GAHC010052982021

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/2431/2021

M/S KAMAKHYA POWER SOLUTIONS
A PARTNERSHIP FIRM REGD. UNDER THE PROVISIONS OF THE INDIAN PARTNERSHIP ACT, 1932 AND HAVING ITS OFFICE AND FACTORY AT 15TH MILE, G.S. ROAD, BYRNIHAT, KAMRUP, ASSAM.

VERSUS

THE UNION OF INDIA AND 3 ORS
THROUGH THE FINANCE SECRETARY, MINISTRY OF FINANCE, HAVING HIS OFFICE AT NORTH BLOCK, NEW DELHI-110001.

2:THE COMMISSIONER
CENTRAL GOODS AND SERVICE TAX
GUWAHATI
OFFICE OF THE CENTRAL GOODS AND SERVICE TAX
GUWAHATI
ASSAM.

3:THE ASSTT. COMMISSIONER
CENTRAL GOODS AND SERVICE TAX
CENTRAL GST DIVISION
GST BHAWAN
KEDAR ROAD
GUWAHATI-781001
ASSAM.

4:THE PRINCIPAL COMMISSIONER
CENTRAL GOODS AND SERVICE TAX
GST BHAWAN
KEDAR ROAD
GUWAHATI
ASSAM

Advocate for the Petitioner : MS. M L GOPE

Advocate for the Respondent : SC, GST

BEFORE
HONOURABLE MR. JUSTICE SOUMITRA SAIKIA

ORDER

Date : 02.02.2023

Heard Ms. N. Hawelia, learned counsel for the petitioner. Also heard Mr. S. C. Keyal, learned standing counsel for the GST.

2. The petitioner is a partnership firm registered under the provisions of the Indian Partnership Act, 1932. It has its office and manufacturing unit at 15th Mile, G.S. Road, Byrnihat, Kamrup, Assam. The petitioner is engaged in the manufacturer of their product Lead Ingot, Re-melted Lead Ingot etc. from the said unit. By this writ petition, the petitioner seeks to challenge the impugned notices dated 28.12.2020 issued by the respondent No. 3 for recovery of Central Excise duty by the respondent authorities/Central Excise Department purportedly in pursuance to the Hon'ble Supreme Court's Judgment dated 22.04.2020 passed in Civil Appeal No. 2256-2263/2020 (Union of India & Anr. –Vs- M/s V.V.F Limited & Anr.) and the Notice dated 27.01.2021 whereby the CGST authorities blocked/attached the HDFC, Fancy Bazar, Bank account of the petitioner.

3. The relevant facts in brief are that in terms of the Government of India, the North East Policy Resolution issued under O.M. dated 24.12.1997, various incentives were offered under the said industrial policy resolution. Amongst the various incentives offered, the policy provided for 100% exemption of Central Excise duty paid. In order to implement the Industrial Policy Resolution, the respondent authority, namely, the Central Excise Department issued Notification No. 32/99-CE and 33/99-CE dated 08.07.1999 whereby the Central Excise

Exemptions were granted in respect of all excisable goods cleared from a unit located in the Growth or Integrated Infrastructure Development Centre or Export Promotion Industrial Park or Industrial Estate or Industrial area or Commercial Estate, as the case may be. The exemptions contained were made application only to new industrial units which commenced their industrial production on or after the 24th Day of December, 1997 or to existing industrial units before the 24th December, 1997 but which undertook substantial expansion by way of increase in the installed capacity by not less than 25% on or after the 24th day of December, 1997. The said exemptions were applicable to any of the eligible industrial units for a period not exceeding 10 years from the date of publication of the notification in the official Gazette or from the date of commencement of commercial production which ever was later. The petitioner herein had availed area-based exemption under the Notification No. 32/99-CE dated 08.07.1999. Thereafter vide notification No. 35/2001-CE dated 29.06.2001, the exemptions given under the Notification dated 08.07.1999 were amended to the extent that the assessee will get refund of the duty which it has paid in cash after exhausting the CENVAT Credit.

4. Upon expiry of 10 years of the Industrial Policy Resolution, the Government of India on 01.04.2007 announced a new policy named North-East Industrial and Investment Promotion Policy (NEIIPP), 2007. Under the said Policy, the Government of India approved a package of fiscal concessions for the North East Region. Under the various fiscal concessions, there was 100% excise duty exemption which was to be continued on finished products made in the North-Eastern Region, as was available under the NEIP, 1997. Several notifications were issued by the Central Excise Department specifying the procedure as well as the manner of availing the excise duty. By notification No. 17/2008-CE dated 27.03.2008 and Notification No. 38/2008-CE dated 10.06.2008, the exemptions granted were further modified to the extent of duty payable on value addition on

specified goods which are cleared from the units. By the said notifications, it was provided that instead of 100% of the refund of excise duty paid, the refund would be subjected to the value addition and as per the rates provided in the notification in respect of different categories of goods as provided therein.

5. Under Clause- 3(1) of the Notification No. 20/2008-CE dated 27.03.2008, an option was provided to the manufacturers that notwithstanding anything contained in the said notification, the manufacturer shall have the option not to avail the rates specified in the table provided in the said notification but instead may apply to the Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, having jurisdiction over the manufacturing unit of the manufacturer for fixation of a special rate representing the actual value addition in respect of any goods manufactured and cleared under this notification, if the manufacturer finds that four-fifth of the ratio of actual value addition in the production or manufacture of the said goods to the value of the said goods is more than the rate specified in the said table contained in the notification.

6. The petitioner in terms of the said Clause-3(1) of the Notification No. 20/2008-CE dated 27.03.2008, made its application claiming that the percentage of value addition made by the manufacturer on the goods produced by them from their units makes them eligible for a special rate as provided under the said notification. Meanwhile, the said notification of granting exemption only to the value addition made by the manufacturer was assailed before this Court as well as several High Courts across the Country. The writ petitions filed by the manufacturers was allowed by the Single Judge Bench of this Court and were also upheld by the Division Bench of this Court holding that the curtailment of excise exemption is not permissible in terms of the promise made under the Industrial Policy. The Notification dated 27.03.2008 was accordingly interfered with and set aside by this Court. An appeal was carried to the Supreme Court by the Union.

During the currency of the appeal, initially an interim order was passed by the Apex Court whereby it was directed that 50% of the refund claimed by the petitioners in terms of the Judgments of the High Courts, was to be refunded to the petitioner subject to furnishing of solvency certificate. Subsequently, the Supreme Court vide Judgment and Order dated 22.04.2020 rendered in (Union of India –vs- VVF Limited) set aside the Judgments of the High Courts including of this Court and the notification dated 27.03.2008 was restored. The Apex Court held that the subsequent notification dated 27.03.2008 did not alter the position but was merely clarificatory in nature.

7. The present appeal is being filed as the petitioner is aggrieved by the fact that pursuant to the Judgment of the Apex Court in VVF Limited (supra), the notification dated 27.03.2002 having been restored by the said judgment, the application of the petitioner for special rate which was submitted was not given due consideration. However, the respondent authorities without first deciding the claim of the petitioner for special rate has now issued the impugned demand-cum-show cause notice seeking to recover the amount of Central Excise Duty refunded by the department in pursuance to the interim order passed by the Apex Court during the currency of the Civil Appeals which were pending before the Apex Court at the relevant point in time. It is the contention of the petitioner that the application for special rate in terms of Clause 3(1) of the Notification No. 20/2008- CE dated 27.03.2008 which was submitted by the petitioner claiming for special rate was required to be first decided upon by the Central Excise Authority prior to issuing any demand for recovery. Clause 3(1) of the said notification No. 20/2008- CE dated 27.03.2008 as provided a legal right to the manufacturers like the petitioner to have an option not to accept the rates provided in the said notification but to instead make an application for a special rate and the authorities are duty bound in terms of the said notification to give due consideration to such application made by

the petitioner.

8. The said application not being decided prior to issuing any demand is the ground on which the impugned demand-cum-show cause notice is assailed in the present proceedings. According to the learned counsel for the petitioner if the authorities accept the special rate as claimed by the petitioner, it will require re-evaluation of the process for deciding as to whether the petitioner is at all required to refund the amount. Alternatively, it may so appear that the petitioner could ultimately be entitled to a higher refund and thereby no recovery is necessitated from the department. That having not been done, the manner in which the respondent authorities are seeking to recover the refunds granted to the petitioner is bad in law and contrary to the expressed terms of the Notification No. 20/2008-CE dated 27.03.2008. And in that view of the matter, the petitioner submits that the impugned demand notice be set aside and quashed and the respondent authorities be directed to first consider the application for special rate filed by the petitioner which is pending before the respondent authorities concerned.

9. The learned counsel for the petitioner has submitted that in similar matters, the Co-ordinate benches have remanded the matter back to the respondent authorities to decide on the special rate application pending before the authorities before proceeding to recovery any amounts stated to have been granted as refund to the petitioner. The learned counsel for the petitioner refers to orders passed by the Co-ordinate Benches in WP(C) No. 1644/2021; WP(C) No. 2089/2021 and WP(C) No. 740/2022.

10. It is seen that this Court vide order dated 09.04.2021 while issuing notice by relying upon the two orders dated 24.03.2021 in WP(C) No. 1644/2021 and WP(C) No. 2089/2021, as ad-interim measure directed the Commissioner, GST, Dibrugarh (respondent No. 2) to dispose of the application dated 05.03.2021 submitted by

the petitioner for fixation of special rate within a period of 4(four) weeks from the date of receipt of the certified copy of the order. It was directed, till such decision taken, no coercive measure be taken against the petitioner pursuant to the notice dated 28.12.2020 impugned in the present writ petition. It was further directed that till the next date of listing, the CGST authorities shall not insist on the compliance of the Notice dated 27.01.2021 issued to the HDFC Bank, fancy Bazar Branch requiring remittance of Rs.86,71,178/- in terms of the Notice dated 09.04.2021.

11. When the matter is listed before this Court, the parties are at idem no order as on date has been passed on the special rate applicable by the department.

12. Upon hearing the learned counsels for the parties and upon perusal of the pleadings on record, it is seen that vide orders dated 24.03.2021 in WP(C) No. 1644/2021 and WP(C) No. 2089/2021, the Co-ordinate Benches have dealt with this issue and the matters were disposed of directing the department to first consider the special rate applications pending before the authority and thereupon re-decide the matter afresh. Till such decisions are arrived at, the demand notices be kept in abeyance. This position of law is not disputed by the learned counsels at the bar. No Appeal or review has been filed against the orders dated 24.03.2021 in WP(C) No. 1644/2021 and WP(C) No. 2089/2021. As such, the department having accepted the directions of this Court vide orders dated 24.03.2021 passed in WP(C) No. 1644/2021 and WP(C) No. 2089/2021 respectively, there is no reason why similar directions cannot be issued in this writ petition as the issues raised and the petitioners in WP(C) No. 1644/2021 and WP(C) No. 2089/2021 and in the present proceedings are similarly placed.

13. Accordingly, this Court is of the view that since there is already a direction by this Court vide order dated 09.04.2021, directing the respondent authority, more

particularly, the respondent No. 2 to decide on the application for special rate which is pending before the authority concerned, the writ petition is disposed of by making the interim order dated 09.04.2021 absolute. This writ petition is disposed of directing the respondent No. 2 to expeditiously consider and dispose of special rate application stated to have been filed by the petitioner. The petitioner should also be afforded an opportunity of hearing before such application is decided. The notices dated 28.12.2020 & 27.01.2021 which are impugned in the present writ petition shall be kept in abeyance till such orders passed in the special rate application issued by the department. It is made clear that the authorities will decide the application on merit and pass appropriate orders and the same shall not be rejected on any technical ground such as limitation etc.

14. The question of the legality of the impugned notices dated 28.12.2020 and the Notice dated 27.01.2021 issued by the respondent department, having not been decided on merit in the present proceedings, are left open. In terms of the above, the writ petition is disposed. No order as to cost.

JUDGE

Comparing Assistant