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

Excise Appeal No.683 of 2011
(Arising out of Order-in-Appeal No.10/CE/Commr./Kol-VI/2011 dated 25.03.2011 passed by Commissioner of Central Excise, Kolkata-VI.)

M/s. Khaitan Electricals Limited
(P-10, Transport Depot Road, Kolkata-700088.)

...Appellant

VERSUS

Commissioner of Central Excise, Kolkata-VI

.....Respondent

(Bamboo Villa, 6th Floor, 169, A.J.C. Bose Road, Kolkata-700014.)

<u>APPEARANCE</u>

NONE 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. 75280/2023</u>

DATE OF HEARING : 27 April 2023
DATE OF DECISION : 27 April 2023

Per : P.K. CHOUDHARY :

The facts of the case in brief are that the Appellant were having three units at (1) Kolkata (2) Hyderabad & (3) Faridabad. They were engaged in the manufacture of electrical fans classifiable under sub-heading 8414 of Central Excise Tariff Act, 1985. In the month of February 2010 they were required to make payment of Rs.58,40,599/- within 6th March 2010. They made the payment, but inadvertently in the payment documents, the code number was not correctly written. By mistake code number of Hyderabad unit was written instead of Kolkata Unit in the GAR-7 Challan. This mistake was detected by the Appellant subsequently and then they themselves took up the matter with the Deputy Commissioner of Central Excise, Taratala Division. However, at the instance of the Department, the Appellants made payment again of the aforesaid amount of Rs. 58,40,599/- on 25.08.2010 and 26.08.2010. Since the said payment was made again through PLA, the

Department initiated the proceeding by issuing a Show Cause Notice dated 01.12.2010 for realization of the amount of Central Excise duty paid by utilizing the CENVAT Credit account during the period from 06.03.2010 to 26.08.2010. The Appellants utilized the CENVAT Credit and Cess to the tune of Rs.4,50,39,736/- and an amount of Rs.89,35,000/- was paid from CENVAT and PLA account respectively. The Show Cause Notice demanded the said amount paid from the CENVAT account along with interest for the account paid from PLA as well. Proposal for imposition of penalties were also made. The whole issue is whether the payment made mentioning the wrong assessee code number in the Central Excise account is not considered as any payment. Several submissions were made in the reply to the Show Cause Notice, but the Ld.Commissioner assuming the aforesaid payment as non-payment and proceeded on and passed the order confirming the demand. Hence the present appeal before the Tribunal.

2. When the matter was called, none appeared on behalf of the Appellant nor any prayer for adjournment has been received. Since the Appeal is an old one pertaining to the year 2011, the same is taken up for disposal with the consent of Ld.Authorized Representative for the Department.

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

4. We find from the grounds of appeal that the whole issue involved in this case is whether the Appellant has defaulted in making monthly payment of duty and whether the provisions of Rule 8(3A) can be invoked in such a situation. We find from the records that the Ld.Commissioner failed to appreciate that the Appellants had three units at Kolakta, Hyderabad and Faridabad. For the month of February the appellants were required to make payment with 6th March 2010 and while making such payment for the March 2010 for an amount of Rs.58,40,599/- from their Kolkata unit from PLA code number of Hyderabad unit was wrongly mentioned in the GAR-7 Challan and as a result the amount though deposited, but under a wrong assessee code

number. It is the submission of the Appellants in their grounds of appeal that mentioning of the wrong code number was through inadvertence by the person, who was handling the e-payment matters. On detection of the mistake the Appellants brought the matter to the notice of the Deputy Commissoiner of Central Excise, Taratala-II Division intimating that the total amount of Rs. 58,40,599/- was paid against the GAR-7 Challan dated 05.03.2010 and 06.03.2010. It was categorically submitted that there was a mistake in mentioning the assessee code number in e-payment documents pertaining to the payment for the month of February 2010. This mistake was also subsequently intimated to the Ld.Commissioner. It is also the case of the Appellant that merely because payment was made putting wrong code number, it cannot be said that the payment was not made. We find that vide Board's Circular No.58/7/2003-ST dated 20.05.2003 it was clarified that even though payment is made by putting wrong code number, the assessee should not be asked to pay again and even if assessee has paid again, the earlier payment shall be refunded. We find that the Tribunal in the case of Gualala Closure (I) Pvt.Ltd. v. CCE-Daman reported in 2008 (228) ELT 39 (Tri.Ahmd.) held that an amount deposited under different heads in TR-6 Challan of the cost accounting problem, but since admittedly the Appellants paid the duty under different code, will not be held liable for making the payment again and the entire exercise would be revenue neutral and accordingly the demand of interest and imposition of penalty is uncalled for. The facts and circumstances of the case, the Board's Circular and the decision of the Tribunal show that making the payment of duty quoting wrong code number cannot be considered as non-payment and in such a situation, the proceeding initiated by the Ld.Commissioner is unwarranted.

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)

sm