IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 30-04-2015

CORAM:

THE HON'BLE MR.JUSTICE S.VAIDYANATHAN

W.P.No.17401 of 2008

And M.P.No.1 of 2013

RESERVED ON 24.03.2015

M/s.Nirmala Filaments (India) Pvt.Limited,
Shed No.33 SIDCO Industrial Estate,
Coimbatore-641 021 .. Petitioner

Versus

1. The Customs and Central Excise Settlement Commission,
2nd Floor, Naramadha Block,
Customs House,
33 Rajaji Salai,
Chennai-600 001.

2. Commissioner of Central Excise,
6/7 A.T.D.Street,
Race Course,
Coimbatore-641 018 .. Respondents

Prayer: This Writ Petition is filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorarified Mandamus, to call for the records of the first respondent, quash the impugned order bearing C.No.V/15/151/2007 SC dated 8.5.2008 passed by the first respondent and consequently direct the first respondent to consider the plea raised by the petitioner in the Miscellaneous Petition.

For Petitioner : Mr.S.Jai Kumar

For Respondents : Mr.A.P.Srinivas
Sr. Standing Cousnel for C & CE

ORDER

This writ petition has been filed, praying for the issuance of the Writ of Certiorarified Mandamus, to call for the records of the 1st respondent pertaining to the impugned order dated 8.05.2008 and to modify the final order dated 20.12.2007 passed by the 1st respondent.

2. The brief facts are that M/s.Nirmala Filaments (India) Private Limited, Coimbatore, the petitioners herein is a manufacturer of Nylon Monofilament Yarn of cross sectional dimension upto 1 mm and above 1mm, falling under Chapter heading 5404.10 and 3916.90 of the first schedule to the Central Excise Act, 1994 respectively. During the relevant period Nylon Monofilament Yarn of cross sectional dimension upto 1 mm and above 1mm was subjected to duty of excise. A show cause notice was issued, alleging that the petitioner has cleared such Yarn in the guise of Yarn of Cross Sectional dimension less than 1 mm, without payment of duty of excise and thereby demanded duty of excise to the tune of Rs.40,55,655/- apart from interest and penalty. The petitioner has filed a petition for settlement of dispute before the respondent by admitting a duty liability of Rs.37,38,184/- and prayed for immunity from payment of interest, imposition of penalty and prosecution as per the provisions of the Central Excise Act, 1944. However, the 1st respondent , by its order dated 20.02.2007, settled the petitioner's duty liability at Rs.36,90,395/- apart from interest and penalty. According to the petitioner, a sum of Rs.27,40,492/- was paid by utilisation of Cenvat credit earned from duties paid on inputs and Rs.8,50,000/- by cash and the balance amount of Rs.99,833/- was also paid by the petitioner through cenvat credit. The 1st respondent has directed the petitioner to pay simple interest at 10% on the settled duty liability and also imposed a penalty of Rs.3,50,000/- and granted immunity from prosecution. In pursuance thereof, the jurisdictional Central Excise Authorities have directed the petitioner to pay a sum of Rs.8,41,472/- towards interest. Thereafter, the petitioner has filed a Miscellaneous Petition before the 1st Respondent, praying to review the Admission-cum-Final Order, dated 20.12.2007, in and by which a total duty liability was settled at Rs.36,90,325/-. By order dated 08.05.2008, the 1st respondent disposed of the Miscellaneous Petition, observing that any such interference with the final order would amount to review of the said final order which is prohibited under Section 32 M of the Central Excise Act, 1944. Aggrieved by the same, the petitioner has come forward with the present writ petition.

3. A counter affidavit has been filed on behalf of the 2nd respondent, wherein it is stated that without complying the Admission-cum-Final Order dated 20.12.2007, the petitioner filed Miscellaneous Petition before the 1st respondent for modification of the order. The petitioner has paid a sum of Rs.23,05,625/- towards duty settled by the Commission, leaving a balance of Rs.99,833/-. In terms of the order passed by the Commission, the Respondent Departments calculated the interest payable by the petitioner and worked out at Rs.8,41,472/- and requested the petitioner to pay the same by communication dated 31.01.2008. In the meanwhile the petitioner had debited a further sum of Rs.99,833/- on 01.01.2008 in full settlement of the duty liability. However, the petitioner had not paid the penalty imposed by the Commission and thereby not

complied the final order. The petitioner had indulged in clearance of Nylon Monofilament yarn of cross Sectional dimension of above 1 mm in the guise of less than 1 mm for the purpose of availing the exemption notification. The claim of the petitioner that sufficient amount of Cenvat credit would have been available to them to discharge their duty liability relating to their clandestine removal of Nylon Monofilament yarn of cross sectional dimension of above 1 mm, had they availed the cenvat credit during the relevant point of time is not a plausible ground for them for claiming exemption from paying the interest. The order dated 20.12.2007 passed by the Settlement Commission is very categorical that the total liability is settled at Rs.36,90,325/- and the petitioner shall pay interest at 10% p.a. on the duty settled from the date when the duty became due till the date of actual payment. Accordingly, the interest has been calculated at Rs.8,41,472/- and communicated to the petitioner on 31.1.2008 for compliance. It is stated that the due duty was not paid during the period 2002-2003, 2003-04, 2004-05 and 2005-06 (four financial years), but the duty payable thereon for the said period was paid on different dates commencing from 12.8.2006, that too after the case was detected by the department. Therefore, the government was certainly deprived of the revenue due from the relevant period till the amount was actually paid much less through cash or through availment of cenvant credit as such, the petitioner is liable to pay the interest. The petitioner filed the miscellaneous petition, praying not only for re-quantification of interest demanded but also penalty imposed which clearly amounts to requiring the Commission for reviewing their own order, to which, they are not empowered. With these averments, the respondents sought for dismissal of the writ petition.

4. Heard the learned counsel for the petitioner and the respondents and perused the entire record.

5. Mr.S.Jaikumar, learned counsel appearing for the petitioner would contend that the petitioner has moved the miscellaneous petition, seeking modification of the final order to the effect that the petitioner is only liable to pay interest on the duty liability discharged through cash, due to shortage of Cenvat credit since the duty paid through cenvat credit can be considered as payment of duty at the relevant point of time. However, according to the learned counsel, the department had worked out the interest liability for the entire amount of duty admitted and paid, irrespective of the fact that if duty was paid at the original instance, the petitioner would have availed cenvat credit and paid duty. Therefore, this aspect, which is a factual mistake on the face of the order, has not been considered by the first respondent while passing the final order, dated 20.12.2007, therefore, the petitioner has sought for modification of the order by way of review and it would not amount to re-opening of the proceedings or re-determining the issue, however, the Commission has erroneously rejected the petition, which is liable to be set aside. He would further contend that the interest has been charged by way of compensation to the government as it has been deprived of its revenue in the form of duty of excise, but the fact remains that only to the extent of duty liability payable by the petitioner, over and above the cenvat

credit entitlement, the duty adjusted through cenvat credit is not at all a revenue to the government, but only an adjustment. With these contentions, the learned counsel sought for setting aside the impugned order and consequently, direct the respondents to grant immunity of interest and the penalty.

6. On the other hand, the learned counsel appearing for the respondents, while reiterating the avernments of the counter affidavit filed on behalf of the respondents, contended that the writ petition is not maintainable and the order dated 20.12.2007 passed by the Settlement Commission is very categorical that the total liability is settled at Rs.36,90,325/- and the petitioner shall pay interest at 10% p.a. on the duty settled from the date when the duty became due till the date of actual payment and the contention of the petitioner that availing of the cenvat credit during the relevant point of time is not a plausible ground for the petitioner for claiming exemption from paying the interest. He pointed out that out of the total duty demand of Rs.36,90,325/-, the petitioner paid Rs.13,84,700/- on cash and balance amount of Rs.23,05,625/- through cenvat credit, but not paid the interest which was worked to Rs.8,41,472/-. Therefore, the learned counsel sought for dismissal of the writ petition.

7. The Customs and Central Excise Settlement Commission (CCESC) was established under Section 32 of the Central Excise Act. The settlement machinery is meant for providing a chance to the tax evader who wants to turn a new leaf as recommended by the Direct Taxes Enquiry Committee, popularly known as Wanchoo Committee. However, the CCESC has to settle cases only in accordance with law and the provisions of the Act and it has no power to go beyond those provisions. The power to grant immunity from penalty is conferred upon the CCESC by sub-section (1) of Section 32K of the Act. If it is satisfied that any person who made the settlement application "has co-operated with the settlement commission in the proceedings before it and has made full and true disclosure of his duty liability", it may grant to such person, subject to conditions which it may think fit to impose, immunity from the imposition of any penalty, fine and interest under the Act with respect to the case covered by the settlement. Sub-section (2) provides for withdrawal of immunity if it turns out that the terms of the order of settlement regarding payment of the duty are not complied with. Sub-section (3) also provides for withdrawal of the immunity if theCCESC is satisfied that it was obtained by concealment of material particulars or by giving false evidence.

8. In view of the settled legal position, this Court is inclined to venture upon examining the decision making process followed by the CCESC in the present case. As regards the imposition of interest and penalty of Rs.8,41,472/- and Rs.3,50,000/- on the petitioner, I am unable to find fault with the decision-making process adopted by the CCESC. In fact, a perusal of the record, it reveals that during investigation, it was found that the petitioner had indulged in evasion of central excise duty by clearing nylon monofilament yarn of cross sectional dimension above 1 mm under the

guise of nylon nil rate of duty and thereby, it is clear there was a deliberate intention to evade duty by mis-declaring the goods in order to avail exemption. In the present case, the CCESC has observed in paragraph 9 and 10 in final order, dated 20.12.2007 as under: -

> "9. The representative of the Revenue reiterate the contentions in the written submission placed before the Bench today and submitted that but for the detection by the department, the evasion would have gone unnoticed and hence, immunity from interest should not be granted and deterrent penalty should be imposed.
>
> "10. The Bench has considered the submissions made and the arguments put forth by both sides. The point raised by Revenue regarding payment of admitted duty liability from RG 23A Part II are technical in nature and can be ignored at this stage when the matter is getting settled in a spirit of settlement. However, the Department contended regarding cenvat credit availed by the applicant on their own and requested that th cenvat credit of Rs.23,05,625/- availed by the applicant has to be verified. The Bench agrees to the request of the Revenue and in this regard, the applicants are directed to produce the necessary input credit documents to the DGCEI for scrutiny. If on verification, it is found that the credit taken is not proper, the applicant shall pay the balance amount. The Bench observes that the application fulfils the conditions stipulated for admission and also that the Advocate accepted the revised demand of Rs.36,90-,325/- and have undertaken to pay the balance amount of Rs.99,833/-. In view of the foregoing and the co-operation extended by the applicant, the Bench takes the view that this case merits admission and final settlement. However, with regard to immunity from interest, the Bench observed that the applicant enjoyed substantial financial accommodation over the period of time and hence, the applicant should pay simple interest. With regard to penalty, the department representative stated that deterrent penalty should be imposed as there was a deliberate intention to evade by mis-declaring the goods in order to avail exemption. The advocate could not counter or explain that there was no deliberate intention on their part. In view of this, the Bench agrees with the department's view and holds that some penalty has to be imposed on the applicant to deter them from further evasion."

9. The duty admitted by the petitioner before the CCESC was Rs.37,38,184/- which was settled at Rs.36,90,325/-. The CCESC has accepted that the petitioner had extended co-operation in the proceedings before them. However, section 32K(1) of the Act requires both co-operation and full and true disclosure of the duty

liability. It cannot be possibly said that while observing as above, the CCESC took into account any irrelevant material or ignored relevant material. The conduct of the petitioner was a relevant factor to be taken into account. The fact that the petitioner had indulged in evasion of central excise duty by clearing nylon monofilament yarn of cross sectional dimension above 1 mm under the guise of nylon nil rate of duty and thereby, it is clear there was a deliberate intention to evade duty by mis-declaring the goods in order to avail exemption and but for detection by the department during investigation by the department, the evasion would have gone unnoticed, is also a relevant factor to be taken into account. Therefore, having regard to the facts and circumstances, I do not find any scope to interfere with the order impugned in this writ petition.

Accordingly, the Writ Petition fails and it is dismissed as devoid of merits. No costs. Consequently, connected MP is closed.

Sd/-

Asst.Registrar (CS II)

/true copy/

Sub Asst. Registrar

Suk

To

1. The Customs and Central Excise Settlement Commission,
   2nd Floor, Naramadha Block,
   Customs House,
   33 Rajaji Salai,
   Chennai-600 001.

2. The Commissioner of Central Excise,
   6/7 A.T.D.Street,
   Race Course,
   Coimbatore-641 018

   1 cc to Mr.S. Jaikumar, Advocate, r. 24885
   1 cc to Mr.A.P. Srinivas, Sr. Standing Cousnel For C & CE, Sr. 24419

W.P.NO.17401 OF 2008

KV (CO)

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