CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

EXCISE APPEAL NO: 1677 of 2011

[Arising out of Order-in-Original No: 42/BR-42/Th-I/2011 dated 30th August 2011 passed by the Commissioner of Central Excise, Thane – I.]

Torane Ispat Udyog Pvt Ltd … ***Appellant***
Cine Wonder Mall, Shop No. 49, Ground Floor,
Ghodbunder Road, Thane (West)

versus

Commissioner of Central Excise ***…Respondent***
Thane – I
4th Floor, Navprabhat Chambers, Ranade Road, Dadar (West), Mumbai 400 028

APPEARANCE:

Shri P S Namboodiri, Advocate for the appellant

Ms A S Parab, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE DR SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO: A/85808 / 2019

DATE OF HEARING: 18/04/2019
DATE OF DECISION: 18/04/2019

PER: C J MATHEW

This appeal of M/s Torane Ispat Udyog Pvt Ltd pertains to the discharge of duty liability of ₹1,94,61,614/-, on clearances effected between 4th July 2010 and 3rd November 2010, through CENVAT credit account even though, owing to default in delayed payment of duty for May 2010 and July 2010, the appellant was, under rule 8(3A) of Central Excise Rules, 2002, barred from such utilisation.

2. It is the contention of Learned Counsel for the appellant that the disbarment relied upon in the adjudication order has been held to be *ultra vires* by the Hon’ble High Court of Allahabad in *Frontier Alloy Steels Ltd v. Union of India [2017 (354) ELT 54 (All.)]* and in *ATV Projects India Ltd v. Union of India [2016 (341) ELT 603 (All.)],* by the Hon’ble High Court of Madras in *Malladi Drugs & Pharmaceuticals Ltd v. Union of India [2015 (323) ELT 489 (Mad.)],* by the Hon’ble High Court of Punjab & Haryana in *Sandley Industries v. Union of India [2015 (326) ELT 256 (P&H)]* and by the Hon’ble High Court of Gujarat in *Indsur Global Ltd v. Union of India [2014 (310) ELT 833 (Guj.)]*. Learned Counsel, therefore, suggests that as the Hon’ble Bombay High Court has not had an opportunity to take a contrary view, these precedents become binding and that the Tribunal, in *Praweg Conveyors v. Commissioner of Central Excise, Kalyan – III [2016 (337) ELT 450 (Tri.-Mumbai)]* has followed these decisions.

3. Learned Authorised Representative relies upon the provisions of rule 8 of Central Excise Rules, 2002 and reiterates the findings of the original authority.

4. After having heard the rival submissions, we find that the decision in *re Indsur Global Ltd,* though, admittedly, under challenge

by Revenue, cannot be disregarded in the light of the finding therein that

> *‘36. In the result, the condition contained in sub-rule (3A) of Rule 8 for payment of duty without utilizing the Cenvat credit till an assessee pays the outstanding amount including interest is declared unconstitutional. Therefore, the portion “without utilizing the Cenvat credit” of sub-rule (3A) of Rule 8 of the Central Excise Rules, 2002, shall be rendered invalid.’*

and the application of rule 8 of Central Excise Rules, 2002 is, thereby, restricted to that which is not invalid. That the provision relied upon was required to be interdicted has been explained thus

> *‘31. This extreme hardship is not the only element of unreasonableness of this provision. It essentially prevents an assessee from availing Cenvat credit of the duty already paid and thereby suspends, if not withdraws, his right to take credit of the duty already paid to the Government. It is true that such a provision is made because of peculiar circumstances the assessee lands himself in. However, when such provision makes no distinction between a willful defaulter and the rest, we must view its reasonableness in the background of an ordinary assessee who would be hit and targeted by such a provision. As held by the Supreme Court in the case of Eicher Motors Ltd. (supra) an assessee would be entitled to take credit of input already used by the manufacturer in the final product. In the said case, the Supreme Court was dealing with Rule 57F which was introduced in the Central Excise Rules, 1944 under which credit lying unutilized in the Modvat credit account of an*

assessee on 16th March, 1995 would lapse. Such provision was questioned. The Supreme Court held that since excess credit could not have been utilized for payment of the excise duty on any other product, the unutilised credit was getting accumulated. For the utilization of the credit, all vestitive facts or necessary incidents thereto had taken place prior to 16-3-1995. Thus the assessees became entitled to take the credit of the input instantaneously once the input is received in the factory of the manufacturer of the final product and the final product which had been cleared from the factory was sought to be lapsed. The Supreme Court struck down the rule further observing that if on the inputs the assessee had already paid the taxes on the basis that when the goods are utilized in the manufacture of further products as inputs thereto then the tax on those goods gets adjusted which are finished subsequently. Thus a right had accrued to the assessee on the date when they paid the tax on the raw materials or the inputs and that right would continue until the facility available thereto gets worked out or until those goods existed. We may also recall that in the case of Dai Ichi Karkaria Ltd. (supra) it was reiterated that a manufacture obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable produce immediately it makes the requisite declaration and obtains an acknowledgment thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product.

32. As held by the Supreme Court in the case of Chantamanrao (supra), the phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and *unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(g) and the social control permitted by Clause (6) of Article 19, it must be held to be wanting in that quality.*

33. In the case of Om Kumar (supra), the Supreme Court recognized the applicability of the principle of proportionality in judging the validity of a provision on the touchstone of reasonableness under Article 14 of the Constitution. It was observed:

> *"53. Now under Art. 19(2) to (6), restrictions on fundamental freedoms can be imposed only by legislation. In cases where such legislation is made and the restrictions are reasonable yet, if the concerned statute permitted the administrative authorities to exercise power or discretion while imposing restrictions in individual situations, question frequently arises whether a wrong choice is made by the Administrator for imposing restriction or whether the Administrator has not properly balanced the fundamental right and the need for the restriction or whether he has imposed the least of the restrictions or the reasonable quantum of restriction etc. In such cases, the administrative action in our country, in our view, has to be tested on the principle of 'proportionality,' just as it is done in the case of the main legislation. This, in fact, is being done by our Courts."*

34. By no stretch of imagination, the restriction imposed under sub-rule (3A) of Rule 8 to the extend it requires a defaulter irrespective of its extent, nature and reason for the default to pay the excise duty without availing Cenvat credit to his account can be stated to be a reasonable restriction. It leads to a situation so harsh and a position so unenviable that it would be virtually impossible for an assessee who is trapped in the whirlpool to get out of his financial difficulties. This is quite apart from being wholly reasonable, being irrational and arbitrary and therefore, violative of Article 14 of the Constitution. It prevents him from availing credit of duty already paid by him. It also is a serious affront to his right to carry on his trade or business guaranteed under

Article 19(1)(g) of the Constitution. On both the counts, therefore, that portion of sub-rule (3A) of rule must fail.

35. The situation can be looked at slightly different angle. With or without the provisions of sub-rule (3A), liability to pay interest for the default period as per sub-rule (3) of Rule 8 continues. Sub-rule (3A) is basically a mechanism for stringent recovery and does not create a new liability unless this mechanism itself is breached. In such a mechanism to provide for withdrawal of CENVAT credit facility for paying the duty borders to creating a penalty. Insisting on an assessee in default to clear all consignments on payment of duty would be a perfectly legitimate measure. However, to insist that he must pay such duty without utilising CENVAT credit which is nothing but the duty on various inputs already paid by him would be a restriction so harsh and out of proportion to the aim sought to be achieved, the same must be held to be wholly arbitrary and unreasonable. We may recall, the delegated legislature in its wisdom now dismantled this entire mechanism and instead has provided for penalty at the rate of 1% per month on delayed payment of duty.

5. In view of the said decision, which has been followed by numerous other High Courts, the impugned order is set aside and the appeal allowed.

(Pronounced in open court)

(C J Mathew)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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