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

REGIONAL BENCH - COURT NO.2

Service Tax Appeal No.71022 of 2013

(Arising out of Order-in-Appeal No.23/CE/B-II/2013 dated 17.05.2013 passed by Commissioner(Appeals), Central Excise, Customs & Service Tax, Bhubaneswar.)

M/s. Utkal Alloys Private Limited
(At-Santoshpur, PO-Bisra, Dist-Sundergarh, Orissa.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Bhubaneswar-II
.....Respondent
(C.R. Building, Rajaswa Vihar, Bhubaneswar, Orissa-751004.)

APPEARANCE

Shri Kartick Kurmy, Advocate for the Appellant (s)
Shri S.Mukhopadhyay, Authorized Representative for the Respondent (s)

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

FINAL ORDER NO. 75175/2021

DATE OF HEARING : 19 February 2021
DATE OF DECISION : 19 February 2021

P.K. CHOUDHARY :

The instant Appeal arises out of Order-in-Appeal dated 17.05.2013 bearing No.23/CE/B-II/2013 passed by the Commissioner(Appeals), Bhubaneswar upholding duty demand of Rs.2,65,12,542/- for contravention of Rule 8(3A) of the Central Excise Rules, 2002 by utilization of CENVAT Credit of Rs.2,12,18,017/- during the period from July, 2006 to February, 2008 i.e. during forfeiture of the facility under Rule 8(1) of the Central Excise Rules, 2002 and payment of duty of Rs.53,31,169/- from PLA on monthly basis during the said period instead of payment of duty, consignment wise.

2. Shri Kartick Kurmy, learned Advocate submits that, in the instant case, out of total duty demand of Rs.2,65,12,542/- they have

discharged duty of Rs.2,12,18,017/- from CENVAT Credit and balance duty of Rs.53,31,169/- is discharged from PLA along with interest of Rs.9,26,268/-, on monthly basis. The duty of Rs.2,12,18,017/- is demanded on the ground that during the period of default in payment of duty in accordance with Rule 8(1)/(3) of the Central Excise Rules, 2002, the Appellant could not have discharged duty from CENVAT Credit in contravention of the provisions of Rule 8(3A) of the Central Excise Rules, 2002, and further, duty of Rs.53,31,169/- paid from PLA on monthly basis should have been discharged under Rule 8(3A) on consignment basis during the period of forfeiture of the facility of monthly payment of duty.

3. The learned Advocate for the Appellant submits that in the instant case the proceeding is initiated without issuance of Show Cause Notice under Section 11A of the Central Excise Act, 1944/Rule 14 of the CENVAT Credit Rules, 2004, and therefore, the entire proceeding is *ab initio void*. In support of his submissions, he relies on Sanghi Polysters Ltd. Vs. Superintendent of C.Excise reported in 2010 (251) ELT 504 (AP), Shreematha Precision Components Vs. CCE reported in 2015 (325) E.L.T. 529 (Kar.) and Unirols Airtex v. Assistant Commissioner reported in 2015 (321) E.L.T. A-226 (Mad.).

4. The learned Advocate for the Appellant further submits that the words “without utilizing Credit” under Rule 8(3A) *ibid* is declared *ultra vires* by the Hon’ble Gujarat High Court in the case of Indsur Global Ltd. Vs. UOI reported in 2014 (310) ELT 833 (Guj.) which is followed by the Hon’ble Bombay High Court in the case of CCE Vs. Nashik Forge Pvt.Ltd. reported in 2019 (368) ELT 20 (Bom.), the Hon’ble Punjab & Haryana High Court in the case of Sandley Indusries Vs. UOI reported in 2015 (326) ELT 256 (P & H) and Tribunal in the case of Prakash Engg. Pvt.Ltd. Vs. CCE Cus. And S.Tax reported in 2020-TIOL-1155-CESTAT-KOL.

5. The learned Advocate for the Appellant further relied upon the judgment of the Hon’ble Calcutta High Court in the case of Goyal MG Gases Pvt.Ltd. Vs. UOI reported in 2017-VIL-655-CAL-CE, wherein it is

categorically held that when Rule 8(3A) is declared *ultra vires* by the different High Courts then the Revenue cannot take a different stand contrary to the said judgments. The Hon'ble Court further declared Rule 8(3A) as invalid which is not stayed by the Hon'ble Supreme Court. The learned Counsel further submits in the alternative that the provisions of Rule 8(3A) cannot be pressed into service for recovery of arrears as in the instant case.

6. Learned Authorized Representative for the respondent Revenue supports the impugned order.

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

8. We find that the Hon'ble Gujarat High Court in the case of Indsur Global Ltd. Vs. UOI cited *supra* has declared the words "without utilizing CENVAT credit" under Rule 8(3A) as *ultra vires* which means that the assessee can discharge duty by utilizing CENVAT Credit which is what exactly has been done in the instant case by the Appellant.

9. We find that the said judgment has been followed by the Hon'ble Calcutta High Court in the case of Goyal MG Gases Pvt.Ltd. Vs. UOI cited *supra* which is not stayed by the Hon'ble Supreme Court. The Hon'ble Calcutta High Court in the said case, has declared the provisions of Rule 8(3A) *ibid* as invalid and further has held that the Revenue cannot take a different stand and parity has to be extended to the assessee.

10. We find that the demand in the instant case has been raised for contravention of Rule 8(3A) *ibid* restricting utilization of CENVAT Credit during the period of default which provision has been declared *ultra vires*/invalid by Court, hence, the demand cannot be sustained and the appeal, thus, succeed on this count.

11. We further find that, in the instant case no show cause notice U/s 11A of the Central Excise Act, 1944/Rule 14 of the CENVAT Credit Rules, 2004 have been issued by the department for recovery of the disputed demand which course is clearly impermissible in law in view of the judgments in the case of Sanghi Polysters Ltd. Vs. Superintendent

of C.Excise cited *supra,* Shreematha Precision Components Vs. CCE cited *supra*, Unirols Airtex v. Assistant Commissioner cited *supra*. Show Cause Notice under section 11A of the Act read with Rule 14 of the CENVAT Credit Rules, 2004 is the foundation of any proceeding and thus mandatory for demand of duty, penalty and no demand can be confirmed without issuance of Show Cause Notice. We find that the impugned order thus fails on this count also.

12. We accordingly, set aside the impugned order and allow the appeal with consequential reliefs, if any.

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

SD/
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

SD/

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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