CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>CHENNAI</u>

REGIONAL BENCH - COURT No. III

Excise Appeal No.42392 of 2014

(Arising out of Order-in-Original No.23 / 2014 dated 05/08/2014 passed by Commissioner of Central Excise, Chennai – II Commisionerate, M.H.U Complex, Nandanam, Chennai – 600 035.

M/s. Win Win Industries (P) Ltd **.... Appellant**
Thiruvallur Tirutani High Road,
Pudur Village, Thiruvallur – 631 210

VERSUS

The Commissioner of CGST & Central Excise **... Respondent**
Chennai Outer Commissionerate
Newry Towers No.2054, I Block, II Avenue,
12^{th} Main Road, Anna Nagar,
Chennai 600 040.

<u>APPEARANCE :</u>

Shri G. Derrick Sam Advocate, for the Appellant
Shri M. Selvakumar Authorized Representative for the Respondent

<u>CORAM</u> :

HON'BLE MS. SULEKHA BEEVI.C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

<u>FINAL ORDER No.41129/2024</u>

DATE OF HEARING : 19.08.2024
DATE OF DECISION :23.08.2024

Per: Ms. Sulekha Beevi. C.S

Brief facts are that the appellant is engaged in the manufacture of Parts and Accessories of Motor Vehicle falling under Chapter heading 87089900 of CETA, 1985 and are registered with the Central Excise Department. They are availing Cenvat Credit on inputs/ input services and utilize the same for payment of excise duty for their final products.

2. On Scrutiny of ER-1 Return filed by the assessee for the month of June 2013, it was found that the appellant had to pay Central Excise duty of Rs 19,86,782/- on due date i.e. 5.7.2013. However the appellant paid an amount of Rs 3,98,712/- on 26.8.2013 and balance amount of Rs 15,88,069/- by utilizing the Cenvat account. For the subsequent period i.e. from July 2013 to December 2013, the appellant had not paid Central Excise duty on due dates and had paid Central Excise duty through both PLA and Cenvat account subsequently. Interest was also paid for payment made in cash.

3. In terms of provisions of Rule 8(3) of the Central Excise Rules 2002, if the assesses defaults in payment of duty beyond thirty days from the due date as prescribed in sub rule (1), then notwithstanding anything contained in the sub rule (1) and sub rule (4) of Rule 3 of Cenvat credit Rules 2004, the assesses shall pay excise duty for each consignment at the time of removal without utilizing the Cenvat Credit till the date the assesse pays the outstanding amount including interest thereon, and in event of any failure, it shall be deemed that such goods have been cleared without payment of duty and for the consequences and penalties as provided in these rules shall apply.

4. From the details of payment made by the appellant, it was seen that without paying the defaulted amount in cash on consignment basis, the assessee continued to utilize Cenvat Credit of Rs 85,72,248/- for payment of Central Excise Duty for the period

from June 2013 to December 2013. This was in violation of Rule 8(3A) of Central Excise Rules, 2002. It appeared to the department that appellant has contravened Rule 8(3A) of the Central Excise Rules 2002 and the goods were cleared without payment of duty by the assessee thereby rendering themselves liable for penalties under Section 11AC and Rule 25 of the Central Excise Rules, 2002.

5. The appellant was issued a show cause notice dated 06.03.2014 wherein it was proposed to demand an amount of Rs 85,72,248/- along with interest for the period June 2013 to December 2013 and also for imposing penalties. After due process of law the original authority confirmed the demand, interest, and imposed penalties. Aggrieved by such order, the appellant is now before the Tribunal.

6. The Ld. Counsel Shri Derrick Sam appeared and argued for the appellant. It is submitted that the delay in payment of duty beyond 30 days is only with respect of two months i.e. June 2013 and August 2013. However, the Adjudicating Authority has demanded duty paid through Cenvat credit from August 2013 to December 2013 to a tune of Rs. 52,79,105/-. The adjudicating authority had dropped the balance of demand raised in the Show Cause Notice.

7. The Ld. Counsel refferred to Rule 8(3A) of Central Excise Rules, 2002 which reads as under.

> *"8(3A). If the assessee defaults in payment of duty beyond thirty days from the due date, as prescribed in sub-rule (1), then notwithstanding anything contained in said sub-rule (1) and sub-rule (4) of Cenvat credit Rules, 2004, the assessee shall, pay excise duty for each consignment at the time of removal, without utilizing the Cenvat credit till the date the assessee pays the outstanding amount including interest thereon and in the event of any failure, it shall be deemed that such goods have been cleared without payment of duty and*

the consequences and penalties as provided in these rules shall follow."

8. The Ld. Counsel submitted that the said rule has been struck down as unconstitutional and 'ultra vires' by the Hon'ble High Court of Gujarat in the case of M/s. *Indsur Global Ltd.,* reported in 2014 (310) ELT 833(Gujarat). The decision was followed by the Hon'ble High Court of Madras in the case of M/s. *Malladi Drugs & Pharmaceuticals Ltd.,* reported in 2015 (323) ELT 489 (Mad.)

9. The Ld. Counsel submitted that the department had filed an appeal before the Hon'ble Supreme Court against the decision passed by the Hon'ble High Court of Gujarat in the case of M/s. *Indsur Global Ltd.,*(supra). The said appeal has dismissed by the Hon'ble Supreme Court vide decision dated 29.7.2024 as the appeal was not pressed by the department on the ground of monetary limits.

10. The Ld. Counsel submitted that the Hon'ble High Court of Bombay in the case of *Nashik Forge (P.) Ltd.*- 2019 (368) E.L.T 20 (Bom.) dated 17.9.2018 considered the very same issue and following the decision of the Hon'ble High Court of Gujarat in the case of *Indsur Global Ltd.,* and the decision of the Hon'ble High Court of Madras in the case of *Malladi Drugs & Pharmaceuticals Ltd., Sandley Industries Ltd Vs UOI* - 2015(326) ELT 256(P&H) held Rule 8 (3A) of the Central Excise Rule 2002 to be unconstitutional.

11. The Tribunal in the case of Andhra Cylinders (P) Ltd versus case Central Excise Hyderabad(2023) 12 Centax 93 (Tri.-Hyd) [3.1.2020] set aside the demand / penalty confirmed alleging violation of Rule 8(3A) of Central Excise Rule 2002.

12. The Ld. Counsel prayed that the appeal may be allowed.

13. The Ld. AR Shri M. Selvakumar appeared and argued for the department. The findings in the impugned order was reiterated.

14. Heard both sides.

15. As per the impugned order the Adjudicating Authority has confirmed a demand of Rs 52,79,105/- along with interest and imposed equal penalty. The original authority has dropped part of the demand raised in the SCN.

16. The main argument on behalf of appellant is that Rule 8(3A) of Central Excise Rules, 2002 has been struck down as unconstitutional by the Hon'ble High Courts and therefore the confirmation of demand cannot sustain.

17. The Hon'ble High Court in the case of *Indsur Global Ltd.,*(supra) has struck down Rule 8(3A) as unconstitutional on the ground that the prescribed Rule which says that the duty has to be paid without using the Cenvat credit is arbitrary and infringement of substantive right of Cenvat credit.

18. The Hon'ble Jurisdictional High Court has followed the decision of the Hon'ble Gujarat High Court in the case of *Indsur Global Ltd.,*(supra). The decision rendered by the Hon'ble High Court of Gujarat in the case of *Indsur Global Ltd.,* was appealed before the Hon'ble Apex Court by the department. It is seen that as per order of the Hon'ble Apex Court dated 29.7.2024 the department has withdrawn the appeal as not pressed.

19. The Hon'ble High Court in the case of *Malladi Drugs & Pharmaceuticals Ltd.,* (supra) had declared the provision to be unconstitutional. Once the provision is declared by any High Court as unconstitutional then the said provision is non-existent. The decision rendered by the Hon'ble High Court of Bombay in the case of Nashik Forge (P.) Ltd (Supra) has been relied by the Tribunal in the case of M/s. Andhra Cylinders (P.) Ltd the relevant para reads as under:

> *14. In view of the above, we find that at least four different High Courts have struck down the constitutional validity of Rule 8(3A) of Central Excise Rules, 2002 and appeals against*

such judgments have been admitted by the Hon'ble Supreme Court and have yet to be decided. There was a stay in one case i.e., Indsur Global Ltd. (supra) only but here was no stay in respect of the other judgments. Learned departmental representative relies on the judgment of Larger Bench of Hon'ble Supreme Court in the case of West Coast Paper Mills(supra) to assert that once an appeal has been admitted before the Hon'ble Supreme Court, the judgment of the High Court or Tribunal is in jeopardy and cannot be followed. We find that this judgment was of the year 2004. What needs to be decided in this factual matrix is where there are judgments by four different High Courts holding Rule 893A) as ultra vires and there is no judgment of any High Court upholding it and where the appeals against these judgments have been admitted and are under consideration of the Hon'ble Apex Court, whether the ratio of these judgments bind this tribunal or otherwise. We find that the last in the series of judgments was passed by the Hon'ble High Court of Bombay in the case of Nashik Forge (p.) Ltd. (supra) on 17-9-2018 holding that the ratio of the judgment of the decision of the Hon'ble High court of Madras, Gujarat and Punjab & Haryana apply. Respectfully following the decision of the Hon'ble High Court of Bombay, we follow the ration of the aforesaid judgments of the Hon'ble High Courts and hold that the demand is unsustainable and needs to be set aside. Consequently, penalties imposed upon the appellant also need to be set aside and we do so.

15. The appeals are allowed and the impugned order is set aside with consequential relief, if any.

20. After appreciating the facts and following the decisions as above, we are of the considered opinion that the demand cannot sustain. In the result, the impugned order is set aside. The appeal is allowed with consequential reliefs, if any.

(Order dictated and pronounced on 23.08.2024)

sd/-

(VASA SESHAGIRI RAO)
Member (Technical)

sd/-

(SULEKHA BEEVI. C.S)
Member (Judicial)

vl