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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.83 of 2010

(Arising out of Order-in-Original No.CCE/BBSR-I/36/2009 dated 11.11.2009 passed by Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar-I.)

M/s. Rana Sponge Limited
(Vill. & P.O. Kulei, P.S. Parjang, District: Dhenkanal, Orissa.)

...Appellant

VERSUS

Commissioner of Central Excise, Customs & Service Tax, BBSR-I
.....Respondent
(Central Revenue Building, Rajaswa Vihar, Bhubaneswar-751007.)

APPEARANCE

NONE 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 K. ANPAZHAKAN, MEMBER(TECHNICAL)

FINAL ORDER NO 75068/2023

DATE OF HEARING : 6 March 2023
DATE OF DECISION : 6 March 2023

P.K. CHOUDHARY :

The instant Appeal arises out of the Order-in-Original dated 11.11.2009/12.11.2009 pased by the Commissioner of Central Excise, Customs & Service Tax, BBSR-I confirming duty demand of Rs.1,02,94,904/- for contravention of Rule 8(3A) of the Central Excise Rules, 2002 read with Section 11AB of the Central Excise Act, 1944 by utilization of Cenvat Credit of Rs.2,55,45,917/- for the period September 2007 to December 2007 and Rs.1,77,40,641/- during the period from June 2008 to July 2008. The Show Cause Notice alleged that the assessee intentionally and knowingly contravened the provisions of Rule 8 of Central Excise Rules, 2002 read with Para 1.1 of Chapter 3 (Para-5) of CBEC Excise Manual of Supplementary instructions, with intent to evade Central Excise duty during the month of November 2007 to December 2007 and August 2008 inasmuch as they had not paid Central Excise duty amounting to Rs.1,02,94,904/- by debiting from their account. Penalty of Rs.25.00 Lakhs has also been imposed under Rule 25 of the Central Excise Rules, 2002.

2. None appears on behalf of the Appellant. Heard the Ld.Authorized Representative for the Department and perused the Appeal records. Ld.Authorized Representative for the Department supports the impugned order.

3. On going through the grounds of appeal filed by the Appellant, we find that the Appellant claims that they have already paid the Central Excise duty of Rs.1,02,94,904/-by debiting their Cenvat Credit account as under:-

S. No.	Period	Duty Demanded (Rs.)
(i)	From 06.11.2007 to 12.12.2007	33,49,283
(ii)	From 05.08.2008 to 12.08.2008	69,45,621
	Total	1,02,94,904

4. It is the case of the Appellants that there is no dispute that they paid the outstanding amount for the month of June 2008 along with interest thereon on 12.08.2008. It is their submission in the grounds of appeal that the Commissioner should have appreciated that the provisions of Rule 8(3A) would apply only till the date the assessee pays the outstanding amount including interest thereon. Therefore, under no circumstances, the demand could have exceeded the amount of duty payable on the goods cleared during the period from 05.08.2008 to 12.08.2008. It is also mentioned in the grounds of appeal that as per the Annexure to the Show Cause Notice itself, the duty payable on the goods cleared during the period from 05.08.2008 to 12.08.2008 was Rs.32,79,822/- only. It is further submitted that the Commissioner has wrongly taken the Cenvat Credit utilized in the entire month of August 2008 which was Rs.69,45,621/- instead of actual duty amount of Rs.32,79,822/-. Accordingly it is their submission that the

demand could not have exceeded Rs.66,29,105/- as per particulars given below:-

S. No.	Period	Duty Demanded (Rs.)
(i)	From 06.11.2007 to 12.12.2007	33,49,283
(ii)	From 05.08.2008 to 12.08.2008	32,79,822
	Total	66,29,105

5. We find that the issue is no more *res integra* and is squarely covered by the judgement of the Hon'ble Calcutta High Court in the case of M/s. Goyal MG Gases Pvt.Ltd. Vs. Union of India & Others reported in 2017 (8) TMI 1515 – CALCUTTA HIGH COURT, 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 judgements. The Hon'ble Court further declared Rule 8(3A) as invalid which is not stayed by the Hon'ble Supreme Court.

6. We find that the Hon'ble Gujarat High Court in the case of Indsur Global Ltd. v. UOI [2014 (310) E.L.T. 833 (Guj.) 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.

7. 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. v. 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.

8. 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.

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

(Dictated and pronounced in the open Court.)

Sd/-
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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