CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
PRINCIPAL BENCH - COURT NO. II
Excise Appeal No. 53092 of 2018 (SM)

(Arising out of Order-in-Appeal No. 91(SM)CE/JPR/2018 dated 01.03.2018 passed by the Commissioner(Appeals), Central Goods & Service Tax, Jaipur.)

M/s Capital Hi Tech Engineering Pvt. Ltd. **Appellant**
G-1-211 RIICO Industrial Area
Neemrana Akera DimgarV K I
Area Extension Alwar-Rajathan

VERSUS

Commissioner of Central Excise & Customs, Central Goods and Service Tax, **Respondent**
NCR Building, Statue Circle,
C-Scheme, Jaipur, Rajashtan-302005

APPEARANCE:
Ms. Surbhi Sinha, Advocate for the Appellant
Shri Pradeep Gupta, Authorised Representative for the Respondent

CORAM:

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

FINAL ORDER NO. 52049/2021

Date of Hearing: 07/07/2021
Date of Decision: 02.12.2021

ANIL CHOUDHARY:

The issue involved in this appeal is whether vide impugned order, penalty of Rs. 7,85,471/- under Rule 25 has been rightly confirmed. Brief facts are as follows:

i) The appellant having Central Excise Registration No. AADCC9738MEM001 was engaged in the manufacture of Steel Fabrication falling under Tariff sub-heading no. 73084000 of the first schedule to the Central Excise Tariff Act, 1985.

ii) A show cause notice dt. 18.11.2013 was issued to the appellant alleged there under, that the appellant defaulted in payment of duty beyond 30 days, for the month of August, 2013 to October, 2013 & April, 2014 and also failed to pay interest on defaulted amount of duty and that the appellant had utilized Cenvat credit of Rs. 7,85,471/- during the period from October, 2013 to June, 2014, which otherwise, was required to be paid in cash or through account current, on consignment basis, as per Rule 8(3A) of the Central Excise Rules, 2002; that the appellant had cleared the goods contravening the provisions of Rule 8(3A) of the Central Excise Rules, 2002.

iii After considering the submissions made by the appellant, the Adjudicating Authority, vide the impugned order confirmed and ordered for the recovery of the demand of Central Excise duty amounting to Rs. 7,85,471/- upon the appellant under Rule 25 of the Central Excise Rules, 2002 and appropriated the penalty amount of Rs. 68,944/- in to the Govt. account.

The Commissioner(Appeals) relying on the ruling of this Tribunal in ***Parekh Bright Bars (P) Ltd. v. CCE 2010(249) ELT (298)*** upheld the penalty.

2. Being aggrieved, this appellant is before this Tribunal, *inter alia,* on the ground that show cause notice has been issued for alleged contravention of Rule 8(3A) of CER, 2002, as it was prior to amendment. Since, the erstwhile Rule 8(3A) has been declared ultravires by various High Courts (particularly in the case of **Indsur Global Ltd. vs. Union of India-2014 (310) ELT-833 (Guj.)**, thus, the subsequent issue of show cause notice dated 10/11/2015 is bad in law as held by the Hon'ble Supreme Court in **Union of India vs. Kamalakshi Finance Company Ltd. (1991-(55) ELT-433)(SC)** wherein the Hon'ble Supreme Court observed that Revenue to unreservedly follow appellate authority's order unless operation thereof is suspended by a competent Court. Mere fact of appeal having been filed against the order is not a good ground for not following it. Learned Counsel also relies on the following rulings:-

1. 2013(296) E.L.T. 449(Mad.) Unirols Airtex v. Assistant Commissioner
2. 2014 (310) E.L.T. 833 (Guj.) Indsur Global Ltd vs. Union of India
3. 2015 (322) E.L.T. 49 (Mad.) A.R. Metallurgicals P. Ltd. v. CESTAT, Chennai
4. 2018 (12) TMI 156 CESTAT Allahabad. M/s Bakewell Agro Ltd. v. CCE, Meerut-I, dated 28-09-2018
5. 2017 (3) TMI 1599- Delhi High Court., Principal Commissioner of C.Ex., Delhi-I v. Space Telelink Ltd.

Accordingly, he prays for allowing their appeal and setting aside the impugned order.

3. Learned DR relies on the impugned order and also relies on the following rulings:-

1. Commissioner of Central Excise v. Harish Silk Industries, 2013(288)E.L.T.74(Guj.)
2. Unirols Airtex v. Assistant Commissioneer-2013(296) E.L.T. 449(Mad.)
3. Chandragupta Ent. 2016 (308) E.L.T. 596 Tri-Del.

4. Having considered the rival contentions, I find that the Revenue itself amended and substituted Rule 8(3A) *vide* Notification No. 19/2014-CE(NT) dated 11/07/14, w.e.f. 11/7/14 and the substituted Rule reads as follows:-

> [(3A) If the assessee fails to pay the duty declared as payable by him in the return within a period of one month form the du dat, then the assessee is liable to pay the penalty at the rate of one per cent. On such amount of the duty not paid, for each month or part thereof calculated from the due date, for the period during which such failure continues.
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> *Explanation*: For the purposes of this sub-rule, 'month' means the period between two consecutive due dates for payment of duty specified under sub-rule (1) or the first proviso to sub-rule (1), as the case may be.]

5. Evidently, as per Rules of interpretation, where a provision is inserted by way of substitution, it is deemed to have been inserted w.e.f. the date of the original statute, unless otherwise provided.

Further, it is noticeable that the erstwhile Rule 8(3A) provided that in case an assessee is in default in depositing the duty for a period of more than 30 days, then the assessee shall be deemed to be in default and during such default, he shall not be entitled to utilise the Cenvat credit and shall be liable to pay duty consignment wise (i.e. on each clearance), whereas the substituted Rule 8(3A) provides that if the duty is not deposited or paid within a period of one month from the due date then the assessee shall be liable to pay a penalty @ 1% on such amount of duty not paid for each month or part thereof, during the period such failure continues. The Hon'ble Gujarat High Court in the case of Indsur Global Ltd. *(supra)* have been pleased to quash/read down the provision of erstwhile Rule 8(3A) to the extent it disabled an assessee from utilising the Cenvat credit lying to its credit, in utilising during the period of default. Accordingly, in view of the substituted provision w.e.f 11/07/14, I hold that the show cause notice is bad in law, in view of ruling of Hon'ble Gujarat High Court and various other High Courts and also in view of the amendment in Rule 8(3A) of the Central Excise Rules 2002 w.e.f. 11/7/2014.

6. Accordingly, the impugned order is set aside and the Appeal is allowed. The appellant is entitled to consequential benefits in accordance with law.

(Order pronounced in the court on 02.12.2021)

(ANIL CHOUDHARY)
Member (Judicial)

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