**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI**
**REGIONAL BENCH**

**Excise Appeal No. 1290 of 2012**

(Arising out of Order-in-Appeal No. YDB(65)Th-I/2012 dated 30.05.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai-I)

**M/s. Gujarat Colours and Coatings (P) Ltd.** **Appellant**
Bhiwandi-Wada Road,
Village: Ghonsal, Tal. Wada,
Dist. Thane 421 303.

Vs.

**Commissioner of Central Excise, Thane-I** **Respondent**
4th floor, Navprabhat Chambers,
Ranade Road, Dadar (W),
Mumbai 400 028.

Appearance:

Shri Manoj Chauhan, Chartered Accountant, for the Appellant
Shri Sanjay Hasija, Superintendent, Authorised Representative for the Respondent

**CORAM:**

**HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**
**HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)**

Date of Hearing: 09.03.2022
Date of Decision: 09.03.2022

**FINAL ORDER NO. A/85193/2022**

PER: SANJIV SRIVASTAVA

This appeal is directed against order-in-appeal No. YDB(65)Th-I/2012 dated 30.05.2012 of the Commissioner of Central Excise (Appeals), Mumbai-I, upholding the order-in-original of the Additional Commissioner of Central Excise, Thane-I. By his order, the Additional Commissioner has held as follows:-

"*ORDER*

*29.01 I order that the facility to M/s Gujarat Colours & Coatings Ltd., for payment of duty through Cenvat credit account be treated as discontinued for the period from 06.12.2008 till the date of payment of Central Excise duty without utilizing Cenvat credit under the provisions of Rule 8(3A) of the Central Excise Rules, 2002; and the goods cleared w.e.f. 06.12.2008 to*

*30.06.2010 be treated as the goods cleared without payment of duty,*

*29.02 I confirm the demand for the Central Excise duty amounting to Rs. 7173677- (Rupees seven lakhs seventeen thousand three hundred sixty seven only) for the period 06.12.2008 to 16.02.2009, and order its recovery from M/s Gujarat Colours & Coatings (P) Ltd., through Account Current under provisions of Section 11A of the Central Excise Act, 1944 read with provisions of Rule 8(4) of the Central Excise Rules, 2002 on account of their failure to observe the provisions of Rule 8(3A) of the Central Excise Rules, 2002.*

*29.03 I confirm the demand for the Central Excise duty amounting Rs.2200338/- (Rupees twenty two lakhs three hundred and thirty eight only) for the period from 17.02.2009 to 31.12.2009, and order its recovery from M/s Gujarat Colours & Coatings (P) Ltd., through Account Current under provisions of Section 11A of the Central Excise Act, 1944 read with provisions of Rule 8(4) of the Central Excise Rules, 2002 on account of their failure to observe the provisions of Rule 8(3A) of the Central Excise Rules, 2002.*

*29.04 I confirm the demand for the Central Excise duty amounting Rs.2130877/- (Rupees twenty one lakhs thirty thousand eight hundred and seventy seven only) for the period from 01.01.2010 to 30.06.2010, and order its recovery from M/s Gujarat Colours & Coatings (P) Ltd., through Account Current under provisions of Section 11A of the Central Excise Act, 1944 read with provisions of Rule 8(4) of the Central Excise Rules, 2002 on account of their failure to observe the provisions of Rule 8(3A) of the Central Excise Rules, 2002.*

*29.05 I order for recovery of interest at appropriate rate on the Central Excise duty payable as at Sr.No, 29.02 to 29.04 above, from them under Section 11AB of the Central Excise Act, 1944 read with Rule 8(3A) & 8(4) of the Central Excise Rules, 2002.*

*29.06 I impose penalty of Rs. 50,48,582/- (Rupees fifty lakhs forty eight thousand five hundred and eighty two only) on M/s Gujarat Colours & Coatings (P) Ltd. under Section 11AC of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002 for contravention of the provisions of Rule 8(3A) of the Central Excise Rules, 2002.*

*29.07 If M/s Gujarat Colours & Coatings (P) Ltd..., pay the Central Excise duty as confirmed against Sr. No. 29.02 to 29.04 above along with entire interest as ordered at Sr. No. 29.05 above, within 30 (thirty) days from the date of communication of this order, the amount of penalty liable to be paid, as per Sr. No. 29.06 above by them under Section 11AC of the Central Excise Act, 1944 shall be 25% of the demand confirmed at Sr. No. 29.02 to 29.04 above. The benefit of reduced penalty shall be available only if the amount of penalty so imposed is paid within the period of 30 (thirty) days from the date of communication of this order."*

2.1 Appellant are manufacturer of excisable goods classifiable under Chapters 31 and 32 of Schedule 1 to the Central Excise Tariff Act. In their ER-1 return for the month of October 2008, they had assessed the duty on the goods cleared during that period to be Rs.6,59,119/-. However, due to some reasons, they paid the duty only to the extent of Rs.5,73,389/- thereby there was short payment of Rs.85,730/-. The appellant made good the duty that was short paid, along with interest on 15.02.2009. Two show cause notices dated 18.02.2010 and 04.11.2020 were issued to the appellant demanding duty in terms of Rule 8(3A) of the Central Excise Rules, 2002 to the extent of Rs.50,48,582/-. The show cause notices were adjudicated as per the order of the Additional Commissioner referred in para 1 above and upheld by the impugned order.

2.2 Aggrieved by the order, the appellant are in appeal.

3.1 We have heard Shri Manoj Chauhan, Chartered Accountant, and Shri Sanjay Hasija, Superintendent, Authorised Representative for the Revenue.

3.2 We find that Rule 8(3A) of the Central Excise Rules, 2002, in terms of which the demand has been made, was considered by Hon'ble Gujarat High Court in the case of Indsur Global Ltd. [2014 (310) ELT 833 (Guj.)] and the said rule has been held to be ultra vires. The relevant paragraphs of the said judgment are reproduced below:-

"***29.*** *This brings us to the last limb of the petitioner's contention, namely, that the condition attached by sub-rule (3A) of Rule 8 is unreasonable and therefore, violative of Article 14 of the Constitution and amounts to serious restriction on the petitioner's right to carry on trade or business of his choice guaranteed under Article 19(1)(g) of the Constitution. This contention requires a closer scrutiny. As noted earlier, the restrictions of sub-rule (3A) come in two folds. Firstly, a defaulter assessee has to clear the consignments on spot payment of excise duty and secondly, that such excise duty has to be paid in cash without availing Cenvat credit. This rule does not make any distinction between the willful defaulter and the others. Though term 'willful defaulter' has not been defined in the statute, the concept is not an unknown one. Section 11AC of the Central Excise Act provides for penalty in case of non-levy, short levy or non-payment or short payment or erroneous refund of the duty where the same is occasioned by reason of fraud or collusion or any willful misstatement or suppression of facts or contravention of any of the provisions of the Act or the rules made thereunder with an intent to evade payment of duty. Likewise, Section 11A which pertains to recovery of duties not levied or not paid or short levied or short paid or erroneously refunded makes a clear distinction when it gives the period of limitation available to the department to institute proceedings, in such cases between such non-payment having been occasioned due to fraud, collusion, etc., in which case a longer period of limitation is available as against rest of the cases. Likewise, under Rule 12CC of the Central Excise Rules as it stood at the relevant time, power was given to the Government by notification to withdraw facilities from the manufacturers, registered dealers or exporters under certain circumstances having regard to the extent of evasion of duty, nature and type* *of offences or such other factors as has been relevant. In exercise of such powers, Notification No. 17/2006 was issued providing for withdrawal of facilities and for imposition of restrictions against who are prima facie found to be knowingly involved in any of the following :*

*"(a) removal of goods without the cover of an invoice and without payment of duty;*

*(b) removal of goods without declaring the correct value for payment of duty, where a portion of sale price, in excess of invoice price, is received by him or on his behalf but not accounted for in the books of account;*

*(c) taking of CENVAT credit without the receipt of goods specified in the document based on which the said credit has been taken;*

*(d) taking of CENVAT credit on invoices or other documents which a person has reasons to believe as not genuine;*

*(e) issue of excise duty invoice without delivery of goods specified in the said invoice;*

*(f) claiming of refund or rebate based on the excise duty paid invoice or other documents which a person has reason to believe as not genuine."*

*This Rule 12CC as well as the notification issued by the Government would apply to special class of assessees who through their conscious act tried to evade duty.*

***30.** It can be seen that the reasons for non-payment of excise duty can be manifold and not necessarily in all cases have to be willful default by an assessee despite availability of funds. Excise duty may remain unpaid due to economic reasons, due to slowness in the business or due to financial crunch temporarily felt by the manufacturer who though might have cleared the finished goods and also sold the goods in the market may not have received the payment as promised. All such cases of defaults willful or otherwise are clubbed together for the same treatment and a stringent condition of payment of excise duty* *without availing Cenvat credit is imposed. It can be appreciated that where a manufacturer falls behind the payment schedule on account of financial constraints, such as, slowing down of business, competition in the market reducing the profit margins, promised payments from the purchasers not coming forth or temporary labour disputes, would find it extremely difficult thereafter to raise further funds for payment of duty in addition to the duty which he has already paid. Cenvat credit is available to a manufacturer upon purchase of inputs which are duty paid. It is the duty element which the assessee has already suffered which is credited to his Cenvat credit account available to him for adjustment for payment of excise duty liability upon clearance of the finished product. If such facility is withdrawn, it could be appreciated, his ability to continue the business under such adverse financial climate would further diminish. This would be a cyclical vicious pattern where in every month he would fall behind by the due date unable to raise cash flow for payment of duty for the clearance which he desires to make and is therefore, further saddled with the burden of paying such duty in cash without availing CENVAT credit. This rule thus imposes a wholly unreasonable restriction which is not commensurate with the wrong sought to be remedied.*

***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.*

***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."*

3.3 This judgment has been subsequently followed by various High Courts and Tribunal, including the jurisdictional High Court i.e. Hon'ble Bombay High Court in the case of Nashik Forge Pvt. Ltd. [2019 (368) ELT 20 (Bom.)] wherein in para 3, Hon'ble High Court has held as under:-

*"**3.** The proceedings against the respondents were commenced on the basis of violation/breach of Rule 8(3A) of the Central Excise Rules, 2002. The impugned order of the Tribunal has noted that Rule 8(3A) of the Central Excise Rules, 2002 has been struck down as unconstitutional by the High Courts of Gujarat, Madras and Punjab & Haryana by the following judgments :*

*(a) Indsur Global Ltd. v. Union of India - 2014 (310) E.L.T. 833 (Guj.)*

*(b) Shreeji Surface Coatings P. Ltd. v. Union of India - 2015 (320) E.L.T. 764. (Guj.)*

*(c) Malladi Drugs & Pharmaceuticals P. Ltd. v. Union of India - 2015 (323) E.L.T. 489 (Mad.)*

*(d) Sandley Indus. v. Union of India - 2015 (326) E.L.T. 256 (P & H)."*

3.4 Tribunal has been consistently following the above judgment and the said judgment of Hon'ble Gujarat High Court deciding the issue in favour of the appellant. In the case of Utkal Alloys Pvt. Ltd. [2021 (55) ELT GSTL 473 (Tri.-Kolkata)], the Tribunal in paras 8, 9 & 10 has held as follows:-

*"**8.** We find that the Hon'ble Gujarat High Court in the case of Indsur Global Ltd. v. UOI cited supra 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.*

***9.** 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.*

***10.** 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."*

4.1 Accordingly we do not find any merits in the impugned order which is set aside and the appeal allowed.

(Order pronounced in the open court)

**(Sanjiv Srivastava)**
**Member (Technical)**

**(Dr. Suvendu Kumar Pati)**
**Member (Judicial)**

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