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

REGIONAL BENCH – COURT NO.2

Ex. Appeal No. 78114 of 2018

Arising out of Order-in-Appeal No.66/KOL-V/2018 dated 20.04.2018 passed by Commissioner of CGST & CX, (Appeal-I), Kolkata.

M/s. Das Brothers & Co
30, Bamacharan Roy Road,
Kolkata-700034

Appellant (s)

VERSUS

Commr. of CGST & CX, Kolkata South
180, Shanti Pally,
Rajdanga Main Road,
Kolkata-700107

Respondent (s)

APPERANCE :

Shri S. Das, Proprietor for the Appellant
Shri S. S. Chattopadhyay, Suptd. (AR) for the Respondent

CORAM:

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

FINAL ORDER NO. FO/A/75658/2019

Date of Hearing/Date of Decision : 10.06.2019

PER P.K.CHOUDHARY :

Briefly stated the facts of the case are that the appellant is a manufacturer of excisable goods and were making use of the facility of cenvat credit. During the period 2012-13 & 2013-14, the total duty liability was discharged partly making use of the cenvat credit. The balance amount which was required to be paid in cash, was not paid by due date. This resulted in default for payment of Central Excise duty. Revenue was of the view that during the default period, the appellant assessee was required to make payment of Central Excise duty on goods cleared on consignment to consignment basis only in cash, without making use of the credit accumulated in cenvat credit account. However, the assessee continued to discharge the duty during the default period making use of the cenvat credit. Citing Rules 8 (3) & 8 (3A) of the Central Excise Rules, 2002, Show-Cause Notice was issued proposing to demand payment of Central Excise duty in cash, which was already debited from the Cenvat Credit Account. The Show-Cause Notice dated 17/09/2015, was adjudicated. The duty demand in the Show-Cause Notice was confirmed along with interest. In addition, a penalty of Rs.1,57,553/- was also imposed. On Appeal, the Commissioner (Appeals) upheld the adjudication order and rejected the appeal. Hence, the present appeal before the Tribunal.

2. The appellant, 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.

3. The appellant further 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.

4. The Ld. D.R. appearing on behalf of the Revenue, 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.

5. I have heard both sides and perused the appeal record.

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

7. By following the decision of the Jurisdictional High Court, I 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. In the result, the impugned order is set aside and the appeal is allowed with consequential benefits, if any.

(Operative part of the order was pronounced in the open Court)

(P. K. Choudhary)
Member (Judicial)

Pooja