**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL**
**OLD RED BUILDING, 38,M.G.Marg,CIVIL LINES, ALLAHABAD**

Dated: 04/03/2016

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/ 70103/2016 SM dated 1/03/2016

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the **Central Excise and Salt Act, 1944.**

Asstt. Registrar

| Application | Appeal | Name and Address of Appellant |
|---|---|---|
| | E/53999/2014SM | OZLA PLASTOCRAFT PVT LTD<br>B-26, HOSIERY COMPLEX<br>PH-II, NOIDA(UP) |

| | |
|---|---|
| Name and Address of Respondent | COMMISSIONER OF CENTRAL EXCISE, NOIDA<br>C-56/42, SECTOR-62<br>NOIDA |

Other Appellants and Respondents as per Annexure

Copy To

3Advocate(s) / Consultant(s   SH RAVINDER SINGH,CONST
12/76, IST FLOOR
TILAK NAGAR, NEW DELHI-

4 Bar Association, CESTAT, ALLAHABAD

5 Director Publications, Customs, Excise. I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhiskm Pitamah Marg, New Delhi-3

7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15

10 LAWCRUX Advisors Pvt. Ltd., LAW House, 3-8, Sector-10, Faridabad 121003 (Haryana)
11 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi – 110070
12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38
13 The ICFAI society, 52, Nagarjuna Hill,Panjagutta Hyderabad.-500082
14 C.D.R.   15 Office Copy   16 Guard File

Asstt. Registrar
Regional Bench, Allahabad

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,**
**REGIONAL BENCH : ALLAHABAD**

**Ex. Appeal No.53999/14**

Arising out of OIA No.NOI/EXCUS/000/APPL/26/14 dated 30.01.2014 passed by Commissioner of Central Excise (Appeals), Customs, Noida.

**For approval and signature:**

**HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)**

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1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? :
2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? :
3. Whether His Lordship wishes to see the fair copy of the Order? :
4. Whether Order is to be circulated to the Departmental Authorities? :

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M/s Ozia Plastocraft Pvt. Ltd. ...APPELLANT(S)

VERSUS

Commissioner of Central Excise & S.Tax, Noida RESPONDENT (S)

APPEARANCE

Shri Ravinder Singh, Consultant for the Appellant (s)
Shri H.M.Dixit, A.C. (A.R.) for the Department

**CORAM:**

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

DATE OF HEARING & PRONOUNCEMENT : 01. 03. 2016

Final ORDER NO. 70103/2016

सीमा शुल्क उत्पाद एवं सेवा कर अपीलीय अधिकरण
CUSTOMS EXCISE & SERVICES TAX APPELLATE TRIBUNAL

**Per Mr. Anil Choudhary :**

The issue in this appeal is whether the appellant assessee was in default in payment of duty in part for the period January,2012 and February, 2012 and the default amount had been made good with interest on 4/3/12 where the utilisation of Cenvat credit could be disallowed and the same again demanded in cash along with interest and equal amount of penalty under rule 25 of CCR read with Rule 8 (3A) and section 11 AC of the Act.

2. The brief facts are that on the scrutiny of ER-1 Returns for the month of January,2012 and February, 2012, the appellant had not paid the duty by the due date and some amount was in arrear which was later on paid as follows :

| Month 1 | Amt. of total duty payable in Jan. 2012 2 | Amt. of duty paid from (PLA) on the due date 3 | Amt. of duty paid from (CENVAT) on the due date 4 | Total amount of duty paid from (PLA +CENVAT) on the due date 5 | Amt. of duty not paid on due date i.e. 5th or 6th of the following month 6 | Due date of payment of duty alongwith interest 7 | Amount of duty paid subsequent to due date 8 | Amt. Of duty not paid till date 9 |
|---|---|---|---|---|---|---|---|---|
| Jan. 2012 | 3,93,892 (382420 + 7649 + 3823) | 0 | 2,22,834 (2,16,545 + 4194 + 2095) | 2,22,834 (2,16545 + 4194 + 2095) | 1,71,058 (1,65875 + 3455 + 1728) | 04.03.12 | 1,39,784 (135029 + 3162 + 1593) on 10.03.12 alongwith the interest of Rs.2758 | 31,274 (30,846 + 293 + 135) |
| Feb. 2012 | 5,08,397 | 0 | 2,63,793 | 2,63,793 | 2,44,605 | 04.03.12 | 2,44,605 On 23.03.12 alongwith the interest of Rs.3010 | 0 |

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2.1 It appeared to revenue that the appellant could not have utilised the Cenvat credit as provided under Rule 8 (3A) of CER and accordingly, was liable to pay the amount of Rs.2,63,792/- along with interest and further, penalty was proposed under Rule 25 read with Section 11 AC of the Act. The appellant contested the show cause notice and the same was adjudicated vide order-in-original dated 27/8/13 and the proposed demand was confirmed along with equal amount of penalty under Rule 25 of CCR read with section 11 AC of the Act.

3. Being aggrieved the appellant preferred appeal before ld. Commissioner (Appeals) who vide the impugned order, was pleased to reject the appeal.

4. Being aggrieved the appellant assessee is in appeal before this Tribunal. The ld. Counsel for the appellant urges that the issue is no longer res-integra. In the case of Indsur Global Limited Vs. Union of India : 2014 (310) ELT 833 (Guj.). The Honourable Gujarat High Court in the Writ Petition vide its order dated 27/11/2014 have held as follows :

> "**29.**This brings us to the last limb of the petitioner's contention, namely, that the condition attached by sub-rule (3A) of Rule 8 is unreasonable and therefore, violative of Article 14 of the Constitution and amounts to serious restriction on the petitioner's right to carry on trade or business of his choice guaranteed under Article 19(1)(g) of the Constitution. This contention requires a closer scrutiny. As noted earlier, the

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restrictions of sub-rule (3A) come in two folds. Firstly, a defaulter assessee has to clear the consignments on spot payment of excise duty and secondly, that such excise duty has to be paid in cash without availing Cenvat credit. This rule does not make any distinction between the willful defaulter and the others. Though term 'willful defaulter' has not been defined in the statute, the concept is not an unknown one. Section 11AC of the Central Excise Act provides for penalty in case of non-levy, short levy or non-payment or short payment or erroneous refund of the duty where the same is occasioned by reason of fraud or collusion or any willful misstatement or suppression of facts or contravention of any of the provisions of the Act or the rules made thereunder with an intent to evade payment of duty. Likewise, Section 11A which pertains to recovery of duties not levied or not paid or short levied or short paid or erroneously refunded makes a clear distinction when it gives the period of limitation available to the department to institute proceedings, in such cases between such non-payment having been occasioned due to fraud, collusion, etc., in which case a longer period of limitation is available as against rest of the cases. Likewise, under Rule 12CC of the Central Excise Rules as it stood at the relevant time, power was given to the Government by notification to withdraw facilities from the manufacturers, registered dealers or exporters under certain circumstances having regard to the extent of evasion of duty, nature and type of offences or such other factors as has been relevant. In exercise of such powers, Notification No. 37/2006 was issued providing for withdrawal of facilities and for imposition of restrictions against who are *prima facie* found to be knowingly involved in any of the following :

"(a) removal of goods without the cover of an invoice and without payment of duty;

(b) removal of goods without declaring the correct value for payment of duty, where a portion of sale price, in excess of invoice price, is received by him or on his behalf but not accounted for in the books of account;

(c) taking of CENVAT credit without the receipt of goods specified in the document based on which the said credit has been taken;

(d) taking of CENVAT credit on invoices or other documents which a person has reasons to believe as not genuine;

(e) issue of excise duty invoice without delivery of goods specified in the said invoice;

(f) claiming of refund or rebate based on the excise duty paid invoice or other documents which a person has reason to believe as not genuine."

This Rule 12CC as well as the notification issued by the Government would apply to special class of assessees who through their conscious act tried to evade duty.

**30.** It can be seen that the reasons for non-payment of excise duty can be manifold and not necessarily in all cases have to be willful default by an assessee despite availability of funds. Excise

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duty may remain unpaid due to economic reasons, due to slowness in the business or due to financial crunch temporarily felt by the manufacturer who though might have cleared the finished goods and also sold the goods in the market may not have received the payment as promised. All such cases of defaults willful or otherwise are clubbed together for the same treatment and a stringent condition of payment of excise duty without availing Cenvat credit is imposed. It can be appreciated that where a manufacturer falls behind the payment schedule on account of financial constraints, such as, slowing down of business, competition in the market reducing the profit margins, promised payments from the purchasers not coming forth or temporary labour disputes, would find it extremely difficult thereafter to raise further funds for payment of duty in addition to the duty which he has already paid. Cenvat credit is available to a manufacturer upon purchase of inputs which are duty paid. It is the duty element which the assessee has already suffered which is credited to his Cenvat credit account available to him for adjustment for payment of excise duty liability upon clearance of the finished product. If such facility is withdrawn, it could be appreciated, his ability to continue the business under such adverse financial climate would further diminish. This would be a cyclical vicious pattern where in every month he would fall behind by the due date unable to raise cash flow for payment of duty for the clearance which he desires to make and is therefore, further saddled with the burden of paying such duty in cash without availing CENVAT credit. This rule thus imposes a wholly unreasonable restriction which is not commensurate with the wrong sought to be remedied.

**31.**This extreme hardship is not the only element of unreasonableness of this provision. It essentially prevents an assessee from availing Cenvat credit of the duty already paid and thereby suspends, if not withdraws, his right to take credit of the duty already paid to the Government. It is true that such a provision is made because of peculiar circumstances the assessee lands himself in. However, when such provision makes no distinction between a wilful defaulter and the rest, we must view its reasonableness in the background of an ordinary assessee who would be hit and targeted by such a provision. As held by the Supreme Court in the case of *Eicher Motors Ltd.* (supra), an assessee would be entitled to take credit of input already used by the manufacturer in the final product. In the said case, the Supreme Court was dealing with Rule 57F which was introduced in the Central Excise Rules, 1944 under which credit lying unutilized in the Modvat credit account of an assessee on 16th March, 1995 would lapse. Such provision was questioned. The Supreme Court held that since excess credit could not have been utilized for payment of the excise duty on any other product, the unutilised credit was getting accumulated. For the utilization of the credit, all vestitive facts or necessary incidents thereto had taken place prior to 16-3-1995. Thus the assessees became entitled to take the credit of the input instantaneously once the input is received in the factory of the manufacturer of the final product and the final

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product which had been cleared from the factory was sought to be lapsed. The Supreme Court struck down the rule further observing that if on the inputs the assessee had already paid the taxes on the basis that when the goods are utilized in the manufacture of further products as inputs thereto then the tax on those goods gets adjusted which are finished subsequently. Thus a right had accrued to the assessee on the date when they paid the tax on the raw materials or the inputs and that right would continue until the facility available thereto gets worked out or until those goods existed. We may also recall that in the case of *Dai Ichi Karkaria Ltd.* (supra) it was reiterated that a manufacture obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable produce immediately it makes the requisite declaration and obtains an acknowledgment thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product.

**32.** As held by the Supreme Court in the case of *Chantamanrao* (supra), the phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(g) and the social control permitted by Clause (6) of Article 19, it must be held to be wanting in that quality.

**33.**In the case of *Om Kumar* (supra), the Supreme Court recognized the applicability of the principle of proportionality in judging the validity of a provision on the touchstone of reasonableness under Article 14 of the Constitution. It was observed :

Now under Art. 19(2) to (6), restrictions on fundamental "53. freedoms can be imposed only by legislation. In cases where such legislation is made and the restrictions are reasonable yet, if the concerned statute permitted the administrative authorities to exercise power or discretion while imposing restrictions in individual situations, question frequently arises whether a wrong choice is made by the Administrator for imposing restriction or whether the Administrator has not properly balanced the fundamental right and the need for the restriction or whether he has imposed the least of the restrictions or the reasonable quantum of restriction etc. In such cases, the administrative action in our country, in our view, has to be tested on the principle of 'proportionality,' just as it is done in the case of the main legislation. This, in fact, is being done by our Courts."

**34.**By no stretch of imagination, the restriction imposed under sub-rule (3A) of Rule 8 to the extent it requires a defaulter irrespective of its extent, nature and reason for the default to pay the excise duty without availing Cenvat credit to his account can be stated to be a reasonable restriction. It leads to a situation so harsh and a position so unenviable that it would be virtually impossible for an assessee who is trapped in the whirlpool to get out of his financial difficulties. This is quite apart from being wholly reasonable, being irrational and arbitrary and therefore, violative of Article 14 of the Constitution. It prevents him from availing credit of duty already paid by him. It also is a serious affront to his right to carry on his trade or business guaranteed under Article 19(1)(g) of the Constitution. On both the counts, therefore, that portion of sub-rule (3A) of rule must fail.

**35.**The situation can be looked at slightly different angle. With or without the provisions of sub-rule (3A), liability to pay interest for the default period as per sub-rule (3) of Rule 8 continues. Sub-rule (3A) is basically a mechanism for stringent recovery and does not create a new liability unless this mechanism itself is breached. In such a mechanism to provide for withdrawal of CENVAT credit facility for paying the duty amounts to creating a penalty. Insisting on an assessee in default to clear all consignments on payment of duty would be a perfectly legitimate measure. However, to insist that he must pay such duty without utilising CENVAT credit which is nothing but the duty on various inputs already paid by him would be a restriction so harsh and out of proportion to the aim sought to be achieved, the same must be held to be wholly arbitrary and unreasonable. We may recall, the delegated legislature in its wisdom now dismantled this entire mechanism and instead has provided for penalty at the rate of 1% per month on delayed payment of duty.

**36.**In the result, the condition contained in sub-rule (3A) of Rule 8 for payment of duty without utilizing the Cenvat credit till an assessee pays the outstanding amount including interest is declared unconstitutional. Therefore, the portion "without utilizing the Cenvat credit" of sub-rule (3A) of Rule 8 of the Central Excise Rules, 2002, shall be rendered invalid."

5. That it is evident that Honourable Gujarat High Court have held the portion of the Rule "without utilising the Cenvat credit" of sub Rule 3 (A) of Rule 8 of Central Excise Rules, 2002 as invalid and ultra-vies under article 14 & 19 (1) (g) of the Constitution of India. The ld. Counsel also draws attention of this Court to the ruling of Honourable Madras High Court in the case of Malladi Drugs & Pharmaceuticals Ltd. Vs. Union of India : 2015 (323) ELT 489, wherein following the ruling of Honourable Gujarat High Court and also relying on the ruling off Honourable Supreme Court in the case of Collector Vs. Dai Ichi Karkaria Ltd. 1999 (112) ELT 353 (S.C.) it was held that there is no case of availing the wrong/irregular credit, right to utilise such credit in paying duty cannot be taken away. Rule 8 (3A) being procedural prescribing manner and method of payment of duty only, cannot interfere with substantive rights provided in Cenvat Credit Rules 2004. It is also pointed out that the said ruling of Honourable Gujarat High Court was also followed by Honourable Punjab & Haryana High Court in the case of Sandley Industries Vs. Union of India : 2015 (326) ELT

256 (P & H). The Honourable High Court also took notice of the subsequent change in law with effect from 11/7/14 wherein the said words " without utilising the benefit of Cenvat credit" where deleted from Rule 8(3A) of the Central Excise Rules, 2002. Accordingly the ld. Counsel prays for allowing the appeal with consequential benefit.

6. The ld.A.R. for revenue relies on the impugned order.

7. Having considered the rival contentions, following the law as pronounced and explained by the Honourable High Court noticed hereinabove, I find that the facts in the present case are squarely covered. Accordingly, following the ruling of Honourable Gujarat High Court in the case of Indsur Global (supra), I allow the appeal with consequential benefit to the appellant.

(Pronounced in the open Court)

**(Anil Choudhary)**
**Member (Judicial)**

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प्रमाणित प्रति / Certified True Copy
सहायक पंजीकार / Asstt. Registrar
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