on actual production basis. However, prior to that date, for the month of April, 1998, the applicant had already discharged duty liability on compounded basis. Having done that, the applicant had clearly indicated to the revenue authorities its intent to remain under the benefit of the compounding scheme for the Financial Year 1998-99. It is self-contradicted contention being advanced that though the applicant had paid up the compounding fee for the month of April, 1998, it had not agreed to be retained under the benefit of the compounding scheme.

17. As to the mode in which the applicant may ever have applied to discontinue the benefit of the compounding scheme, Rule 96ZO(3) of the Rules leaves no doubt that a declaration was required to be filled

by the applicant to be admitted to the benefit of the compounding scheme. It must have been filled at the relevant time i.e. August, 1998, in terms of the said provision. Clearly, the applicant was not required to submit the same on year to year basis. Once the scheme has been interpreted by the Supreme Court, it is mandatory that option once exercised for a financial year, may not be withdrawn midway. The only recourse that applicant may have taken may be to apply to the jurisdictional authority to discontinue the benefit of the compounding scheme from the beginning of the next Financial Year i.e. 1.4.1998. For such option to be exercised, the applicant ought to have made that application before the date i.e. 1.4.1998, and in any case before making the deposit of the compounding fee for the month of April, 1998. Having done otherwise, the applicant lost the opportunity to withdraw from the compounding scheme for the Financial Year 1998-99.

18. In view of the above, the question referred above, is answered in the affirmative in favour of the revenue and against the assessee.

19. Accordingly, the application stands **dismissed**.

Order Date :- 23.4.2024
SA

(Donadi Ramesh, J.) **(S.D. Singh, J.)**