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

EASTERN ZONAL BENCH: KOLKATA

Excise/MA(ROA)/316/12
AND
Excise Appeal No.76/2009

(Arising out of Order-in-Original No. 10/Commissioner/CE/Kol-IV/2008 dated 25.11.2008 passed by the Commissioner of Central Excise, Kolkata-IV)

M/s. Incorporated Daub Verhoeven Ltd. (IDVL)

Applicant (s)/Appellant (s)

Vs.

Commr. of Central Excise, Kolkata-IV

Respondent (s)

Appearance:

NONE for the Appellant (s)

Shri S. S. Chattopadhyay, Supdt.(AR) for the Respondent (s)

CORAM:

SHRI P.K. CHOUDHARY, HON'BLE JUDICIAL MEMBER
SHRI V. PADMANABHAN, HON'BLE TECHNICAL MEMBER

Date of Hearing/Decision :- 07.01.2019

ORDER NO…MO/75130/2019 & FO/75232/2019

PER SHRI V. PADMANABHAN

The present appeal E/76/2009 is directed against the Order-in-Original No.10/Commissioner/CE/Kol-IV/2008 dated 25.11.2008 passed by the Commissioner of Central Excise, Kolkata-IV. The appeal was dismissed vide the final order No. A-247/KOL/2012 dated-23/04/2012 for failure to make pre deposit ordered by the Tribunal vide its order dated-08/12/2011. Misc. Application have been filed praying for restoration of the appeal. After carefully considering the grounds advanced for restoration of the appeal, we allow the same and restore the appeal to its original number.

2. None appeared on behalf of the appellant. Revenue is represented by Shri S. S. Chattopadhyay, Ld. D.R. He submitted that the appeal may be considered for final decision in the absence of the appellant.

3. We have heard the Ld. D.R. and perused the record.

4. Appellant was engaged in the manufacture of furnace and ovens falling under Chapter 84 of the Schedule to the Central Excise Tariff Act, 1985. They were availing the facility of CENVAT Credit for discharging the Central Excise duty. During the months of October and November, 2005, the appellant defaulted in making payment of Central Excise Duty. The entire defaulted amount of duty of Rs.5,13,932/- was paid on 10/5/2007 and the applicable interest was also paid on 18/8/2007. The duty from May to August, 2007 was paid in a consolidated manner through CENVAT Credit instead of paying from PLA. The Revenue was of the view that the appellant was required to make payment only on consignment to consignment basis and that too with cash for making use of accumulated amount of CENVAT Credit.

5. In terms of Rule 8 (3A), show cause notice was issued proposing the demand of Central Excise Duty in cash which was already debited from the CENVAT Credit account. The case was adjudicated with the issue of impugned order in which duty demand made in the show cause notice was confirmed alongwith interest. In addition, penalty equal to the duty demanded, has also been imposed. This order is under

challenge in the present proceedings. The appellant in the grounds of appeal have urged that there is no mandate for insisting on payment of duty in cash. Payment of duty made by making the CENVAT Credit has also to be considered as valid payment of duty. It has accordingly been prayed that the impugned order may be set aside in as much as the entire duty stands paid through CENVAT Credit account.

6. The Ld. D.R. justified the impugned order and submitted that in terms of Rule 8 (3A) of the Central Excise Rules, 2002, during the period when the assessee has defaulted in making payment of the duty, they were required to make payment of duty in cash on consignment to consignment basis. Since the same has not been done by the appellant, the impugned order may be sustained.

7. We have considered the appeal record carefully and also the arguments of Ld. D.R.

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

9. Even though Revenue has challenged such decision of various High Courts before the Hon'ble Supreme Court, we note that the jurisdictional High Court at Calcutta in case of Goyal MG Gases Pvt. Ltd (supra) has followed the decision of the Hon'ble Gujarat High Court in the case of Indsur Global Ltd. and has held the portion of Rule 8 (3A) as ultra vires. By following the decision of the jurisdictional high court, we come to the conclusion that there is no bar in making use of accumulated CENVAT Credit in making payment of Central Excise duty even during the default period.

10. In the result, the impugned order is set aside and the appeal is allowed.

(Operative part of the order already pronounced in the court)

S/d
P.K. CHOUDHARY
(JUDICIAL MEMBER)

S/d
V. PADMANABHAN
(TECHNICAL MEMBER)

k.b/-