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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.692 of 2011

(Arising out of Order-in-Appeal No.28/RAN/2011 dated 11.05.2011 passed by Commissioner(Appeals), Central Excise & Service Tax, Ranchi.)

M/s. Bharat Alloys Private Limited
(Factory & Office at :-
Dukhiya Mahadev Road, Giridih, Jharkhand-815301.)

...Appellant

VERSUS

Commissioner of Central Excise, Ranchi

.....Respondent

(Central Revenue Building, 5A, Main Road, Ranchi-834001, Jharkhand.)

<u>APPEARANCE</u>

Shri H.K.Pandey, Advocate for the Appellant (s)
Shri A.Roy, Authorized Representative for the Respondent (s)

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

<u>FINAL ORDER NO. 75030/2021</u>

DATE OF HEARING : 28 January 2021
DATE OF DECISION : 28 January 2021

P.K.CHOUDHARY :

The present appeal is against the Order-in-Appeal No.28/RAN/2011 dated 11.05.2011, by which the learned Commissioner(Appeals) has upheld the order of the learned adjudicating authority except modification for imposition of penalty. The Revenue's case is that the appellant is a manufacturer of various excisable goods and were making use of facility of the Cenvat Credit. During the month of December 2007, the said noticee had defaulted in duty payment for clearances made. Further, on scrutiny of ER-1 returns of the said noticee for the months of February, 2008 and March, 2008 it was found that they had not paid the aforesaid defaulted duty amount for clearances effected during December 2007 within 30 days of the due date, which was 05.02.2008. Moreover, the said noticee continued to make clearances without payment of consignment-wise duty at the time of removal. This resulted in default in the payment of Central Excise Duty. The Revenue was of the view that during the default period, the appellant was required to make payment of Central Excise duty on consignment to consignment basis, in cash, without making use of the credit accumulated in Cenvat account, on the removals of excisable goods made during 05.02.2008 to 11.03.2008.

2. Citing the Rule 8(3A), a show cause notice was issued proposing to demand payment of Central Excise duty in cash, which was already deposited on 11.03.2008 vide GAR-7 No.00155. The show cause notice was adjudicated with the issue of Order-in-Original dated 25.02.2010. On appeal, the learned Commissioner(Appeals) has rejected the appeal of appellant upholding the order of the learned adjudicating authority except modification in the imposition of penalty, stating that it should be imposed in terms of Rule 26 and not Rule 25, which is subject to the provisions of Section 11A. Accordingly, the penalty already imposed by the Original authority was held to be imposable under Rule 26. Hence, the present appeal before the Tribunal.

3. I have heard Shri H.K.Pandey, learned Advocate for the appellant and Shri A. Roy, learned Authorized Representative for the Respondent Revenue through video conferencing and perused the appeal records.

4. The learned Advocate 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) Indsur Global Ltd. vs. UOI [2014 (310) ELT 833 (Guj.)], (ii) Sandley Industries vs. UOI [2015 (326) ELT 256 (P & H)], (iii) Malladi Drugs & Pharmaceuticals Ltd. Vs. UOI [2015 (323) ELT 489, (iv) Precision Fastners Ltd. vs. CCE [2015 (316) ELT 595 (Guj.)] and (v) A.T.V. Projects India Ltd. vs. UOI [2016 (341) ELT 603

(Allahabad) and (vi) Goyal MG Gases Pvt.Ltd. vs. UOI [2017-VIL-655-CAL-CE].

5. The learned Advocate 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.

6. The learned Authorized Representative for the respondent Revenue submitted that the present issue regarding the applicability of Rule 8(3A) of the Central Excise Rules, 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 Hon'ble High Courts. Accordingly, he submitted that the issue may be kept pending until outcome of the decision of the Hon'ble Supreme Court.

7. Heard both sides at length through video conferencing and perused the records.

8. I have also carefully perused the decisions of the various High Courts cited by the learned Advocate. 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. vs. UOI (supra) and has held the portion of Rule 8(3A) as *ultra vires.*

9. 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.

(Dictated and pronounced in the open Court.)

SD/

(P.K.CHOUDHARY)

MEMBER (JUDICIAL)

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