

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA**

Appeal No. E/247/2008

(Arising out of Order-in-Original No. 02/Commissioner/CE/Kol-IV/2008 dated 05.02.2008 passed by the Commissioner of Central Excise, Kolkata-IV)

Commissioner of C. Ex, Kol-IV

Appellant (s)

Vs.

M/s. Sai Construction

Respondent (s)

Appearance:

Shri A. K. Biswas, Suptd. (A. R.) for the Revenue

None for the Respondent (S)

CORAM:

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

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

Date of Hearing: -06.12.2018

Order No. FO/77094/2018

PER BENCH

The present appeal is against the Order-in-Original No. 02/Commissioner/CE/Kol-IV/2008 dated 05.02.2008. The appeal is filed by Revenue.

2. The brief facts of the case are that the respondent is a manufacturer of various excisable goods and was making use of Cenvat Credit facility. During the period August 2006 to November 2006 (except September, 2006), the total Excise Duty liability was discharged partly by making use of Cenvat Credit. The balance amount was required to be paid in cash, was not paid by the due date. This resulted in default in the payment of Central Excise Duty. It continued from 06/10/2006 to 31/03/2007. The Revenue was of the view that during the default period, the appellant was required to make payment

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of duty on consignment to consignment basis, only in cash, without making use of credit accumulated in Cenvat Credit.

3. Citing the Rule 8 (3A), the Show Cause Notice was issued proposing to demand payment of Central Excise Duty in cash which has already been debited from Cenvat Credit. The SCN dated 06/09/2007 was adjudicated by issue of the impugned order in which the duty demand was upheld but no interest was demanded. Penalty was imposed under Rule 27 but not under Rule 25. Revenue has filed the present appeal only with a plea that interest under Section 11AB of the Act as well as penalty under Rule 25 should be ordered to be imposed.

4. When the appeal was called, Revenue is represented by Shri A. K. Biswas, Ld. DR and none appeared on behalf of the respondent.

5. After hearing the Ld. DR as well as perusal of record, it is seen 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

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(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. 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. By following the decision of the Jurisdictional High Court, we come to the conclusion that there is no bar in making use of the accumulated Cenvat Credit in making payment of Central Excise Duty even during default period.

8. In view of the above, there is no justification for ordering payment of interest or penalty as sought by the Revenue. In the result, the appeal filed by the Revenue is rejected.

(Operative part of the order was pronounced in the open court.)

Sd/-
(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(V. PADMANABHAN)
MEMBER (TECHNICAL)

Pooja