Commissioner Of Central Excise & ... vs M/S Venus Castings (P) Ltd on 5 April, 2000

Equivalent citations: AIR 2000 SUPREME COURT 1568, 2000 (4) SCC 206, 2000 AIR SCW 1328, 2000 CLC 1121 (SC), (2000) 4 JT 77 (SC), 2000 (2) LRI 410, 2000 (3) SCALE 64, 2000 (4) JT 77, 2000 (5) SRJ 116, (2000) 117 ELT 273, (2000) 90 ECR 9, (2000) 3 SUPREME 257, (2000) 3 SCALE 64

Bench: S.N.Phukan, S.R.Babu

PETITIONER:
COMMISSIONER OF CENTRAL EXCISE & CUSTOMS

Vs.

RESPONDENT:
M/S VENUS CASTINGS (P) LTD.

DATE OF JUDGMENT: 05/04/2000

BENCH:
S.N.Phukan, S.R.Babu

JUDGMENT:

RAJENDRA BABU, J. :

These appeals are filed under Section 35-L(b) of the Central Excise Act, 1944 (hereinafter referred to as `the Act']. The background facts leading to these appeals are that the manufacturer, who is a respondent herein, having availed of the procedure for payment of duty under the Act in terms of Rule 96ZO(3) of the Central Excise Rules cannot claim the benefit of Section 3A(4) for determination of actual production and re- determination of amount of duty payable by him with reference to the actual production at the rates as specified in the said Section. Earlier on several occasions when the matter reached the Tribunal the view taken is that the Collector (Appeals) had to follow the orders made by the Tribunal and the order made by the Collector is not in accordance with law inasmuch as no duty is payable by the manufacturer otherwise than on actual production and clearance and no demand of duty could be made or recovered on the basis of production capacity alone without verification. In case of M/s Minakshi Castings (P) Ltd., one of the respondents before us, it is held that the right vested in the assessee under Section 3A(4) cannot be denied on the ground that he had opted for payment of duty under Rule 96ZO(3).

The matter is remanded to the Commissioner for determination of the actual production and re-determination of duty liable to be paid with reference to the actual production in accordance with the provisions of Section 3A(4). Hence these appeals.

In another batch of matters writ petitions have been filed before the High Court of Delhi and certain orders have been obtained thereto at the interim stage which are subject matter of another appeal before us and in those circumstances the Delhi High Court had ordered that "it will be open to the manufacturers to submit applications on the basis of actual production and, if any such application is submitted, the same shall be duly considered by the competent authority in accordance with the Rules." Now we are informed at the bar that the very questions arising in the cases before us stand referred to a Larger Bench by the Tribunal for deciding (i) whether there is any conflict between the provisions of sub-section (4) of Section 3A of the Act and sub-rule (3) of Rule 96ZO of the Central Excise Rules ?, and (ii) whether a manufacturer who has exercised the option to make payment of amount based on total furnace capacity installed in his factory under sub-rule (3) of Rule 96ZO and not on the basis of annual capacity of production can make an application for determining the actual production during the period his aforesaid option is in operation ?

An objection has been raised that these appeals do not involve determination of any question having a relation to the rate of duty of excise or to the value of the goods for purpose of assessment and, therefore, even if at all aggrieved by the order of the Tribunal ought to have followed the procedure in Section 35- L(a) of obtaining a reference to the High Court and on its decision to approach this Court under certificate. The learned Attorney General without entering into the controversy as to whether an appeal in this case is maintainable or not made it clear that he would seek conversion of these appeals into petitions for grant of special leave under Article 136 of the Constitution of India. Appropriate applications in this regard have also been made.

When the wind out the same sails set in by the respondents has been taken off by the astute stand of the learned Attorney General, the learned counsel for the respondents addressed arguments that these are not fit cases where this Court should exercise its discretion under Article 136 to grant leave and entertain these appeals.

It is no doubt true that a Larger Bench of the Tribunal itself is now seized of the very question raised in these appeals. However, the learned Attorney General pointed out that there are at least two decisions of the Andhra Pradesh High Court and Allahabad High Court on this issue. In Sathavahana Steels & Alloys (P) Ltd. vs. Government of India, 1999n (114) ELT 787, the Andhra Pradesh High Court has taken the view that Rule 96ZO(3) of the Excise Rules has been framed for the facility of assessees and being at the volition and option of the assessee to avail of the said procedure instead of the procedure under sub- rules (1) and (2) thereof and once such option is availed of he takes advantages and disadvantages associated with it. An assessee who comes

under the purview of sub-rule (3) of the scheme cannot obviously avail of the reliefs provided to the assessee who preferred to pay duty in accordance with sub-rule (1) thereof. The High Court further stated that it is not probable that the assessee will not be aware of the adverse factors which affect production. He cannot, therefore, claim that provisions for abatement of duty and re-determination of the capacity as contained in the proviso to sub- sections (3) and (4) of Section 3A should be imported to Rule 96ZO(3). When once the assessee opts for lumpsum payment under Rule 96ZO(3) he forgoes the benefit under the proviso to sub-sections (3) and (4) of Section 3A as laid down in express and categorical terms by sub-rule (3) of Rule 96ZO of the Excise Rules. The Allahabad High Court in Pravesh Castings (P) Ltd., Kanpur Nagar vs. Commissioner of Central Excise, Allahabad & Anr., 2000 (36) RLT 239, directed the Commissioner to re- determine the production capacity afresh and to follow the orders of the Tribunal. There is no discussion as to the scope of the relevant rules or the provisions of the enactment. Again another Bench of the Allahabad High Court considered this question in Civil Miscellaneous Writ Petition No. 1127 of 1999 M/s Jalan Castings (P) Ltd. vs. Commissioner of Central Excise & Ors.. wherein the view taken is that when a manufacturer has asked for a lumpsum method of assessment as provided under Rule 96ZO(3) of the Excise Rules, the manufacturer cannot back out and claim that he should be assessed in the normal mode under Section 3A(4) of the Act and such a course is not available to him. In these circumstances, when different Benches of the same High Court have taken different views and another High Court has taken a view contrary to what has been stated by the Tribunal and when there is uncertainty as to the state of law, it is eminently proper for this Court to grant leave in such a matter and settle the legal position. We thought over the matter as to whether we should ourselves consider the questions raised before us or set aside the order impugned before us and remand the matter to the Tribunal for a fresh consideration. We are of the view that when there is uncertainty in law so far as the High Courts are concerned, it is not at all proper to allow the Tribunal to re- examine the matters as it would not be in the interest of either the assessee or the Department. In this special background, we do not think we can accede to the objection raised on behalf of the respondents that we should not entertain the special leave petitions and reject these matters. On the other hand, we would grant leave and proceed to deal with these appeals.

In these proceedings the validity of the provisions of the Rules is not in challenge but only their interpretation and application have to be examined.

Section 3A of the Act enables the Central Government to charge excise duty on the basis of capacity of production in respect of notified goods. This clause came to be inserted in the Act by the Finance Act, 1997. The intention to introduce this provision appears to be that in certain sectors, like induction furnaces, steel re-rolled mills, etc. evasion of excise duty on goods is substantial and the production is not disclosed accurately and collection of excise duty on the basis of their production capacity is thought of as appropriate. Under the scheme evolved in this provision the annual

production capacity of mills and furnaces is determined by the Commissioner of Central Excise in terms of the Rules to be framed under Section 3A(2) of the Act by the Central Government. Thereafter, the assessee would be liable to pay duty based on such determination. If the annual production capacity determined by the Commissioner is disputed by the assessee, the Commissioner is required to re-determine the same as provided in Section 3A(4).

Rules 96ZO and 96ZP provide for procedure to be followed by the manufacturer of ingots and billets and hot re-rolled products respectively. The scheme envisaged under these provisions is identical. These two Rules come into play after the Commissioner of Central Excise determines the annual capacity of the factory or mills manufacturing ingots or billets and hot re-rolled steel products under Section 3-A of the Act read with the relevant annual capacity determination rules. Rules 96ZO and 96ZP proceed to lay down the manner of payment of duty, claim for abatement non-payment, payment of interest/penalty and such other incidental matters. Rule 96ZO classifies the manufacturers into two classes, those whose furnace capacity is 3 tonnes and other manufacturers with high capacity of furnaces. The rate of duty payable, except for period from 1.1.1997 to 31.3.1998 which was the transitional period, is Rs. 750/-

per tonne, at the time of clearance. Total amount of duty should be paid by the 31st March of relevant financial year, otherwise interest at the rate of 18 per cent per annum is payable and if the duty has not been paid by this date penalty is also payable which is equal to outstanding duty or Rs. Five thousand whichever is greater. Sub-rule (2) thereof provides that if no ingots and billets are produced for a continuous period of seven days, the manufacturer may claim abatement by following appropriate procedure. Sub-Rule 3 thereof envisages a composition method of payment of duty. Manufacturers of ingots and billets with furnace capacity of 3 tonnes have an option of paying duty of Rs. Five lakhs per month in two equal instalments prior to 15th of a month and by last date of that month. Such payment is treated to be in full discharge of duty liability. The Rule specifically excludes application of Section 3A(4). But manufacturers opting for this composite scheme cannot claim abatement. If the furnace capacity is less than or more than 3 tonnes payment of Rs. 5 lakhs can be varied on pro-rata basis. The manufacturer opting for this composite scheme has to give a declaration to the Jurisdictional Assistant Commissioner as provided under the Rules. There are similar provisions in relation to hot re-rolled products. By reason of the assessee having exercised his desire of paying duty based on total furnace capacity the determination of annual capacity of production is not determined by the Revenue as the procedure adopted obviates determination of production. In the absence of determination of production the question of its determination on the basis of actual production as detailed in Section 3A(4) of the Act does not arise.

The schemes contained in Section 3A(4) of the Act and Rule 96ZO(3) or Rule 96ZP(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 procedure under Rule 96ZO(1) he may opt out of the procedure under Rule 96ZO(3) for a subsequent period and seek the determination of annual capacity of production. An assessee cannot have a hybrid procedure of

combining the procedure under Rule 96ZO(1) to which Section 3A(4) of the Act is attracted. The claim by the respondents is a hybrid procedure of taking advantage of the payment of lumpsum on the basis of total furnace capacity and not on the basis of actual capacity of production. Such a procedure cannot be adopted at all, for the two procedures are alternative schemes of payment of tax.

The learned counsel for the respondent contended that the Rule 96ZO(3) is contrary to Section 3A(4) of the Act and, therefore, should be held to be ultra vires or read the relevant rules in such a manner as to allow the procedure prescribed under the provisions of Section 3A(4) to be followed. Section 3A 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 3A provides 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 license fee and not on 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 & Anr. vs. Builders Association of India & Ors., 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 the 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 whether 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 is 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 96ZO(3) at their option, cannot claim the benefit of determination of production capacity under Section 3A(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. vs. Government of India (supra) and the similar view expressed by the Division Bench of the Allahabad High Court in Civil Miscellaneous Writ Petition No. 1127 of 1999 M/s Jalan Castings (P) Ltd. vs. Commissioner of Central Excise & Ors. disposed of on February 28, 2000 is reasonable and correct. We overrule the view taken by the Allahabad High Court in Pravesh Castings (P) Ltd., Kanpur Nagar vs. Commissioner of Central Excise, Allahabad & Anr. (supra).

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.

There are a few peripheral submissions made on behalf of the respondents that in several cases the Commissioners have wrongly fixed the furnace capacity and that aspect has to be examined by the

Tribunal in such cases. In these cases, therefore, we set aside the orders made by the Tribunal and direct the Tribunal to bring the orders in conformity with the view expressed by us and pass appropriate orders.

We allow these appeals accordingly. However, in the circumstances of the case there shall be no orders as to costs.