CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD

Division Bench
Court – I

Appeal No. E/1108/2011
(Arising out of Order-in-Original No.03/2011-(CE)-Commr. dt.28.01.2011 passed by CCCE, Hyderabad - I)

Andhra Cylinders Pvt Ltd
Sy No.203, Pati Village, Patancherumandal,
Medak District, Andhra Pradesh – 500 024 **......Appellant**

VERSUS

Commissioner of Customs, Central Excise & Service Tax, Hyderabad – I
Kendriya Shulk Bhavan, L.B. Stadium Road,
Basheerbagh, Hyderabad, Telangana – 500 004 **......Respondent**

and

Appeal No. E/1109/2011
(Arising out of Order-in-Original No.03/2011-(CE)-Commr. dt.28.01.2011 passed by CCCE, Hyderabad - I)

Nalin Khara, Managing Director
Sy No.203, Pati Village, Patancherumandal,
Medak District, Andhra Pradesh – 500 024 **......Appellant**

VERSUS

Commissioner of Customs, Central Excise & Service Tax, Hyderabad – I
Kendriya Shulk Bhavan, L.B. Stadium Road,
Basheerbagh, Hyderabad, Telangana – 500 004 **......Respondent**

Appearance
Shri K. Vijaya Kumar, Advocate for the Appellant.
Shri L.V. Rao, Authorized Representative for the Respondent.

Coram:
HON'BLE Mr. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)
HON'BLE Mrs. RACHNA GUPTA, MEMBER (JUDICIAL)

FINAL ORDER No. A/30001-30002/2020

Date of Hearing: 20.11.2019
Date of Decision: 03.01.2020

[Order per: P. VENKATA SUBBA RAO.]

1. These two appeals are filed against Order-in-Original No. 03/2011 – (CE) – Commr. dt.28.01.2011.

2. The issue involved in this case is the default of monthly payment of duty and consequent denial of utilization of Cenvat credit under Rule 8(3A) of the Central Excise Rules, 2002 during the period September, 2009 to August, 2010.

3. The appellant is a manufacturer of LPG Cylinders and is registered with the Central Excise department and has been paying excise duty accordingly. They have also been availing the benefit of Cenvat credit as per Cenvat Credit Rules (CCR), 2004. For the period September, 2009, the appellant short paid a duty of Rs.2,01,749/-. Subsequently, the appellant also short paid the duty during the months of November 2009, December 2009 and January 2010. By March 2010, the appellant paid all the short paid duties.

4. Rule 8 of Central Excise Rules, 2002 deals with the manner of payment of Central Excise duty. It requires the duty on goods removed from the factory or warehouse during the month to be paid by the 6th of the following month. Further, Sub-Rule 3A of this rule states that if the assessee fails to pay the duty declared as payable by him within one month then he cannot utilize the Cenvat credit for payment of Central Excise duty and the same needs to be paid in cash. Rule 8 of Central Excise Rules, 2002, as applicable during the relevant period, is reproduced below:

> *"**Rule 8 - Manner of payment –** [(1) The duty on the goods removed from the factory or the warehouse during a month shall be paid by the 6th day of the following month, if the duty is paid electronically through internet banking and by the 5th day of the following month, in any other case:*
>
> ***Provided** that in case of goods removed during the month of March, the duty shall be paid by the 31st day of March:*
> *..........*
>
> ***Explanation.** – For the purpose of this rule –*
>
> *a) The duty liability shall be deemed to have been discharged only if the amount payable is credited to the account of the Central Government by the specified date.*
> *b) If the assessee deposits the duty by cheque, the date of presentation of the cheque in the bank designated by the Central Board of Excise and Customs for this purpose shall be deemed to be the date on which the duty has been paid subject to realization of that cheque.*
>
> ***Explanation**. - For removal of doubts, it is hereby clarified that the duty liability shall be deemed to have been discharged only if the amount payable is credited to the account of the Central Government by the specified date.*
>
> *(2) The duty of excise shall be deemed to have been paid for the purposes of these rules on the excisable goods removed in the manner provided under sub-rule (1) and the credit of such duty allowed, as provided by or under any rule.*

(3) If the assessee fails to pay the amount of duty by due date, he shall be liable to pay the outstanding amount along with interest at the rate specified by the Central Government vide notification under section 11AB of the Act on the outstanding amount, for the period starting with the first day after due date till the date of actual payment of the outstanding amount.

(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.

(4) The provisions of section 11 of the Act shall be applicable for recovery of the duty as assessed under rule 6 and the interest under sub-rule (3) in the same manner as they are applicable for recovery of any duty or other sums payable to the Central Government.

*[**Explanation**.- For the purposes of this rule, the expressions 'duty' or 'duty of excise' shall also include the amount payable in terms of the CENVAT Credit Rules, 2004.]"*

5. As the appellant had failed to pay the Central Excise duties within one month from the due date, the department had issued show cause notices and confirmed the demands demanding Central Excise duty in cash denying them the utilization of Cenvat credit as per Rule 8 (3A) of Central Excise Rules, 2002. The differential Central Excise duty was accordingly demanded in terms of section 11A along with interest under section 11AB. Penalty was also proposed to be imposed under Rule 25 of Central Excise Rules, 2002 on the company as well as on the Managing Director of the appellant company.

6. Learned counsel for the appellant submits that the basis for the entire show cause notice is the violation of Rule 8(3A) of Central Excise Rules, 2002. This rule has been struck down as *ultra vires* of the Constitution by the Hon'ble High Court of Gujarat in the case of Indsur Global Ltd [2014 (310) ELT 833 (Guj)]. It has also been struck down by the Hon'ble High Court of Madras in the case of Malladi Drugs & Pharmaceuticals Pvt Ltd and others disposing of a batch of writ petitions as reported in *2015 (323) ELT 489 (Mad.)*. The Hon'ble High Court of Gujarat has also struck down the rule in the case of Shreeji Surgace Coatings Pvt Ltd [2015 (320) ELT 764 (Guj)]. Further, the Hon'ble High Court of Punjab & Haryana had struck down this rule as unconstitutional in the case of Sandley Industries vs UOI [2015 (326) ELT 256 (P & H). Relying on all the aforesaid judgments the Hon'ble High Court of Bombay had, in the case of Nashik Forge Pvt Ltd [2019 (368) ELT 20 (Bom.)], struck down the Rule 8(3A).

7. He would urge that since the four different High Courts have struck down the Constitutional validity of Rule 8(3A) the same cannot be enforced and accordingly, the entire basis for the show cause notice, the confirmation of demand and imposition of penalties by the impugned order cannot stand. He fairly submits that the first of the series of judgments was the judgment by the Hon'ble High Court of Gujarat in the case of Indsur Global Ltd (supra) which has been stayed by the Hon'ble Apex Court as reported in *2016 (335) ELT A109 (SC)*. He would submit that regardless of the fact that the judgment of the Hon'ble High Court of Gujarat has been stayed by the Hon'ble Apex Court, underlying ratio regarding the validity of Rule 8(3A) still holds good as this ruling of the Hon'ble High Court of Gujarat has not been struck down by the Hon'ble Apex Court. It is his assertion that, in the circumstances, the ratio of the judgment of the Hon'ble High Court of Gujarat still holds. He relies on the case law of Space Telelink Ltd [2017 (3) TMI 1599 (Delhi HC)] in which it has been held that staying or an order or the judgment by a lower court or authority does not deface the underlying basis of the judgment i.e., its reasoning and therefore, the ratio would still apply. Therefore, he would urge that despite the stay by the Hon'ble Apex Court, the ratio of the judgment of Hon'ble High Court of Gujarat applies.

8. Further, he would argue that even if the judgment of the Hon'ble High Court of Gujarat in the Indsur Global Ltd (supra) is not considered the remaining judgments of the four Hon'ble High Courts of Gujarat, Madras, Bombay and Punjab & Haryana would also apply to their case as there is no contrary judgment by the jurisdictional High Court of this bench.

9. Per contra, learned departmental representative draws the attention of the bench to the order of the Hon'ble Apex Court while staying the judgment of the Hon'ble High Court of Gujarat as follows:

> *".....*
> *Notice*
> ***There shall be interim stay of the impugned judgment and order passed by the High Court of Gujarat*** *at Ahmedabad in Special Civil Application No. 3344 of 2014, dated 27-11-2014.*
> *We restrain the petitioner(s) herein to recover a sum of Rs.87,00,000/- (Rupees eighty seven lakhs only) from the respondent till the disposal of the Special Leave Petition (C) C.C. No. 16523 of 2015"*

10. Coming to the question as to whether the stay by a superior court or admission of appeal by superior court against an order by the lower court would adversely affect the ratio laid down by the lower court, learned

departmental representative relies on the case law of the West Coast Paper Mills Ltd [2004 (164) ELT 375 (SC)] in which the Larger Bench of the Hon'ble Supreme Court has held as follows:

> *"38. In the aforementioned cases, this Court failed to take into consideration that once an appeal is filed before this Court and the same is entertained, the judgment of the High Court or the Tribunal is in jeopardy. The subject matter of the lis unless determined by the last Court, cannot be said to have attained finality. Grant of stay of operation of the judgment may not be of much relevance once this Court grants special leave and decides to hear the matter on merit."*

11. He would therefore urge that it is now a well settled position that once a decision or order of a Court is stayed by or an appeal against the same has been admitted by a superior court, the same is in jeopardy and cannot form the ratio decidendi.

12. We have considered the arguments on both sides and perused the records. We find the entire issue revolves around the vires of Rule 8(3A) of Central Excise Rules, 2002. In the case of Indsur Global Ltd (supra) the Hon'ble High Court of Gujarat has struck it down as unconstitutional. This judgment of the Hon'ble High Court of Gujarat has been stayed by the Hon'ble Apex Court. Similar decision was taken by the Hon'ble High Court of Gujarat in the case of Shreeji Surface Coatings Pvt Ltd (supra) and it does not appear that this order has been struck down or stayed by the Hon'ble Supreme Court. However, an appeal against this appears to have been admitted by the Hon'ble Apex Court. In the case of Malladi Drugs & Pharmaceuticals Ltd (supra) a batch of writ petitions filed by various parties were decided by the Hon'ble High Court of Madras striking down Rule 8(3A) as ultra vires. Against this batch order three appeals have been admitted by the Hon'ble Apex Court which are as follows:

a) SVM Auto Products [2017 (349) ELT A220 (SC)]
b) Hari Alloys Pvt Ltd [2016 (342) ELT A228 (SC)]
c) Titan Industries Ltd [2016 (341) ELT A155 (SC)]

13. Revenue's appeal against judgment of the Hon'ble High Court of Punjab & Haryana in the case of Sandley Industries Ltd (supra) was dismissed on monetary limits by the Hon'ble Apex Court. Further, we find from the website of the Hon'ble Supreme Court of India that a batch of several appeals have been tagged with the appeal of Union of India in the case of Indsur Global Ltd (supra).

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 there 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 8(3A) 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 Pvt Ltd (supra) on 17.09.2018 holding that the ratio of the judgment 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 ratio 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.

(Pronounced in the open court on 03.01.2020)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(RACHNA GUPTA)
MEMBER (JUDICIAL)

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