CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL MUMBAI

REGIONAL BENCH – COURT NO.1

Excise Appeal No.174 of 2012

[Arising out of Order-in-Original No.25/CEX/2011/8877, dt.14.11.2011, passed by the CCE & ST, Nasik]

M/s Nashik Forge Pvt. Ltd **......Appellant**
Plot No.H-149, MIDC, Ambad,
Nashik 422 010

VERSUS

CCE Nashik **......Respondent**
Kendriya Rajaswa Bhavan,
Gadkari Chowk,
Nasik 422 002

WITH

Excise Appeal No.175 of 2012

[Arising out of Order-in-Original No.25/CEX/2011/8877, dt.14.11.2011, passed by the CCE & ST, Nasik

Shri Mukesh Bheda **......Appellant**
Plot No.H-149, MIDC, Ambad,
Nashik 422 010

VERSUS

CCE Nashik **......Respondent**
Kendriya Rajaswa Bhavan,
Gadkari Chowk,
Nasik 422 002

Appearance:
For Appellant : Shri H.P. Kanade, Advocate
For Respondent : Mrs. A.S. Parab, AC (AR)

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.A/86833-86834/2019

Date of Hearing: 15.10.2019
Date of Decision: 15.10.2019

PER: DR.D.M. MISRA

These two appeals are filed against Order-in-Original No.25/CEX/2011/8877, dt.14.11.2011, passed by the CCE & ST, Nasik.

2. Briefly stated the facts of the case are that the Appellants are engaged in the manufacture of excisable goods falling under Chapter 73 of Central Excise Tariff Act, 1985. During the relevant period i.e. July 2002 to June 2011, they have wrongly utilised CENVAT Credit in discharging their duty liability on clearance of excisable goods, in contravention of Rule 8(3A) of Central Excise Rules, 2002. Demand notice was issued to them on 01.08.2011 for recovery of interest under Section 11AB of Central Excise Act, 1944 and proposing confiscation of the goods under Rule 25 of Central Excise Rules, 2002. On adjudication, the demand was confirmed with penalty. Hence, the present appeal.

3. The learned Advocate, at the outset, submits that in their own case, for discharging duty liability by debiting CENVAT Credit for the month of February 2008, the issue had been decided in their favour by this Tribunal vide Order No.A/84560/16-SMB dt.01.10.2015, which was later upheld by Bombay High Court reported at 2018-TIOL-2054-HC-MUM-CX. Further, he has submitted that the issue of discharge of duty during the default period, by utilising CENVAT Credit account, is no more res integra and covered by the judgments of various High Courts and the Tribunals as mentioned below:-

i) Frontier Alloy – 2017 (354) ELT 54 (All)
ii) ATV Project – 2016 (341) ELT 603 (All)
iii) Malladi Drugs – 2015 (323) ELT 489 (Mad.)
iv) Sandley Industries – 2015 (326) ELT 256 (P&H)

v) Indsur Global – 2014 (310) ELT 833 (Guj.)
vi) Praweg Conveyor – 2016 (337) ELT 450 (T)
vii) Torane Ispat Udoyg Ltd - CESTAT Order No.A/85808/2019, dt.18.04.2019

4. The learned A.R. for the Revenue reiterates the findings of the learned Commissioner (Appeals). He has submitted that the SLP against the judgment of the Hon'ble Gujarat High Court in Indsur Global Limited is pending before the Hon'ble Supreme Court, however, no stay has been granted.

5. We have carefully considered the submissions advanced by both sides and perused the records. The short issue involved in the present appeal is whether for the default in making payment of monthly liability of duty during the period May 2008 to September 2008, the Appellant would be debarred from utilising CENVAT Credit for the period thereafter i.e. from July 2010 to June 2011. The issue of utilisation of CENVAT Credit post default in monthly payment of duty under Rule 8(3A) of Central Excise Rules, 2002 is no more res integra. The relevant portion, which debars utilisation of such credit, has been struck down by the Hon'ble Gujarat High Court in Indsur Global case (supra). Their lordships have observed as follows:-

> "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.
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> 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.
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> 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."

6. Similar view has been expressed by other High Courts as referred to by the learned Advocate. Also, in the Appellant's own case for the previous period, the judgment was delivered in their favour by this Tribunal, which on appeal by the Revenue before Hon'ble Bombay High Court has been upheld.

7. Therefore, in view of the aforesaid precedent, we do not find merit in the impugned order. Consequently, the same is set aside and the appeals are allowed with consequential relief, if any, as per law.

(Operative part of the order pronounced in the open court)

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

(Sanjiv Srivastava)
Member (Technical)

Bahalkar