FAX : 0532-2400149

REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
SINGLE MEMBER APPEAL BRANCH

Dated: 03/06/2016

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/70219-70220/2016-SM[BR] dated 17/05/2016

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
1	E/60358/2013	**Commissioner of Customs-Ghaziabad** 202,..WING A C.G.O. COMPLEX-II, KAMLA NEHRU NAGAR, GHAZIABAD,UTTAR PRADESH 201002
2	E/60515/2013	**BHAGWATI PACKAGING** 15/10, AND 11, SOUTH SIDE G.T.ROAD,GHAZIABAD UP
		Name and Address of Respondent

Other Appellants and Respondents as per Annexure

Copy To

3Advocate(s) / Consultant(s):

S. K. Pandey,Adv
62, KHURSHED BAGH,
LUCKNOW,UTTAR PRADESH

6 Additional Party's Name & Address :
7 Bar Association, CESTAT, Delhi
8 Director Publications, Customs, Excise. I.P, Estate, Delhi
9 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3
10 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithiyaram Street, T. Nagar, Chennai-17
11 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005
12 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15
13 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)
14 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070
15 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad -- 38
16 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082
17 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032
18 C.D.R. 19 Office Copy 20 Guard File

Asstt. Registrar

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

Ex. Appeal No.60515/13

Arising out of OIA No.GZB/EXCUS/000/APP/136/2013-14 dated 10.09.2013 passed by Commissioner of Central Excise (Appeals) & S. Tax, Ghaziabad.

M/s Bhagwati Packaging ...APPELLANT(S)

VERSUS

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

Ex. Appeal Nos.60358/13
CO-51345/14

Commissioner of Central Excise & S. Tax, Ghazlabad ...APPELLANT(S)

VERSUS

M/s Bhagwati Packaging RESPONDENT (S)

For approval and signature:

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

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	: No
2.	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	: Yes
3.	Whether His Lordship wishes to see the fair copy of the Order?	: Seen
4.	Whether Order is to be circulated to the Departmental Authorities?	: Yes

APPEARANCE

Shri H. M. Dixit, Asstt.Commr. (A.R.) for the Department
Shri S. K. Pandey, Adv. for the Assessee

CORAM:

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

DATE OF HEARING & PRONOUNCEMENT : 02. 11. 2015

Final ORDER NO. 70219-70220/2016

Per Mr. Anil Choudhary :

The assessee and the Revenue are in cross Appeal against order-In-appeal dated 10/9/13 passed by the Commissioner (Appeals), Customs and Central Excise, Ghaziabad, and the assessee is in cross objection against the Revenue's Appeal No.E/60358/13. The ld. Commissioner (Appeals) have upheld the Levy of duty with interest under Rule 8 (3A) of Central Excise Rules, 2002 but have been pleased to set aside the penalty imposed of Rs.5 lakhs under Rule 25 of Central Excise Rules 2002.

2. That the assessee, being a manufacturer, is engaged in manufacture of flexible laminate, flexible laminated pouches, et cetera. In the course of scrutiny of the monthly ER-1 Returns for the month of February,2011, the revenue noticed the duty payable through PLA account was shown at Rs.6,02,470/- and through Cenvat credit account Rs.10,80,000/-. The amount shown payable in the PLA account Rs.6,20,722/- was deposited on 30/4/11. The said amount was payable by 5/4/11 that is within 30 days of the due date, being 5/3/11 with interest. Also it appeared to Revenue that as the duty was permitted to be paid vide PLA by 04/4/11 but the same was paid with interest on 30/4/11, therefore, the assessee committed default for the period 5/4/11 to 30/4/11. During the period of default, the assessee

was required to pay duty for each consignment at the time of removal without utilizing Cenvat credit, in terms of sub-rule 3A of the Rule 8 of Central Excise Rules 2002. Further, it appeared that the facility of utilizing Cenvat credit was not available during the period of default. Accordingly, the appellant was required to show cause as to why not Excise duty amounting to Rs.15,30,059/- should not be demanded and recovered along with interest and further why not penalty be imposed under Rule 25 of the Central Excise Rules.

3. Similarly, for the month of March, 2011, the assessee was required to pay duty by 31.3.11 and could have paid the duty ~~on~~ by 30/4/11 and further, had paid the same on 23/6/11, therefore there was a default for the period 1/5/11 to 23/6/11 within the meaning of Rule 8 (3A) of Central Excise Rules and vide a show cause notice No. 01/ADC/GZB/2012-13 dated 12/4/12, the appellant was required to show, as to why not the amount of Rs.28,65,645/- be not demanded with interest and penalty was also proposed.

4. The appellant assessee contested the show cause notices and the same was adjudicated vide order in original dated 6/5/13 wherein the demands were confirmed along with interest and penalty of Rs.5 lakhs was imposed under Rule 25 (1) Central Excise Rules, 2002.

5. Being aggrieved the appellant- assessee preferred appeal before the Commissioner (Appeals) who, in the impugned orders, was pleased to uphold the duty demand but was pleased to set aside the penalty imposed under Rule 25 of the Central Excise Rules.

6. The ld.A.R. for the revenue, relying on the grounds of appeal, submits that the Commissioner (Appeals) have erred in deleting the penalty as excessive and the same is against the spirit of law. In the case of CCEx., Bhavnagar Vs. Saurashtra Chemicals Ltd. : 2007 (212) ELT 7 (SC) relied upon by the Commissioner (Appeals), the Honourable Supreme Court granted relief under the fact that there was financial difficulty of the assessee and the duty was paid soon, the funds where available, such facts are not there in the present case. Relying on the rulings of this Tribunal in the case of Weldon Cello Plast Ltd. Vs. CCE, Delhi IV : 2013 (287) ELT 141 (Tri.), where it is held that legal fiction has to be taken to its logical conclusion. Under similar facts, under the provisions of Rule 8(3A) during the period of forfeiture, the assessee did not pay duty consignment-wise and the clearance could be treated having been made without payment of duty and hence, the provisions of Rule 25 (1) where attracted. Further relying on the ruling of this Tribunal in the case of CCE versus K. K. Kohli and Brothers : 2013 (295) ELT 709 (Tri.Del.), where this Tribunal held that the assessee was debarred from the facility of payment of duty by cenvat credit, which was deferred by the original authority is deemed to have been restored after two months and credit was allowed to be adjusted towards dues at the time of clearance of final products and the assessee was directed to pay interest for the months of default in each case.

7. The ld. Counsel for the assessee states that the issue is no longer *res-integra*, the same have been decided in favour of the assessee by Honourable Gujarat High Court in writ petition vide Order dated 26/27-11-2014 in the case of Andsur Global Ltd. Vs. Union of India : 2014 (310) ELT 833 (Guj.), wherein it has been held that the provisions of Rule 8(3A) imposes unreasonable restriction, which is not commensurate with the wrong sought to be remedied. It was also held that it leads to a situation so harsh and position so unbelievable that it would be virtually impossible for an assessee to get out of his financial difficulties and it is irrational and arbitrary and in violation of Article 14 of the Constitution. The ld. Counsel further points out that the said Ruling of Honourable Gujarat High Court, have been followed by Honourable Punjab and Haryana High Court in the case of M/s Standly Industries Vs. Union of India : 2015-TIOL- 2490-HC-P&H-CX. Further, the said ruling have been followed by Honourable Madras High Court in the case of A.R. Mettallurgicals Private Ltd. Vs. CESTAT, Chennai : 2015 (322) ELT 49 (Mad.). He further points out that it is admitted fact that the appellant have deposited the duty in default along with interest and on the date of issue of SCN, no amount was payable. The concept of deemed default under Rule 8(3A) no longer stands, in view of quashing of the provision by Honourable Gujarat High Court in the case of Indsur Global Limited. (supra). Accordingly, he prays for allowing the appeal of the assessee along with the cross objection and dismissing the appeal of Revenue.

8. Having considered the rival contentions, I find that the facts in this case before Tribunal, are similar to the facts in the case of Indsur Global Limited. (supra) (before the Honourable Gujarat High Court). Further, it is admitted fact that the appellant had paid the amount of duty in default along with interest before issue of show was notice. Further, Honourable High Courts have held that payment by way of Cenvat credit is legal and allowable and have quashed the provisions of Rule 8(3A) so far, they provide for restriction in utilising the Cenvat credit, during the period of default. In this view of the matter, the appeal of Revenue (Ex.Appeal No.60358/13) is dismissed and the appeal by assessee (Ex.Appeal No.60~~6~~5 15/13) along with the cross objection are allowed. The assessee will be entitled to any consequential benefits, in accordance with law.

(Pronounced in the open Court)

Sd/-

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

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