IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA
REGIONAL BENCH - COURT NO.2

Excise Appeal No.919 of 2011

(Arising out of Order-in-Appeal No.67-68/Kol-V/2011 dated 09.08.2011 passed by Commissioner of Central Excise (Appeals), Appeal-I, Kolkata.)

M/s. Superol Industrial Lubricant
(Block-D-195, Trenching Ground Road, Kolkata-700024.)

...Appellant

VERSUS

Commissioner of Central Excise, Kolkata-V

.....Respondent

(180, Shantipally, Rajdanga Main Road, Kolkata-700107.)

<u>APPEARANCE</u>

Shri N.K.Chowdhury, Advocate for the Appellant (s)
Shri S.Mukhopadhyay, Authorized Representative for the Respondent

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

<u>FINAL ORDER NO. 75240/2023</u>

DATE OF HEARING : 18 April 2023
DATE OF DECISION : 18 April 2023

Per : P.K. CHOUDHARY :

The facts of the case in brief are that the Show Cause Notice dated 21.09.2008 was issued alleging contravention of the provisions of Rule 8(3A) read with Rule 8(1) and Rule 8(3) of Central Excise Rules, 2002 read with Rule 3(4) of the CENVAT Credit Rules, 2004 and also Rule 12 of the Central Excise Rules, 2002. It is the case of the Department that the assessee inasmuch as continued to clear the excisable goods availing the facility of duty payment on installment basis not resorting to consignment wise payment of duty from account current by not utilizing CENVAT Credit during the period subsequent of their default in payment of the Central Excise duty to the tune of Rs.2,47,911/- along with interest for the period from September 2007 to February 2008 with an obvious intention to evade payment of duty by resorting to suppression of facts as evident by their non-submission of their ER-1s in time repeatedly for the months of October 2007, November 2007, December 2007, January 2008 and February 2008. The contention of the Appellant is that they were late in paying duty in PLA. It is their submission in the grounds of appeal that the proceedings have been initiated by the Department against them on the ground that they have defaulted in payment of duty. It is further submitted that they have paid the duty relating to the month of September 2007 along with interest on 12.10.2007 and hence there was no contravention of the provisions of Sub-Rule (3A) of Rule 8 ibid during the months of September-October 2007. Again Central Excise duty of Rs.61,852/- was due to be paid for clearance for excisable goods during the month of October 2007 of which Rs.40,270/- was paid from CENVAT Credit account and out of outstanding account of Rs.21,582/-, an amount of Rs.17,029/- including an interest of Rs.192/- was paid on 06.12.2007 and the remaining maount of Rs.4,812/- including an interest of Rs.68/-. It is also submitted that the during the period 07.12.2007 to 11.12.2007 there was no clearance of excisable goods form their factory and they have paid the entire amount through CENVAT Credit.

2. The Ld.Authorized Representative for the Department reiterated the findings of the Ld.Commissioner(Appeals).

3. Heard both sides and perused the Appeal records.

4. We find that the Appellants have paid the entire duty through CENVAT Credit along with interest. 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 the interest thereon.

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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