IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NOS: E/237 & 238/2010

[Arising out of Order-in-Original No: 40/BR-36/Th-I/2009 dated 12/11/2009 passed by the Commissioner of Central Excise, Thane– I.]

Sigma Solvents Pvt Ltd
Salim Memon … ***Appellants***

versus

Commissioner of Central Excise
Thane – I ***…Respondent***

Appearance:

Shri Rajiv Wagle, Advocate for appellants

Shri Ajay Kumar, Additional Commissioner (AR) for respondent

CORAM:

Hon'ble Dr. D. M. Misra, Member (Judicial)
Hon'ble Shri C. J. Mathew, Member (Technical)

Date of hearing: 18/10/2018
Date of decision: 18/10/2018

ORDER NO: A/87867-87868/2018

Per: Dr. D.M. Misra

These appeals are against Order-in-Original No. 40/BR-36/Th-I/2009 dated 12/11/2009 passed by the Commissioner of Central

Excise, Thane– I.

2. Briefly stated, the facts of the case are that the appellant had defaulted in discharging their duty liability for the month of September 2006 to December 2006, February 2007, April 2007, May 2007 and July to October 2007. A show cause notice was issued to them for recovery of the Central Excise duty amounting to ₹ 75,50,815/- as during the default period between 06/11/2006 to 11/02/2008 the appellant had besides discharged part of the duty liability through PLA/cash, but debited their CENVAT credit account which is in violation of the provisions of sub-rule 3(A) of Rule 8 of the Central Excise Rules, 2002. On adjudication, the demand was confirmed with interest and penalty and the amount of duty of ₹ 38,50,338/- paid by the appellant through PLA has been appropriated. Aggrieved by the said order the present appeal.

3. Learned Advocate Shri Rajiv Wagle, for the appellant submits that the department does not dispute about the payment of 38,50,338/- which comprises duty of ₹ 22,03,377/- and ₹ 16,40,364/- paid by them through PLA in February 2008 and interest of ₹ 6,327/-; the dispute relates to utilization of CENVAT credit in discharging a part of their monthly duty liability during the aforesaid period alleging that CENVAT credit cannot be utilized during the default period. He submits that the issue is no more *res integra* being covered by the

judgment of various Tribunal including the latest judgment of Tribunal in the case of *GEI Industrial Systems Ltd v. Commissioner of Central Excise, Bhopal [2017 (347) ELT 289 (Tri.-Del.)]*. The Learned Advocate submits that the payment of duty liability by debiting CENVAT credit during the default period is held to be legal and proper.

4. Learned Authorised Representative for Revenue reiterates the submissions of the Learned Commissioner. No contrary decision is placed on behalf of Revenue.

5. We have carefully considered the submissions advanced by both the sides and perused the records. Undisputedly the appellant during the period in question has defaulted in discharging their monthly duty liability and in some months also failed in filing their regular returns. However, subsequently, the entire amount of duty along with interest has been paid by the appellant through their PLA in February 2008, and a part of the liability also discharged during the default period by debiting their CENVAT account. Revenue has accepted the duty discharged through PLA but objected to reversal of CENVAT credit account in discharging duty liability during the default period.

6. We find that the issue has been dealt by various benches of this Tribunal and in *GEI Industrial Systems Ltd (supra)* this Tribunal, after

taking note of the development of law in this regard and pendency of the appeal against constitutional *vires* declared by the Gujarat High Court, observed as follows:

> **"7.** Admittedly, in terms of the legal provisions applicable during the relevant time up to 1-6-2006 an order is required to be passed by the Asstt. Commissioner to forfeit the facility to pay duty in monthly instalments under sub-rule (1). On issue of such order, during the period covered by the said sub-rule, the assessee shall be required to pay excise duty for each consignment by debit to the current account. We note that in the present case, there is no such order forfeiting the facility of monthly payment issued by the Asstt. Commissioner. The Hon'ble Supreme Court in the case of Jayaswal Neco Ltd. - 2015 (322) E.L.T. 587 (S.C.) interpreting the terms "paid excise duty for each consignment by debit to Account Current" held that it could not be said to be the only mode of payment of duty during this period. Payment through Cenvat credit is also a valid mode of payment. We also note that Rule 8(3A) to the extent requiring the payment of duty without utilizing the Cenvat credit during the period of default is held to be unconstitutional by several High Courts. The Hon'ble Gujarat High Court in case of Indsur Global Ltd. - 2014 (310) E.L.T. 833 (Gujarat) held the expression "without utilizing the Cenvat credit" used in Rule 8(3A) was held to be ultra virus and inconsistently. The said decision was concurred by the Hon'ble High Courts of Madras, Punjab & Haryana, Delhi and Allahabad and has been followed by the Tribunal in various decisions. Reference can be made to the following :-
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> (a) Precision Fasteners - 2015 (316) E.L.T. 595 (Guj.)
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> (b) Shreeji Surface Coating Pvt. Ltd. - 2015 (320) E.L.T. 764 (Guj.)

(c) A.R. Metallurgicals (P) Ltd. - 2015 (322) E.L.T. 49 (Mad.)

(d) CCE v. Star Drugs and Research Labs - 2016-TIOL-1282-HC-MAD-CX = 2016 (338) E.L.T. 652 (Mad.)

(e) Sandlley Industries - 2015 (326) E.L.T. 256 (P & H)

(f) CCE v. Anand Tissue Ltd. - 2016-TIOL-2018-HC-ALL-CX

(g) Order dated 11-8-2016 in CEAC No. 4/2016 of the Hon'ble High Court in the case of CCE v. Vikrant Auto Industries [2016 (340) E.L.T. 291 (Del.)]

(h) Cheran Cements Ltd. v. CCE - 2015-TIOL-2119-CESTAT-MAD.

We also take note that the decision of the Hon'ble Gujarat High Court is now pending before the Hon'ble Supreme Court in 2016 (335) E.L.T. A-109 (S.C.). The Hon'ble Supreme Court granted interim stay of the order and also restrained the department from recovering the amount from the respondent. However, we note that the ratio adopted by the various High Courts and by this Tribunal in similar set of facts is still binding. Even without support of this ratio, we find that in the present case, the appellants have fully discharged the default amount, by 16-6-2006 in cash, with applicable interest for the delayed payment. In such situation to hold that the clearances subsequent to March, 2006 as non-duty paid clearance only on the ground that the Cenvat credit has been used for payment of such liability, is not legally sustainable. The ratio of the Hon'ble Supreme Court's decision in the case of Jayaswal Neco Ltd. (supra) can be referred to."

7. We do not find any reason in not following the aforesaid precedent. In the result, the impugned orders are set aside and the appeals are allowed with consequential relief as per law.

(Pronounced in Court)

(C J Mathew)
Member (Technical)

(Dr. D.M. Misra)
Member (Judicial)

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