IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. I

Appeal No. E/4144/2012 [DB]

[Arising out of Orders in Original No. 47/COMMR/CEX/BPL-1 dated 08.10.2012 passed by the Commissioner, Central Excise & ST, Bhopal]

GEI Industrial Systems Limited, Bhopal ….Appellant

vs.

Commissioner of Central Excise & S.T., Bhopal ….Respondent

Appearance:

Rep by. None for the Appellants. Written submissions
Rep by. Shri H.C. Saini, DR for the Respondent

CORAM:

Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. V. Padmanabhan, Member (Technical)

Date of Hearing: 22.12.2016

Date of Pronouncement: 24.01.2017

FINAL ORDER NO. 50458 / 2017-EX (DB)

Per V. Padmanabhan

The present appeal is directed against Order-in-Original dated 08.10.2012 passed by Commissioner of Central Excise & S.T., Bhopal.

2. The appellant is engaged in the manufacture of heat exchanger and parts thereof falling under Chapter 84195090 and 84199090 of the first schedule to the Central Excise Tariff Act, 1985. The department noticed that in the month of December 2009, the appellant defaulted in payment of S & HE Cess to the tune of Rs. 6,104/- and the same was paid along with interest only on 13.04.2010.

For failure to pay a part of Central Excise dues within 30 days from the due date, for the month of December 2009 i.e. by 05.01.2010, Revenue took the view that clearances made during the month of February to April, 2010 should have been paid without making use of Cenvat credit account. This view was taken in view of the provisions of Rule 8 (3A) of Cenvat Credit Rules, 2002, which is reproduced below for ready reference:-

> "**Rule 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 rule 3 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."

It was found by the department that during the defaulted period as above, the appellant paid duty by making use of Cenvat credit to the extent of Rs. 2,43,84,100/-. Accordingly, a demand was raised vide show cause notice dated 28.04.2011, which was confirmed in the impugned order, wherein it was ordered for payment of duty to the extent mentioned above by cash along with interest. Penalties were also imposed under various rules and sections.

3. With the above background, we have heard Shri Z.U. Alvi, ld. Counsel appearing for the appellant and Shri H.C. Saini, ld. DR for the Revenue.

4. Ld. Advocate appearing for the appellant submitted that the amount of payment was very small amount of Rs. 6,104/- in respect of S & HE Cess which has also been subsequently paid along with interest. He further submitted that various High Courts have already held that payment of excise duty by making use of Cenvat credit, during the defaulted period is a valid mode of payment.

He further submitted that the very same Rule 8(3A) had been struck down by the Hon'ble Gujarat High Court in the case of *Indsur Global Limited vs. UOI – 2014 (310) ELT 833 (Guj.)*. A similar view has also been taken by various other High Courts. Accordingly, he prays that the impugned order is not sustainable.

5. Ld. DR supports the impugned order.

6. The impugned order has raised demand for Central Excise duty to the tune of Rs. 2.43 Crores which already stands paid by the appellant by making use of Cenvat credit validly accumulated. By taking support of Rule 8(3A) of the Cenvat Credit Rules, the ld. Commissioner in the impugned order has held that such payment is improper. However, we find that the said Rule 8(3A) itself has been struck down by the Hon'ble Gujarat High Court in the case of *Indsur Global Limited* (supra). The ratio of the decision is reproduced below:-

> "**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 borders 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.**"**

7. In view of the above, the impugned order is not sustainable and is therefore, set-aside and appeal is allowed.

[Pronounced in the open Court on 24.01.2017]

(Justice Dr. Satish Chandra)
President

(V. Padmanabhan)
Member (Technical)

KL