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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.687 of 2010

(Arising out of Order-in-Original No.43/Commr./BOL/10 dated 23.08.2010 passed by Commissioner of Central Excise, Bolpur.)

M/s. Golden Poly Products Limited
(De-Gaulle Avenue, Durgapur-713206, Dist: Burdwan.)

...Appellant

VERSUS

Commissioner of Central Excise, Bolpur

.....Respondent

(Nanoor Chandidas Road, Sian, Bolpur, Dist: Birbhum, West Bengal.)

APPEARANCE

Shri Debaditya Acharya, Authorized Representative for the Appellant (s)

Shri S.Mukhopadhyay, Authorized Representative for the Revenue

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

FINAL ORDER NO. 75197/2023

DATE OF HEARING : 30 March 2023
DATE OF DECISION : 30 March 2023

P.K. CHOUDHARY :

The present Appeal is against Order-in-Original No.43/Commr./BOL/10 dated 23.08.2010. The Appellant is a manufacturer of articles of plastic/polythene, iron & steel products falling under Chapter 39, 72 & 73 of Central Excise Tariff Act, 1985 and were making use of facility of the CENVAT Credit. During the month of April 2007, the Appellant could not pay the duty by the due date i.e. 05.05.2007. However, the duty including Education Cess along with interest for the delay caused was paid by TR-6 Challan on 13.06.2007 in compliance of Sub-Rule 3 of Rule 8 of the Rules. The Appellant thereafter continued to clear the goods in the manner as provided under Sub-Rule (1) of Rule 8 of the Rules i.e. by way of utilizing the CENVAT Credit. A Show Cause Notice dated 13.01.2010 was issued seeking to recover an amount of Rs.1,23,59,288/- for the removal of goods during the period from January 2009 to September 2009. It was alleged in the Show Cause Notice that the Appellant failed to pay the Central Excise duty on goods cleared during the month of April 2007 within 30(thirty) days after due date i.e. 05.05.2007 and after which the Appellant was bound to pay the duty only from PLA and on consignment to consignment basis till the due amount with interest was paid.

2. It is the case of the Appellants that the monthly installment facility was not withdrawn by the proper officer as required under Sub-Rule (3A) of Rule 8 of the Central Excise Rules, 2002. The Appellant also referred to the provision of Rule 8 of the Rules which is self-contained Rules and provides that in the event the dues including interest thereof are not paid within the period of two months or thereafter then the penal consequences as provided in the Rule shall follow. Since the duty and interest for the month of April 2007 was paid within two months therefore no penal provision under the Rules was attracted. Even after penalty was invoked, although not invocable, the penalties under the Rules were applicable under Section 11AC of the Central Excise Ac, 1944 since there was no suppression of facts etc.. The Ld.Commissioner vide the impugned Order-in-Original demanded the Central Excise duty as proposed in the Show Cause Notice along with interest and also imposed penalty of equal amount under Rule 25(1)(a) of the Central Excise Rules, 2002. Hence the present Appeal before the Tribunal.

3. Heard the Ld.Authorized Representative for the Department and perused the Appeal records.

4. It is the case of the Appellants that there is no dispute that they paid the outstanding amount for the month of April 2007 along with interest thereon on 13.06.2007. 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 January 2009 to September 2009. 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 January 2009 to September 2009 was Rs.1,23,59,288/- only.

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 various High Courts, hence the demand cannot be sustained and the Appeal, thus, succeeds on this count.

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

(Dictated and pronounced in the open Court.)

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

Sd/

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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