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

REGIONAL BENCH – COURT NO.2

Excise Appeal No. 71468 of 2013

(Arising out of Order-in-Original No. CCE/BBSR-II/No.12/Commissioner/2013 dated 30.09.2013 passed by Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar-II.

M/s Bhaskar Steel & Ferro Alloys Ltd.,
P.O.- Bad Tumkela, Village-Lathikata, Dist.-Sundergarh, Odisha-770040.

..Appellant

VERSUS

Commissioner of Central Excise, Customs & S. Tax, BBSR-II.
Central Revenue Building, Rajaswa Vihar, Bhubaneswar (Odisha) Pin-751007.

.. ...**Respondent**

APPERANCE :

Shri A. K. Prasad, Advocate for the Appellant
Shri A. Roy, Authorized Representative for the Respondent

CORAM:

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

FINAL ORDER No...75942/2021

DATE OF HEARING : 08.12.2021
DATE OF DECISION : 08.12.2021

PER BENCH:

Brief facts of the case are that M/s Bhaskar Steel & Alloy Ltd P.O. Bad Tumkela, via-Lathikata, Dist : Sundergarh, Odisha-770040 (hereinafter referred to as the appellants) are, inter alia, engaged in the manufacture of Sponge Iron and M.S. Billets classifiable under the erstwhile Chapter 72 of the Central Excise Tariff. During the relevant period they were duly registered with central excise department.

2. Central excise duty for the month of March 2011 amounting to Rs.1,48, 90, 772/- was payable by 31.03.2011. However, the appellants could pay only an amount of Rs.1,09,22,100/- on 31/3/2011. The balance amount of Rs.39,68,672/- was paid on 05.04.2011 and the interest of Rs.9,786/- was paid on 12/9/2011. In other words, the total duty involved in respect of clearances relating to March 2011 was paid before the expiry of 30 days from 31.03.2011, that is, much before 30/04/2011.

3. Similarly, for the month of April 2011 the total duty payable of Rs.1,09,18,716/- was payable by 05.05.2011 but only an amount of

Rs.61,18,716/- was paid on 30.04.2011 and the balance amount of Rs.48,00,000/- was paid on 09.05.2011. The interest for delayed payment was paid on 08.06.2011. In this case too, the full duty for April 2011 was paid within one month after the due date.

4. For the month of May 2011 the total duty of Rs.47,41,517/- was payable by 05.06.2011 but only an amount of Rs.7,04,517/- was paid on 31/5/2011, an amount of ₹26,000/- was paid on 5/6/2011 and the balance amount of Rs 40,11,000/- was paid on 08.06.2011. The interest for delayed payment of duty was paid on 20.08.2011. Thus, in this case also the total duty involved was paid within one month after the due date.

5. The Central Excise department was of the view that the appellants had violated the provisions of Rule 8(3A) of the Central Excise Rules, 2002, as during the period 01.05.2011 to 12.09.2011 they had not paid the *duty* as well as *interest* within one month of the due date and they were, therefore, required to pay duty for subsequent periods only through PLA and that too, consignment-wise, and their clearances during 01.05.2011 to 12.09.2011 by utilizing Cenvat Credit was irregular.

6. Accordingly, vide show cause notice dated 07.03.2012, a demand of duty of Rs.1,60,58,909/-, to be paid only from PLA, was raised on the appellants. Penal provisions were also invoked under Rule 25 of the Central Excise Rules, 2002.

7. The case was adjudicated by the Commissioner of Central Excise, Customs and Service Tax, Bhubaneshwar-II, who, vide his Order dated 30.09.2013(the impugned order), confirmed the full demand of duty along with interest. He also imposed equivalent penalty.

8. The appellants are now before us in appeal against the said impugned Order.

10. Following submissions have been made by the learned counsel for the appellants:-

10.1 The provisions of Rule 8(3A) of the Central Excise Rules, 2002 are applicable only if the default in payment of ***duty*** is beyond 30 days from the due date. It does not talk about payment of ***interest*** within this period of 30 days. Since, admittedly, for each of the months of March, April and May, 2011, the **duty** was paid within the period of 30 days from the due date, the question of invoking this rule should not have arisen.

10.2 Duty is defined in Rule 2(e) of the Central Excise Rules, 2002, as "*duty payable under section 3 of the Act",* whereas "*interest*" is covered by section

11AA/11AB of the Act. Thus, conceptually as well as legally, *"duty"* cannot be equated with "*interest*".

10.3. When there is no contravention of Rule 8(3A) of the Central Excise Rules, 2002, there is no question of imposing any penalty under Rule 25 of the said Rules.

10.4. The Hon'ble Gujarat High Court in the case of **Indsur Global Limited vs Union of India reported in 2014(310)ELT833(Guj)** has held Rule 8(3A) to be ultra vires the Constitution of India. This decision of the Gujarat High Court has been subsequently followed by various High Courts as well as various Benches of the Tribunal as indicated below:-

(i) Neesa Infrastructure Ltd. Vs. CCE, Ahmedabad -II [2015 (321) ELT 328 (Tri-Ahd)]

(ii) A.R. Metallurgicals Pvt. Ltd. Vs. Cestat, Chennai [2015 (322) ELT 49 (Mad)]

(iii) Sandley Industries Vs. Union Of India [2015 (326) ELT 256 (P&H)]

(iv) Space Telelink Ltd. Vs. CCE, Delhi – I [2016 (335) ELT 157 (Tri-Del)]

(v) Praweg Conveyors Cs. CCE, Kalyan – III [2016 (337) ELT 450 (Tri-Mum)]

(vi) Vrajeshwari Steel Pvt. Ltd. Vs. CCE & amp; ST, Vadodara –II [2017 (346) ELT 490 (Tri-Ahd)]

(vii) Space Telelink Ltd. Vs. CCE, Delhi – I [2017 (346) ELT 509 (Tri-Del)] upheld by the High Court as reported in 2017 (355) ELT 189 (Del)

(viii) GEI Industrial Systems Ltd. Vs.CCE, Bhopal [2017 (347) ELT 289 (Tri-Del)]

(ix) Frontier Alloy Steels Ltd. Vs. Union of India [2017 (354) ELT 54 (All)]

(x) DRD Body Tech's (India) Pvt. Ltd. Vs. CC., C.EX. &ST., Hyderabad -IV [2020 (374) ELT 270 (Tri-Hyd)].

11. The learned Authorised Representative (AR) reiterated the findings of the impugned order and added that the Hon'ble Gujarat High Court in the case of Indsur Global Ltd (supra) had not declared the whole of Rule 8(3A) as unconstitutional but only that part which provides for '*payment of duty without utilizing the Cenvat credit till an assessee pays the outstanding amount including interest*.

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

13. For better appreciation of the issue at hand the relevant rule is extracted below:-

> ***Rule 8(3A).*** *"If the assessee defaults in payment of duty beyond thirty days from the due date, as prescribed in sub-rule (1), then notwithstanding anything contained in said sub-rule (1) and sub-rule (4) of Rule 3 of CENVAT Credit Rules, 2004, the assessee*

> *shall, pay excise duty for each consignment at the time of removal, without utilizing the CENVAT credit till the date the assessee pays the outstanding amount including interest thereon and in the event of any failure, it shall be deemed that such goods have been cleared without payment of duty and the consequences and penalties as provided in these rules shall follow."*

14. The wordings of the above rule support the submissions of the learned counsel for the appellants that Rule 8(3A) of the Central Excise Rules, 2002, during the relevant period, provided for stringent provisions only if the '**duty'** was not paid within 30 days from the due date. In the instant case, for each of the three months, duties were all paid within 30 days of the due date. There was no requirement, as per law, that both duty as well as interest have to be paid within 30 days of the due date for payment of duty to escape the rigours of Rule 8(3A). It has rightly been pointed by the learned counsel that duty and interest are two different levies, statutorily as well as commercially, and 'duty' can never include 'interest'.

15. Further, the provisions of Rule 8(3A) of the Central Excise Rules, 2002, providing for '*payment of duty without utilizing the Cenvat credit till an assessee pays the outstanding amount including interest',* has been declared as unconstitutional by the Gujarat High Court in the case of Indsur Global Ltd (supra). This decision has been followed by various High Courts as well as various Benches of the Tribunal, as pointed out by the learned counsel.

16. In view of the above the Appeal is allowed by setting aside the impugned Order-in-Original dated 30.09.2013.

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

Sd/-
(P. K. Choudhary)
Member (Judicial)

Sd/-
(P. Anjani Kumar)
Member (Technical)

Tushar