

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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.75151 of 2017

(Arising out of Order-in-Appeal No.46-47/KOL-V/2016 dated 26.08.2016 passed by Commissioner of Central Excise (Appeal-I), Kolkata.)

M/s. Chowdhury Industries Corporation Private Limited
(62, Alipore Road, Kolkata-700027.)

...Appellant

VERSUS

Commissioner of Central Excise, Kolkata-V

.....Respondent

(180, Shantipally (3rd Floor), Rajdanga Main Road, Kolkata-700107.)

APPEARANCE

NONE for the Appellant (s)

Shri S. S. Chattopadhyay, Authorized Representative for the Respondent (s)

CORAM: HON'BLE MR. ASHOK JINDAL, MEMBER (JUDICIAL)

FINAL ORDER NO. 76098/2023

DATE OF HEARING : 23.06.2023

DATE OF DECISION : 23.06.2023

PER ASHOK JINDAL:

When the matter was called, none appeared on behalf of the appellant. Heard the learned Authorized Representative for the respondent Revenue. As the issue lies in a narrow compass, I take up the appeal for disposal in the absence of the Appellant.

2. The appellant is a manufacturer of various excisable goods and were making use of facility of the Cenvat Credit. The appellant failed to pay duty involving on goods removed for the months of November & December 2006, within the due dates as specified in Rule 8(1) of the Central Excise Rules, 2002. This resulted in default in the payment of Central Excise Duty. A show cause notice was issued to the appellant,

which was confirmed by the Adjudicating Authority by confirming the demand and imposing a penalty of identical amount upon the Appellant. Revenue was of the view that the appellant was required to make payment of Central Excise Duty on consignment to consignment basis, only in cash, without making use of the credit accumulated in Cenvat Credit. On appeal, learned Commissioner(Appeals) has upheld the order of learned Adjudicating Authority. Hence, the present appeal before the Tribunal.

3. The learned Authorized Representative for the respondent Revenue submitted that the present issue regarding the applicability of Rule 8 (3A) of the Central Excise Rule, 2002, has been decided by various High Courts against Revenue. However, Revenue has challenged all such orders by filing SLP before the Hon'ble Supreme Court. The Hon'ble Supreme Court has admitted the SLP. Accordingly, he submitted that the issue may be kept pending until outcome of the decision of the Hon'ble Supreme Court.

4. I find that citing Rule 8(3A), the Show Cause Notice was issued proposing to demand payment of Central Excise duty in cash, which was already debited from the Cenvat Credit account. The SCN dated 20.07.2007 was adjudicated with the issue of the Order-in-Original. The duty demand in the Show Cause Notice was confirmed along with interest. In addition, penalty of amount equal to the due demand was also ordered to be paid, which culminated into the impugned order passed by learned Commissioner(Appeals). This order is under challenge in the present proceedings.

5. I find that the provisions of Rule 8 (3A) of the Central Excise Rules, 2002, based on which the demand for duty has been raised by the Department has been struck down by the various High Courts as *ultra vires*. In this connection, reference can be made for the decisions, (i) 2014 (310) Excise Law Time 833 (Gujarat) (Indsur global Ltd. V. Union of India), (ii) 2015 (326) Excise Law Time 256 (Punjab & Haryana), (iii) (Sandley Industries v. union of India), 2015 (323) Excise Law Time 489, (iv) (Mad)-2015-VIL-208-MAD-CE (Malladi Drugs & Pharmaceuticals Ltd. v. union of India), (v) 2015 (316) Excise Law Time, 595 (Gujarat), (vi)

Precision Fasteners Ltd. V. CCE and (vii) 2016 (314) and 2016 (341) Excise Law Time 603 (Allahabad)- A.T.V. Projects India Ltd. v. Union of India, (viii) Goyal MG Gases Pvt. Ltd. vs. Union of India-2017-VIL-655-CAL-CE.

5. I also find that in view of the above decisions including the decision of the Jurisdictional High Court, there is no bar in making use of the accumulated Cenvat Credit for making payment of Central Excise Duty even during default period.

8. I have carefully perused the decisions of the various High Courts. I note that the Jurisdictional High Court at Calcutta, in the case of Goyal MG Gases Pvt. Ltd. has followed the decision of the Gujarat High Court in Indsur global Ltd. V. Union of India and has held the portion of rule 8 (3A) as *ultra vires*.

9. By following the decision of the Jurisdictional High Court, I come to the conclusion that there is no bar in making use of the accumulated Cenvat Credit in making payment of Central Excise Duty even during the default period. In the result, the Impugned Order is set aside and the appeal is allowed.

(Dictated and pronounced in the open Court.)

Sd/-
(ASHOK JINDAL)
MEMBER (JUDICIAL)

PINAKI