IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

EASTERN ZONAL BENCH: KOLKATA

Appeal Nos. E/269/2009, E/332 & 333/2012

Arising out of the following Order-in-Appeal/Order-in-Original No.:-

(i) **Order-in-Original No. 02/Commissioner/CE/Kol-IV/2009 dated 24/03/2009 passed by the Commissioner of Central Excise, Kolkata-IV.**

(ii) **Order-in-Appeal No. 33/Kol-IV/2012 dated 17.04.2012 passed by the Commissioner of Central Excise (Appeals), Kolkata-IV.**

(iii) **Order-in-Appeal No. 12/Kol-IV/2012 dated 23.02.2012 passed by the Commissioner of Central Excise (Appeals), Kolkata-IV.**

M/s. Star Battery Ltd. Appellant (s)

Vs.

Commr. Of Central Excise-Kolkata-IV Respondent (s)

Appearance

Shri S. P. Siddhanta, Consultant for the Appellant

Shri S. Mukhopadhyay, Suptd. (A.R.) for the Revenue

Appeal Nos. E/320/2012 & CO-45/2012, E/464/2012

Arising out of the following Order-in-Appeal/Order-in-Original No.:-

(i) **Order-in-Appeal No. 12/Kol-IV/2012 dated 23.02.2012 passed by the Commissioner of Central Excise (Appeals), Kolkata-IV.**

(ii) **Order-in-Appeal No. 33/Kol-IV/2012 dated 17.04.2012 passed by the Commissioner of Central Excise (Appeals), Kolkata-IV.**

Commr. Of Central Excise-Kolkata-IV Appellant (s)

Vs.

M/s. Star Battery Ltd. Respondent(s)

Appearance

Shri S. Mukhopadhyay, Suptd. (A.R.) for the Revenue

Shri S. P. Siddhanta, Consultant for the Respondent

CORAM:

HON'BLE SHRI P. K. CHOUDHARY, MEMBER (JUDICIAL)

HON'BLE SHRI V. PADMANABHAN, MEMBER (TECHNICAL)

Appeal Nos. E/269/2009, E/320/2012 & CO-45/2012, E/332-333/2012, E/464/2012

Date of Hearing-27.11.2018
ORDER NO. FO/77043-77047/2018

Per Bench

The issue involved in all these appeals is identical and hence, the same are being taken up for the decision through this common order.

2. During various periods, the assesse defaulted in making payment of Central Excise Duty in cash on the due dates. A part of the dues were paid by debiting the Cenvat Credit account. In the interim period when defaulted continued, the Revenue was of the view that the assessee was required to make payment of Central Excise Duty on goods cleared only on consignment basis and that too only in cash, without making use of the Cenvat Credit. However, the assessee continued to dis-charge the duty during the default period making use of the Cenvat Credit. Consequently, Show Cause Notices were issued to the assesee, directing them to make payment in cash, the duty amounts which were already debited by them from Cenvat Credit. The Show cause Notices were decided by issue of the impugned orders. In the impugned orders dated 23/02/2012 as well as 17/04/2012, the Commissioner (appeals) allowed the appeals filed before him and took the view that the assessee was entitled to make payment from Cenvat Credit Account during the default period. However, he imposed penalties. The assesse have filed appeal challenging the imposition of penalties but Revenue has also challenged

the view taken that Cenvat Credit cannot be used to make payment of duty during the default period.

3. In respect of the Impugned Order dated 24/03/2009, the Adjudicating Authority, Commissioner confirmed the demand of duty along with penalty which is under challenge in the assesse's appeal.

4. In this connection, we heard Shri Siddhanta, Ld. Consultatnt for the appellant and Shri S. Mukhopadhyay, Ld. DR for the Revenue.

5. The Ld. Consultant submitted that the provisions of Rule 8 (3A) of the Central Excise Rules, 2002, based on which the demand for duty has been raised by the Department has been struck down by the various High Courts as ultra vires. In this connection, he referred to some of the decisions, (i) 2014 (310) Excise Law Time 833 (Gujarat) (Indsur global Ltd. V. Union of India), (ii) 2015 (326) Excise Law Time 256 (Punjab & Haryana), (iii) (Sandley Industries v. union of India), 2015 (323) Excise Law Time 489, (iv) (Mad)-2015-VIL-208-MAD-CE (Malladi Drugs & Pharmaceuticals Ltd. v. union of India), (v) 2015 (316) Excise Law Time, 595 (Gujarat), (vi) Precision Fasteners Ltd. V. CCE and (vii) 2016 (314) and 2016 (341) Excise Law Time 603 (Allahabad)- A.T.V. Projects India ltd. v. Union of India, (viii) Goyal MG Gases Pvt. Ltd. vs. Union of India-2017-VIL-655-CAL-CE.

6. The Ld. consultant submitted that in view of the above decisions including the decision of the Jurisdictional High Court, there is no bar in

making use of the accumulated Cenvat Credit for making payment of Central Excise Duty even during default period.

7. The Ld. DR submitted that the present issue regarding the applicability of Rule 8 (3A) of the Central Excise Rule, 2002, has been decided by various High Courts against Revenue. However, Revenue has challenged all such orders by filing SLP before the Hon'ble Supreme Court. The Hon'ble Supreme Court has admitted the SLP and had stayed the operation of all such decisions of the High Courts. Accordingly, he submitted that the issue may be kept pending until outcome of the decision of the Hon'ble Supreme Court.

8. We have heard both sides at length and perused the record.

9. We have also carefully perused the decisions of the various High Courts cited by the Ld. Consultant. We also note that the Jurisdictional High Court at Calcutta, in the case of Goyal MG Gases Pvt. Ltd has followed the decision of the Gujarat High Court in Indsur global Ltd. V. Union of India and has held the portion of rule 8 (3A) as ultra vires.

10. By following the decision of the Jurisdictional High Court, we come to the conclusion that there is no bar in making use of Cenvat Credit in making payment of Central Excise Duty even during default period, in view of the fact that the Rule 8 (3A) ibid which steps otherwise, has been struck down as ultra vires.

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11. In view of the above, we set aside the portion of the order imposing penalties as well as demand for Central Excise Duty. All the appeals stands disposed of as above. Cross Objection also stands dispose of.

(Dictated and Pronounced in the Open Court)

Sd/-	Sd/-
(P. K. CHOUDHARY)	**(V. PADMANABHAN)**
MEMBER (JUDICIAL)	**MEMBER (TECHNICAL)**

Pooja