

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.04.2021

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

W.P.Nos.9398 to 9400 of 2018

W.M.P.Nos.11205, 11207 & 11209 of 2018

T.H.Mohammad Farishta Garib
Former Partner of M/s.Hamma Steel Industries,
(Since dissolved)
Plot No.2/159/Flat No.G1 (Ground Floor),
Trent Bridge Apartments, ECR,
Injambakkam
Chennai-600 115. ...Petitioner in W.P.No.9398 of 2018

T.H.Mohammed Firdous
Power of Attorney Holder for
T.H.Mohammad Farook
Former Partner of M/s.Hamma Steel Industries,
Both are residing at
No.9, Bishop Waller Avenue South
Mylapore,
Chennai-600 004. ...Petitioner in W.P.No.9399 of 2018

T.H.Mohammad Farook
Former Partner of M/s.Hamma Steel Industries, (since dissolved)
No.9, Bishop Waller Avenue South
Mylapore,
Chennai-600 004. ...Petitioner in W.P.No.9400 of 2018

vs.

1. Deputy Commissioner of Central Excise
Perungudi Division,
No.690, E.V.R. Periyar Building (4th floor)
Anna Salai, Nandanam,
Chennai-600 035.

2. Superintendent of GST and Central Excise
Sholinganallur I Range, Sholinganallur Division,
No.692, 4th floors, M.H.U Complex,
Nandanam
Chennai-600 035.

..Respondents in all W.P's

COMMON PRAYER : Writ Petitions filed under Article 226 of the Constitution of India, pleased to issue a Writ in the nature of Certiorari filed mandamus or any other Writ, order or direction to call for the records and quash the order passed by the 1st respondent in Order-in-Original No.7 of 2011 dated 28.07.2011

and to further forbear the second respondent from initiating any recovery proceedings based on the recovery notice issued by it in O.C.Nos.49, 50, 51 of 2018 dated 14.03.2018, 12.03.2018 against the petitioners.

In all W.P's

For petitioners : Mr.Karthik Ranganathan

For Respondents : Mr.A.P.Srinivas

SPC for RR1 and 2

C O M M O N O R D E R

The relief sought for in these writ petitions is to quash the order passed by the first respondent in Order-in-Original No.7 of 2011 dated 28.07.2011.

2. The learned counsel appearing for the writ petitioners made a submission that the petitioners were running a Partnership Firm and the manufacture of Hot Re-rolled products falling under Chapter subheading 8469.80 and Plastic Molded Parts falling under Chapter Heading 72 of the Central Excise Tariff Act, 1985. The firm was operating under the then Compounded Levy Scheme (CLS) as per Section 3A of the Central Excise Act, 1944 read with Sub-rule 3 of Rule 96ZP of then Central Excise Rule, 1944. As per the provisions of the Hot Re-rolling Steel Mills Annual Capacity Determination Rules, 1997, the Commissioner of Central Excise (CCE) had fixed the Annual Production Capacity (APC) of the petitioner's firm as 4204.74 Metric Tonnes with effect from 01.09.1997. The monthly lump sum duty was fixed at Rs.1,05,118 for every month.

3. The scheme opted by the petitioners was Compounded Levy Scheme as per Section 3A of the Central Excise Act, 1944 read with Sub-rule 3 of Rule 96ZP of then Central Excise Rule, 1944.

4. The learned counsel for the petitioners reiterated that the Production Unit stopped its production activities with effect from 26.04.1999. Relying on the said factor, the petitioner is of the opinion that the very claim of excise duty is untenable and contrary to the provisions of the Act as well as the Rulings of the Hon'ble Supreme Court of India. It is contended that the petitioner/Company stopped its production activities on 26.04.1999 and the fact was communicated to the respondent/Department in vide letter dated 03.05.1999. The said letter was communicated and the same was not disputed by the respondent. In view of the fact that the respondent had admitted these facts regarding the closure of the Production Unit, there is no reason to issue show cause notice for recovery of excise duty.

5. The learned counsel appearing for the petitioner cited the judgment of the Hon'ble Supreme Court of India in the case of Bhuwalka Steel Industries Limited vs. Union of India reported in [2017] 79 taxmann.com 299(SC), wherein the Hon'ble Apex Court considered the issue whether an assessee can be compelled to pay duty calculated without any regard to the actual production and the relevant paragraphs are extracted hereunder:

45. Whether an assessee who chooses once to pay duty in terms of Rule 96ZP(3) can be compelled to pay duty calculated in accordance with the said rule for all times to come without any regard to the actual production? is a question which requires examination.

46. It is possible that in a given case an assessee choosing at a given point of time to make payment of duty on monthly basis calculated in terms of sub-rule (3) but a few months later (for that matter even a month later), for various legitimate reasons, production may fall considerably below the ACP (of the assessee's factory). It is possible, in some cases there can be total cessation of the manufacturing activity for reasons beyond the control of the assessee. If the option exercised by an assessee under Rule 96ZP(3) is held to be good for eternity it would not only lead to illogical consequences but also to an unconstitutional collection of taxes without there being a taxable event. We do not see anything in Rule which prevents the assessee from opting out of the Scheme of Rule 96ZP (3).

47. After availing the scheme for a month by paying the duty in advance, if the assessee ends up in a situation of not being able to produce the quantum of goods equivalent to 1/12 of his ACP, we see no reason which compels the assessee to continue the availment of concessional rate of duty (for the next month) on a quantum of production which he is unable to achieve. In our opinion the assessee must have an option to make the payment of duty in accordance with Rule 96ZP(1) at a higher rate but on the actual production. For those assessee who chose to pay the duty at higher rate in accordance with sub-rule (1) the benefit of section 3A (4) is available. The rule does not bar it. However the question remains how frequently the assessee is entitled to exercise such an option; whether it is annual or monthly is a matter which requires a further examination.

6. Relying on the above findings of the Hon'ble Apex Court of India, the learned counsel for the petitioner reiterated that it is an unconstitutional collection of taxes without there

being a taxable event. When there is no production activities during the relevant point of time, the question of collection of excise duty does not arise at all. In the present case, the factum regarding the closure of production unit is duly informed to the respondent/Department and the said letter was acknowledged by the Department. This being the factum, there is no reason whatsoever to issue the impugned order by the respondent. This apart, it is contended that the impugned order itself was not communicated to the writ petitioner and it was communicated belatedly along with recovery notice which was issued during the year 2018. For all these reasons, the writ petition is to be allowed.

7. The learned Senior Standing Counsel appearing on behalf of the respondent objected the said contention by stating that the petitioner acknowledged the original order passed by the first respondent dated 10.03.2003 and the address stated is M/s.Hamma Steel Industries, Inchambakkam, Thiruvanniyur, Chennai-41. With the same address, the petitioner filed an appeal before the Commissioner of Central Excise [Appeals] and the said appeal was allowed. Against the said order of the Commissioner, the respondent/Department approached the Customs, Excise and Service Tax Appellate Tribunal, in which also the address of the petitioner has been stated as M/s.Hamma Steel Industries, Inchambakkam, Thiruvanniyur, Chennai-41. The appeal was allowed and the order of the Commissioner dated 28.08.2003 was set aside by the Tribunal.

8. The learned Senior Standing Counsel contended that all along, the notices before in the appellate proceedings as well as the proceedings before the Tribunal were received by the writ petitioner and the subsequent order dated 28.07.2011 which is impugned in the writ petition was also sent to the last known address. Therefore, the very contention that the order was not received is false and in-correct. In fact, the impugned order was affixed in the last known address given by the petitioner and the said procedure was followed in duly compliance of the Rule. Thus, the writ petitioner cannot say that the order was not communicated. Therefore, the writ petition now filed after a lapse of 7 1/2 years cannot be entertained and liable to be rejected on the ground of laches.

9. The learned Senior Counsel on merits also contended that the writ petitioner had opted for "Compounded Levy Scheme". The writ petitioner/Company was operating under the Compounded Levy Scheme as per Section 3A of the Central Excise Act, 1944 read with Sub-rule 3 of Rule 96ZP of then Central Excise Rule, 1944, during the relevant point of time. This fact was admitted by the writ petitioner even in the affidavit filed in support of the writ petition. When the petitioner had opted to pay the excise

duty under the Compounded Levy Scheme, now they cannot say that they have stopped the production unit on 26.04.1999. Therefore, they are not liable to pay for the entire financial year. Admittedly, the production unit was closed on 26.04.1999. Therefore, they have liable to pay excise duty for the entire year under the Compounded Levy Scheme. The Appellate Tribunal has elaborately considered these issues and set aside the order passed by the Commissioner. The very findings of the Appellate Tribunal are clear in this regard and paragraph No.2 of the order of the Tribunal dated 24.03.2010 is extracted hereunder:

"2. None appears for the respondent inspite of notice having been served by pasting on the premises of the assessee. We, therefore, heard the learned SDR and perused the records. We find that the Commissioner (Appeals) had relied upon certain decisions of the Tribunal in coming to the conclusion that the abatement is available under Section 3A(2) of the Central Excise Act, 1944 for the period of closure of the mill. However, the Revenue seeks to rely upon the decision of the Hon'ble Bombay High Court [Aurangabad Bench] in Rajuri Steels Pvt. Ltd. Vs.CCE, Aurangabad-2008 (225) ELT 189 (Bom.), holding that benefit of proviso to Sub-section (3) and sub-section(4) of erstwhile Section 3A of the Central Excise Act, 1944 is not available to the assessee if it had enjoyed benefit of excise duty under procedure prescribed by Rule 96ZP(3) of the erstwhile Central Excise Rules, 1944. Since this decision has been passed subsequent to the passing of the impugned order, interest of justice require that the case be decided afresh in the light of the Bombay High Court decision cited supra and for this purpose we set aside the impugned order and remand the case to the adjudicating authority who shall pass fresh order after extending a reasonable opportunity to the assessee of being heard in their defence.

10. With reference to the judgment of the Hon'ble Supreme Court of India in the case of Bhuwalka Steel Industries Limited vs. Union of India cited supra, the learned Senior Standing Counsel referred paragraph No.58 which reads as under:

58. Therefore, we find it difficult to accept the submission of the respondent that the issue is covered by the judgments of this Court in Venus Castings and Supreme Steels. In our opinion, for the reasons mentioned above, these two judgments require a further examination. Apart from that, these judgments did not deal with vires of Rule 96ZP(3). However, in view of the fact that Supreme Steels is a decision rendered by a Bench of three learned Judges,

we deem it appropriate that the question of law be settled by a Bench of an appropriate strength. We, therefore, direct the Registry to place the matter before Hon'ble the Chief Justice of India for further orders.

12. As per the said judgment, the Hon'ble Supreme Court of India has not granted any relief and paragraph Nos.45 to 47 are the clarifications issued for the questions raised before the Hon'ble Supreme Court. The said paragraphs are no way connected with the Compounded Levy Scheme opted by the petitioner. Once the petitioner is falling under a particular scheme, the benefit of scheme is extended and the liability is also to be fixed based on the terms and conditions of the scheme. In the present case, the petitioner had opted for the scheme and admittedly, the production unit was closed on 26.04.1999. The excise duty is to be paid for the whole year as per the Scheme which was formulated with reference to the provisions of the Act and Rules.

13. This Court is of the considered opinion that the judgment of the Hon'ble Supreme Court is regarding the general question which was raised before the Hon'ble Apex Court and further, the said judgment has been referred to the larger bench. However, the fact remains that the petitioner in the present case had opted for Compounded Levy Scheme which was not dealt with by the Hon'ble Apex Court. Therefore, the case on hand is to be decided independently with reference to the terms and conditions of the Compounded Levy Scheme which was framed under the provisions of the Act and Rules. When the petitioner admits that he was paying the excise duty under the Compounded Levy Scheme and he is bound by the scheme and further, the petitioner admitted the fact that the production unit was closed with effect from 26.04.1999, the petitioner is liable to pay excise duty for the whole year as claimed by the Department. Apart from this, the writ petition is filed after a lapse of 7 1/2 years from the date of passing of the impugned order on 28.07.2011. Therefore, the writ petitions stand dismissed both on merits as well as on the ground of laches. No costs. Consequently, connected miscellaneous petitions are also closed.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

ssb

To

1. Deputy Commissioner of Central Excise
Perungudi Division,
No.690, E.V.R. Periyar Building(4th floor)
Anna Salai, Nandanam,
Chennai-600 035.

2. Superintendent of GST and Central Excise
Sholinganallur I Range, Sholinganallur Division,
No.692, 4th floors, M.H.U Complex,
Nandanam
Chennai-600 035.

+2 Ccs to M/s. Karthik Ranganathan, Advocate sr 22747, 22746
+1 CC to Mr.A.P. Srinivas, Advocate sr 22845.

W.P.Nos.9398 to 9400 of 2018

JPII(CO)
SP(14/06/2021)



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