

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

Excise Appeal No. 87220 of 2017

(Arising out of Order-in-Original No. 10/SP/COMMR/C.EX AUDIT/M-I/2017 dated 26.05.2017 passed by the Commissioner of Central Excise Audit, Mumbai-I)

M/s. Supermax Personal Care Pvt. Ltd.
LBS Marg, Wagle Industrial Estate, Thane 400 604.

Appellant

Vs.

Commissioner of Central Excise , Mumbai-I Respondent
115, New Central Excise Building,
Maharshi Karve Road, Churchgate,
Mumbai 400 020.

Appearance:

Shri Mihir Mehta, Advocate, for the Appellant

Shri Sydney D'Silva, Additional Commissioner, Authorised
Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

Date of Hearing: 01.07.2022

Date of Decision: 15.07.2022

FINAL ORDER NO. A/85629/2022

PER: SANJIV SRIVASTAVA

This appeal is directed against the order in original No 10/SP/COMMR/C Ex Audit/M-I/2017 dated 26.05.2017 of Commissioner Central Excise Audit, Mumbai-I. By the impugned order, the Commissioner has held as follows:

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ORDER

- i) *I confirm central excise duty of Rs. 4,18,14,846/- (Rupees Four Crores Eighteen lakhs Fourteen thousand Eight hundred Forty Six only) under Rule 8(3A) of Central Excise Rules, 2002 read with Section 11A of Central Excise Act, 1944 as raised in subject Show cause cum Demand Notice; along with interest under Rule 8(3) of Central Excise Rules 2002 read with Section 11AA of central excise Act 1944;*

- ii) I order appropriation of Rs.4932/- (Rupees Four Thousand Nine Hundred only) paid by the assessee against interest under Rule 8(3) of Central Excise Rules 2002 read with Section 11AA of central excise Act 1944;*
- iii) I hereby impose penalty of Rs. 4,18,14,846/- (Rupees Four Crores Eighteen lakhs Fourteen thousand Eight hundred Forty Six only) under Section 11AC of the Central Excise Act 1944 read with Rule 25 of the Central Excise Rules, 2002 as proposed in subject show cause notice.*

28. M/s Supermax Personal Care Pvt. Ltd (previously known as Vidyut Metallic Pvt. Ltd.) is at liberty to avail of the benefit of reduced penalty imposed as per (iii) above in terms of sub section (b) of Section 11AC of Central Excise Act 1944, subject to the condition that the entire amount of duty determined and confirmed hereinabove along with interest at appropriate rate, as ordered, is paid within 30 days of the date of communication of this order. If the same is not paid within 30 days of receipt of the order, then the benefit of reduced penalty shall not be applicable."

2.1 Appellant is engaged in manufacture of excisable goods falling under Chapter Nos. 8212900 & 39239090 of the First Schedule to the Central Excise Tariff Act, 1985. They are also availing Cenvat credit on the input/input service and capital goods as per Cenvat Credit Rules, 2004.. They consented to join the Large Tax Payers Unit, Mumbai and allotted Membership No. Large Tax Payers Unit/MUM/3306 Mumbai on 04.03.2013.

2.2 Appellant defaulted in payment of duty of Rs.5,00,000/- by the due date (06.03.2013) for the clearances effected during February 2013. Later on the default amount of Rs.5,00,000/- was paid on 26.03.2013 through CENVAT credit account along with interest amount of Rs. 4,932/-, paid from account current.

2.3 As per Rule 8(3A) of Central Excise Rules 2002 Appellant should have paid the duty on clearances effected during February 2013 by 6th March, 2013, further extended upto 05.04.2013 along with the interest, beyond which the appellant

was required to pay the Central Excise duty without utilizing the Cenvat credit for each consignment at the time of removal of goods. However the noticee paid duty by utilizing Cenvat credit in contravention of Rule 8(3A) of Central Excise Rules, 2002.

2.4 For the period from April 2013 to February-2014 Central Excise duty totally amounting to Rs. 4,13,14,846/- was paid by the assessee through their Cenvat credit account. A show cause notice dated 31.01.2014 was issued to them asking them to show cause as to why:-

- a. the clearance effected in the month of February 2013 (duty of Rs. 5,00,000/-) and the clearance effected for the period from April-2013 to February 2014 (duty of Rs.4,13,14,846/-) should not be treated as clearances without payment of duty in accordance with the provisions of Rule 8(3A) of Central Excise Rules. 2002;*
- b. the amount of Rs. 4,18,14,846/- (Rs. 5,00,000/- + Rs. 4,13,14,846/-) (Rupees Four crores Eighteen lakhs Fourteen thousand Eight hundred Forty Six only) utilized as Cenvat Credit in contravention of Rule 8 (3A) of Central Excise Rules, 2002 & Rule 3(4) of Cenvat Credit Rules, 2004, should not be denied & recovered through account current from the assessee under Rule 8(3A) of Central Excise Rules, 2002 read with Section 11A of Central Excise Act, 1944;*
- c. interest at appropriate rate on the said amount should not be demanded from them under Rule 8(3) of the Central Excise Rules, 2002 read with Section 11 AA of the Central Excise Act. 1444;*
- d. the interest amount of Rs. 4,932/- (Rupees Four thousand Nine hundred Thirty Two) paid through current account during March-2013 should not be appropriated against the interest demanded from them under Rule 8(3) of the Central Excise Rules, 2002 read with Section 11AA of the Central Excise Act. 1944;*
- e. Penalty should not be imposed upon them under the provisions of Rule 25 of Central Excise Rules, 2002 read with Section 11AC of the Central Excise Act 1944.*

2.5 The show cause notice was adjudicated as per the impugned order referred to in para 1, above. Aggrieved by the impugned order appellants have filed this appeal.

3.1 We have heard Shri Mihir Mehta, Advocate for the appellant and Shri Sydney D'Silva, Additional Commissioner, Authorized Representative for the revenue. Both sides have filed written submissions which have been taken on record.

3.2 Arguing for the appellants, learned counsel submits that,-

- There was default in the payment of Central Excise Duty determined by them for the month of February 2013. The duty for the month February 2013, was to be paid by them as by 6th March, 2013. The defaulted duty along with interest latest could have been paid by 6th April 2013. They have paid the defaulted duty along with interest on 26.03.2013, well within the period in which they have been permitted to pay the defaulted amount along with the interest.
- In case of any delay beyond 6th April 2013 the provisions of Rule 8 (3A) get attracted and they were required to pay the duty in manner as prescribed by the said rule.
- The payment of Rs.5,00,000/- (defaulted amount) by the Appellant through CENVAT account is correct and proper and duly supported by the circular of the Board dated 13.04.2018. They deposited the defaulted amount along with the interest of Rs.4,932/- (paid through account current).
- In any event, the payment of arrears of Rs.5,00,000/- on 26.03.2013, is correct and proper in view of Rule 12A of the CENVAT Credit Rules, 2004, and Rule 3(4) relied upon by the learned Commissioner has no application as Rule 12A beings with non-obstante clause and it overrides Rule 3(4) of the Rules.
- In any event, proviso to Rule 3(4) of the CENVAT Credit Rules is held to be ultra vires by the Hon'ble Gujarat High Court. In the case of Advance Surfactants India Limited-[2017 (358) ELT 53 (GUJ)]

- Since the Appellant has fully complied with provisions of Rule 8, the demand made against them invoking Rule 8(3A) is bad in law.
- Hon'ble High Courts of Gujarat [Indsur Global Limited reported in 2014 (310) E.L.T. 833 (Guj.)], Bombay [Nashik Forge Private Limited-[2019(368) ELT 20 (Bom)]] and Delhi have held that Rule 8(3A) of the Rules is ultra vires and is struck down by the Hon'ble Courts and this Hon'ble Tribunal following the said judgment has allowed the appeals.

3.3 Arguing for the revenue, learned Authorized representative while reiterating the findings recorded in the impugned order submits that.-

- On scrutiny of the ER 1 filed by Plant VII for February 2013, it is observed that the Appellants has effected clearances CETSH-82129000 valued at Rs.98,78,192/- attracting duty of Rs. 12,20,942/- and CETSH 39159090 valued at Rs.3,14,503/- attracting duty Rs.38,873/-, making total duty to be paid as Rs 12,59,815/-. Against this duty liability they paid Rs 7,29,815/- through the credit account and Rs 30,000/- from their account current. Though ER-1 says that payment of Rs 5,00,000/- in cash through GAR-7 challan, but no such challan is available.
- Thus In the instant case the Appellants have defaulted duty of Rs.5,00,000/- for February 2013, fact which has not been denied by them. The default has continued for period beyond thirty days. As the Appellants failed to discharge duty consignment wise without utilizing the Cenvat credit, the amount of Rs.4,18,14,846/ utilized as cenvat credit for the subsequent period is in contravention of Rule 8(3A) of Central Excise rules, 2002.
- He relies upon the following decisions in his support:
 - Sharp Industries Ltd. [(2014 (304) E.L.T. 689 (Tri Mumbai)]
 - Shivam Pressings [2015-TIOL-1188-CESTAT-MUM)
- In the case of MALLADI DRUGS & PHARMACEUTICALS LTD. V/s UNION OF INDIA [2015 (323) ELT 489], the Madras

High Court in its impugned order while expressing full agreement with the judgment of Gujarat High Court in Indsur Global Ltd. case (2014 (310) E.L.T. 833 (Guj.)) had held that Rule 8(3A) of the Central Excise Rules, 2002, is ultra vires of Article 14 of the Constitution of India. The said Rule being procedural prescribing the manner and method of payment of duty only, cannot infringe substantive right provided in Cenvat Credit Rules, 2004, regarding utilization of Cenvat credit in paying duty. The Supreme Court Bench comprising Hon'ble Mr. Justice Dipak Misra and Hon'ble Mr. Justice N.V. Ramana on 11-1-2016 issued notice in the Petition for Special Leave to Appeal (C) No. CC 229 of 2016 filed by Commissioner of Central Excise, Chennai III (Respondent being Titan Industries Ltd.) against the Judgment and Madras High Court in W.P. No. 27363 of 2012 as reported in 2015 (323) E.L.T. 489 (Mad.) (Malladi Drugs & Pharmaceuticals Ltd. v. Union of India). While issuing the notice in the petition, the Supreme Court passed the following order:

"Issue notice returnable within eight weeks. There shall be interim stay of the impugned judgment and order dated 27-3-2015 passed by the High Court of Judicature at Madras in Writ Petition No. 27363 of 2012 till next date of hearing. Tag with SLP (C) No. 28309 of 2015."

SLP (C) No. 28309 of 2015 pertains to UNION OF INDIA vs. INDSUR GLOBAL LTD

[Commissioner v. Titan Industries Ltd. - 2016 (341) E.L.T. A155 (S.C.)]

- Further in the case of Commissioner of Customs, Mundra V/s Cargill India Pvt. Ltd. The Hon'ble Supreme Court has held that when matter pending with SC lower authorities not to decide {2019-TIOL-549-SC-CUS}
- In C. Excise Appeal No.24 of 2016 and 288 of 2016 before the Hon'ble Bombay High Court in the case of The Principal Commissioner of Central Excise Customs & Service Tax-Daman V/s Vikas Vinyl Industries and The Commissioner of Central Excise Customs and Service Tax, Daman Commissionerate V/s Temple Packaging (P) Ltd. while

referring to the case of Indsur Global Limited vs. Union of India [2014 (310) E.L.T. 833], has held as under:

"We keep both the appeals together and treat them presently as adjourned sine die. We grant liberty to both sides to mention them after the Hon'ble Supreme Court delivers its verdict in the pending proceedings."

- Tribunal had in case of Savita Construction Pvt. Ltd. (2018-TIOL 1207-CESTAT-AHM) and RV Refractories Vs Commissioner of Central Excise Chennai-II (2018-TIOL-1408 CESTAT-MAD) has remanded to the adjudicating authority to decide the issue on the basis of the outcome of the pending case before the Hon'ble Supreme Court on the appeal filed by the Revenue.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 Commissioner has recorded following findings for making the order as indicated in para 1, above:

"12. I have gone through the case records and submissions made by the assessee. I find that the SCN seeks to recover duty defaulted of Rs. 5,00,000/- for February 2013 which was subsequently paid through Cenvat credit account (instead of current account) on 25.03.2013. I find that the SCN also seeks to recover the cenvat credit amounting to Rs. 4,13,14,846/- utilized by the assessee for the subsequent period April-2013 to February-2014 from their Cenvat account for contravention of Rule 8 (3A) of Central Excise Rules, 2002 and Rule 3(4) of Cenvat Credit Rules, 2004,

13. I find that the assessee in their defence submitted that they had opted for LTU status and the same was granted to them on 28 February 2013 by Chief Commissioner, Large Tax Payers Unit, Mumbai. I find that Rule 12A of Cenvat Credit Rules, 2002 specifies the procedure and facilities in respect of Large Tax Payer. As per Rule 12A (4) of Cenvat credit Rules 2002

(4) A large taxpayer may transfer, CENVAT credit available with one of his registered manufacturing premises or premises providing taxable service to his other such registered premises by,

(1) making an entry for such transfer in the record maintained under rule 9; issuing a transfer challan containing registration number, name and address of the registered premises transferring the credit as well as receiving such credit, the amount of credit transferred and the particulars of such entry as mentioned in clause (i), and such recipient premises can take CENVAT credit on the basis of such transfer challan as mentioned in clause (ii):

Provided that such transfer or utilisation of CENVAT credit shall be subject to the limitations prescribed under clause (b) of sub-rule (7) of rule 3.

14. I have perused the copies of return filed by the assessee under Rule 12 of Central Excise Rules, 2002 for months Feb 2013 and Mar 2013 in respect of Plant VII and IX of the assessee. I observe that the said ER 1 has been filed by the assessee in compliance to their statutory requirement under Rule 12 of central excise Rules 2002 after self assessment.

15. On scrutiny of the ER 1 filed by Plant VII for February 2013, I observe that the assessee has effected clearances CETSH-82129000 valued at Rs.98,78,192(Home clearance) attracting duty of Rs. 12,20,942/- and CETSH - 39159090 valued at Rs.3,14,503/- (Home clearance) attracting duty Rs.38,873/-. I observe the assessee has shown amount of Rs.5,30,000/- as paid through GAR 7 and Rs.28,50,905/- as paid in their CENVAT A/c with remark that Rs.15,40,444/ has been paid on account of differential duty. However, I observe that for the payment of Rs.5,00,000/- there is no corresponding GAR 7 shown in the return.

16. I find that the assessee in their reply has submitted that they have transferred credit of Rs.43,26,000/- from their Plant IX factory to Plant VII under provisions of Rule 12 A of Central Excise Rules 2002 . On scrutiny of the ER1 filed by Plant IX factory of the assessee for the month Mar 2013, I notice that there is no mention of any inter unit transfer of credit under Rule 12A as stated by the assessee at relevant Sr No.5. DETAILS OF CENVAT CREDIT TAKEN AND UTILIZED in ER 1 filed. Furthermore, I also observe that in the SELF ASSESSMENT MEMORANDUM at 5 No.7 of the said return there is no reference

to any transfer challan being issued under Rule 12 A of Cenvat credit Rules 2002 evidencing transfer as claimed by the assessee. Therefore I am of the view the assessee's claim that credit of Rs.43,26,000/- had been transferred from Plant IX to their plant VII factory cannot be established and accepted.

17. Moreover, I observe that in the ER 1 filed for March 2013 by Plant VII factory, there is no mention of credit of Rs. 43,26,000/- being availed at relevant column 5. DETAILS OF CENVAT CREDIT TAKEN AND UTILIZED as having being received on account of inter unit transfer under 12 A as claimed by the assessee. In absence of any receipt of credit on account of inter unit transfer, the claim of utilization of such credit for discharging duty liability cannot be accepted. Instead I find that the assessee has shown receipt of cenvat credit as under for the ER 1 filed for Mar 2013 for Plant VII

Details of credit	CENVAT	ED CESS	SEC EDU CESS
Credit taken on inputs on invoices issued by manufacturers (Rs.)	4626336	92527	46264
Credit taken on inputs on Invoices issued by I or II stage dealers (Rs.)	595200	11904	5952
Credit taken on inputs on imported inputs (RS.)	532200	0	0

18. No other details of credit availed have been shown. Thus the assessee's claim that the payment of delayed duty for Feb 2013 was through the credit accumulated on account of earlier period in respect of their Plant IX cannot be accepted.

19. I find that the SCN alleges that duty of Rs. 5,00,000/- has been short paid in respect of clearances effected for month February 2013. I observe that this short payment has not been disputed by the assessee. I also observe that the assessee has closing balance of Rs.89229-BED, 9681-ED.CESS and Rs.6753-

HED.CESS in Feb 2013 in their at Plant VII. As per the provisions of Rule 3(4) of Cenvat Credit Rules, 2004

The CENVAT credit may be utilized for payment of -

- (a) any duty of excise on any final product; or*
- (b) an amount equal to CENVAT credit taken on inputs if such inputs are removed as such or after being partially processed; or*
- (c) an amount equal to the CENVAT credit taken on capital goods if such capital goods are removed as such; or*
- (d) an amount under sub-rule (2) of rule 16 of Central Excise Rules, 2002; or*
- (e) service tax on any output service:*

Provided that while paying duty of excise or service tax, as the case may be, the CENVAT credit shall be utilized only to the extent such credit is available on the last day of the month or quarter, as the case may be, for payment of duty or tax relating to that month or the quarter, as the case may be :

20. Hence it is evident that the assessee have utilized credit available on goods received in March 2013 for discharging duty liability of goods cleared in Feb 2013 , which is in violation of Rule 3(4) of Cenvat Credit Rules, 2004. I observe that Sub-rule (1) of Rule 8 of the Central Excise Rules, 2002 states that the duty of the goods removed from the factory or the warehouse during a month shall be paid by the 6th day of the following month, if the duty is paid electronically through internet banking and by the 5th day of the following month, in any other case.

Further I find that Sub-rule (3A), of Rule 8, reads as under :

"If the assessee defaults in payment of duty beyond thirty days from the due date, as prescribed in sub-rule (1), then notwithstanding anything contained in said sub-rule (1) and sub-rule (4) of Rule 3 of CENVAT Credit Rules, 2004, the assessee shall, pay excise duty for each consignment at the time of removal, without utilizing the CENVAT credit till the date the assessee pays the outstanding amount including interest thereon and in the event of any failure, it shall be deemed that such goods have been cleared without payment of duty and the

consequences and penalties as provided in these rules shall follow."

21. I find that in the instant case the assessee has defaulted duty of Rs. 5,00,000/- for February 2013 which has not been denied by them. I also observe that in the instant case the default has continued for period beyond thirty days as discussed in forgoing paras. As the assessee failed to discharge duty consignment wise without utilizing the cenvat credit, I hold that the amount of Rs.4,18,14,846/ utilized as cenvat credit for the subsequent period is in contravention of Rule 8(3A) of central excise rules, 2002.

22. I observe that the assessee has placed reliance on Indsur Global Ltd. Vs Union of India, 2014 (310) ELT 833 (Guj.) and other various judgments in their favour. In this context I find that Hon'ble Apex court on 24.09.2015 issued notice in the Petition for Special Leave to Appeal (Civil) CC No.16523 of 2015 filed by Union of India with SLP © No.17377 of 2015 against the judgment and Order dtd 27.11.2014 of Gujarat High Court in S.C.A No.3344 of 2014 as reported in 2014 (310) ELT 833 (Guj) (Indsur Global Ltd v Union of India). While issuing notice in the petitions, Hon'ble Supreme Court directed that there shall be interim stay of the impugned judgment and order passed by the High Court of Gujarat at Ahmedabad in Special Civil Application No. 3344 of 2014, dated 27-11-2014.

23. Further I find that Hon'ble Supreme Court Bench on 11-1-2016 issued notice in the Petition for Special Leave to Appeal (C) No. CC 229 of 2016 filed by Commissioner of Central Excise, Chennai-III (Respondent being Titan Industries Ltd.) against the Judgment and Order dated 27-3-2015 of Madras High Court in W.P. No. 27363 of 2012 as reported in 2015 (323) E.LT. 489 (Mad.) (Malladi Drugs & Pharmaceuticals Ltd. v. Union of India). While issuing the notice in the petition, the

Supreme Court passed the following order :

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Madras in Writ Petition No. 27363 of 2012 till next date of hearing.

Tag with SLP (C) No. 28309 of 2015."

Therefore the judgment/decisions relied upon by the assessee do not mitigate the action that follow on account of violation of Rule 8(3)A of Central Excise Rules, 2002.

24. I observe that the SCN proposes recovery of interest under Rule 8(3) of the Central Excise Rules, 2002 read with Section 11AA of the Central Excise Act, 1944 and penalty under the provisions of Rule 25 of Central Excise Rules, 2002 read with section 11AC of Central Excise Act 1944. In this background I find that the decision in case of M/s Michigan Rubber (India) Ltd. Versus Commissioner of Central Excise, Bhopal vide Final Order No. A/52902/2016-EX(DB), dated 8-7-2016 in Appeal No. E/1228/2009-EX(DB)2016 reported in (340) E.L.T. 528 (Tri. - Del.) CESTAT, Principal Bench, New Delhi is relevant wherein it has been held that there being no provision giving relaxation from payment of interest in cases of delayed payment of duty, interest liable to be paid - Sections 11A and 11AA of Central Excise Act, 1944. [para 5]

Penalty - Default in payment of duty on monthly basis - Reduction in penalty - In view of aforesaid default, penalty imposable.

25. For this continued act of omission of continued payment of duty through cenvat, for the period April 2013 to Feb 2014 even though they were not entitled, I uphold penalty proposed under Rule 25 of Central Excise Rules 2002 read with Section 11AC of the Central Excise Act, 1944."

4.3 During the course of arguments counsel for appellants had submitted a timeline depicting the events leading to issuance of show cause notice and impugned order. Said timeline is reproduced below.

Date	Particulars
09.03.2012	The Appellant applied for membership of LTU.
06.02.2013	The Appellant defaulted in payment of part of duty

	Rs 5,00,000/- for the clearance of February, 2013.
28.02.2013	The application of the Appellant to become member of LTU was granted/allowed.
26.03.2013	The Appellant transferred credit of Rs. 43,26,000/- under Rule 12A(4) of the CENVAT Credit Rules, 2004 from Plant IX to Plant VII at Thane. Present appeal related to Plant VII of the Appellant at Thane
26.03.2013	The Appellant paid arrears of Rs. 5,00,000/- by making debit entry in Cenvat Account and paid interest of Rs. 4,932/- in cash.
26.03.2013	Since the arrears in terms of Rule 8 of the Central Excise Rules, 2002 were made good by them within the period of 30 days along with the interest, Rule 8 (3A) could not have been invoked in their case.
13.03.2014	Rejecting the deposit of Rs 5,00,000/- made by them on 26.03.2013, revenue issued the show cause notice, demanding this Rs 5,00,000/- paid by them through CENVAT account and duty in respect of the clearances made during the period 26.03.2013 to 28.02.2014, in cash by invoking Rule 8 (3A) of the Central Excise Rules, 2002

4.4 Facts are not in dispute. Admittedly appellants had defaulted on payment of duty determine by them for the month of February 2013. The defaulted amount was paid by them by way of debit entry made by them in their CENVAT credit account on 26.03.2013.

4.5 Commissioner has recorded the submissions made by the appellant before him in his order in following manner:

"WRITTEN SUBMISSIONS BY THE ASSESSEE

The assessee vide their reply dtd 17.04.2014 submitted that due to financial crisis, they could not deposit part of the duty amount of Rs.5,00,000/- in respect of the goods cleared in the month of

February 2013, on the due date viz. 6th March.2013. They submitted that they were required to pay central excise duty of Rs.12,59,815/- for the goods cleared in the month of February 2013.

9. Out of the amount of Rs.12,59,815/-.they could deposit Rs.7,59,815/- on the due date viz. 6 March 2013. They contended that vide their letter dated 9 March 2012, they submitted an application for the consent of the Chief Commissioner, Large Tax Payers Unit, to accept them as Large Tax Payers Unit, Mumbai. They further stated that vide letter dated 28 February 2013, Chief Commissioner, Large Tax Payers Unit, Mumbai accepted their application and were given Large Tax Payers Unit Membership No, LTU/MUM/-3306.

10. They submitted that in view of the aforesaid letter dated 28 February 2013, as permitted under Rule 12A (4) of the Cenvat Credit Rules, 2004 they transferred credit of Rs.43,26,000/ from the Supermax Personal Care Pvt. Ltd. (Plant-IX} factory to Supermax Personal Care P. Ltd. (Plant-VII) Unit I at Thane, within the jurisdiction of this Hon'ble Commissioner of Central Excise, on 26 March 2013, vide challan no.01/2012-13 dated 26 March 2013. They submitted that the credit so transferred was duly recorded in the monthly return filed for the month of March 2013 in respect of the Transferee and Transferor factories; that the credit of Rs.5,00,000/- transferred from the Plant IX-Bhiwandi factory was earned and availed upto January, 2013 .They submitted that Rule 12A (4) of the Cenvat Credit Rules, 2004 permits a Large Tax Payer to transfer cenvat credit available with one of its registered manufacturing premises to its other such registered premises by making an entry of such transfer in the record maintained under Rule 9 and issuing transfer challan containing details mentioned in clause (ii) of Rule 12 A (4) of the Cenvat Credit Rules. They submitted that the first proviso to Rule 12A(4), provides that transfer or utilisation or cenvat, credit shall be subject to limitation prescribed in Rule 3 (7) (b) of the Cenvat Credit Rules; They reiterated that it is clear that the credit transferred from Plant IX- Bhiwandi was earned prior to February 2013, and as such they were entitled to and have rightly utilized the same for

payment of arrears of duty payable for month February 2013. They stated that they had debited the amount of Rs, 5,00,000/ in their cenvat account on 26 March 2013 towards arrears duty payable for Feb 2013 along with Rs.4,932/- in cash towards payment of interest for the aforesaid arrears of from 7th March 2013 to 26 March 2013. They submitted that once application to join LTV is allowed, it would relate back to the date of the application made and the credit earned at Plant IX-Bhiwandi factory was available to them for transfer and credit so transferred could be used for payment of arrears of part of the duty on the goods cleared in the month of February 2013. They stated that the utilisation by the transferee factory is in accordance with the first proviso to Rule 7(3) (b) of the Cenvat Credit Rules, 2004. They requested for personal hearing in the said matter.”

4.6 Commissioner has rejected the above submission in para 16, 17 and 18 of the impugned order. He has done so by referring to the ER-1 returns of the appellant (both the transferor and transferee returns for the month relevant months. Appellants have challenged the said finding before us. Relevant Extracts of the ER-1 returns filed by the appellant are reproduced below:

Table 1: ER-1 return of the Supermax Private Limited (Plant – IX)

Month : January 2013						
Details of Credit	CENVAT	EDU_Cess	Sec_ED U_Cess	SERVICE _TAX	EDU_C ess	Sec_ED U_Cess
Opening Balance (Rs)	20596333	321724	153537	1116561	22330	11162
Credit taken on inputs on invoices issued by manufacturers (Rs.)	4027995	80556	40287	0	0	0
Credit taken on inputs on	3120	62	31	0	0	0

<i>Invoices issued by I or II stage dealers (Rs.)</i>						
<i>Credit taken on inputs on imported inputs (RS.)</i>	0	0	0	0	0	0
<i>Credit taken on Capital Goods on invoices issued by manufacturer or by I or II stage dealers (Rs.)</i>	7188	144	72	0	0	0
<i>Credit taken on Imported Capital Goods (Rs)</i>	0	0	0	0	0	0
Credit Taken on Input services (Rs)	0	0	0	0	0	0
Credit taken from inter unit Transfer of Credit under Rule 10A of CENVAT Credit Rules, 2004	0	0	0	0	0	0
Total Credit Available	24634636	402486	193927	1116561	22330	11162
Credit utilized for payment of Duty on Goods (Rs)	10682845	213671	106822	0	0	0
Credit utilized when inputs goods are removed as such (Rs.)	182667	3658	1827	0	0	0

Credit utilized when Capital Goods are removed as such (Rs.)	0	0	0	0	0	0
Credit utilized for payment of amount in terms of Rule 6 of CENVAT Credit Rules, 2004 (Rs)	0	0	0	0	0	0
Credit utilized for other payment (Rs)	0	0	0	0	0	0
Credit utilized for payment of tax on Services (Rs)	0	0	0	0	0	0
Credit utilized towards Inter Unit transfer of Credit under Rule 10A of CENVAT Credit Rules, 2004	0	0	0	0	0	0
Closing Balance (Rs)	13769124	185157	85278	1116561	22330	11162
Month: February 2013						
Opening Balance (Rs)	13769124	185157	85278	1116561	22330	11162
<i>Credit taken on inputs on invoices issued by manufacturers (Rs.)</i>	3255201	65108	32549	0	0	0
<i>Credit taken on inputs on Invoices issued by I or II stage dealers (Rs.)</i>	0	0	0	0	0	0

<i>Credit taken on inputs on imported inputs (RS.)</i>	0	0	0	0	0	0
<i>Credit taken on Capital Goods on invoices issued by manufacturer or by I or II stage dealers (Rs.)</i>	0	0	0	0	0	0
<i>Credit taken on Imported Capital Goods (Rs)</i>	0	0	0	0	0	0
Credit Taken on Input services (Rs)	0	0	0	0	0	0
Credit taken from inter unit Transfer of Credit under Rule 10A of CENVAT Credit Rules, 2004	0	0	0	0	0	0
Total Credit Available	17024325	250265	117827	1116561	22330	11162
Credit utilized for payment of Duty on Goods (Rs)	4308999	86187	43090	0	0	0
Credit utilized when inputs goods are removed as such (Rs.)	242743	4856	2426	0	0	0
Credit utilized when Capital Goods are removed as such (Rs.)	0	0	0	0	0	0
Credit utilized for payment of amount in terms of Rule 6 of CENVAT Credit Rules, 2004 (Rs)	0	0	0	0	0	0
Credit utilized for other payment (Rs)	0	0	0	0	0	0
Credit utilized for payment of tax on	0	0	0	0	0	0

Services (Rs)						
Credit utilized towards Inter Unit transfer of Credit under Rule 10A of CENVAT Credit Rules, 2004	0	0	0	0	0	0
Closing Balance (Rs)	12472583	159222	72311	1116561	22330	11162
Month: March 2013						
Opening Balance (Rs)	12472583	159222	72311	1116561	22330	11162
<i>Credit taken on inputs on invoices issued by manufacturers (Rs.)</i>	3332040	66649	33324	963897	19282	9637
<i>Credit taken on inputs on Invoices issued by I or II stage dealers (Rs.)</i>	37170	0	0	0	0	0
<i>Credit taken on inputs on imported inputs (RS.)</i>	13943	0	0	0	0	0
<i>Credit taken on Capital Goods on invoices issued by manufacturer or by I or II stage dealers (Rs.)</i>	0	0	0	0	0	0
<i>Credit taken on Imported Capital Goods (Rs)</i>	0	0	0	0	0	0
Credit Taken on Input services (Rs)	0	0	0	0	0	0
Credit taken from inter unit Transfer of Credit under Rule 10A of CENVAT Credit Rules, 2004	0	0	0	0	0	0
Total Credit Available	15855736	225871	105635	2080458	41612	20799
Credit utilized for payment of Duty on	3740323	74810	37400	0	0	0

Goods (Rs)						
Credit utilized when inputs goods are removed as such (Rs.)	290594	5812	2905	0	0	0
Credit utilized when Capital Goods are removed as such (Rs.)	0	0	0	0	0	0
Credit utilized for payment of amount in terms of Rule 6 of CENVAT Credit Rules, 2004 (Rs)	0	0	0	0	0	0
Credit utilized for other payment (Rs)	4200500	84000	42000	0	0	0
Credit utilized for payment of tax on Services (Rs)	0	0	0	0	0	0
Credit utilized towards Inter Unit transfer of Credit under Rule 10A of CENVAT Credit Rules, 2004	0	0	0	0	0	0
Closing Balance (Rs)	7624319	61249	23330	2080458	41612	20799

From the ER-1 returns filed by the Appellant for their Plant-IX, as above it is quite evident the closing balance available with the appellant at the end of January and February 2013, was far in excess of the credit claimed by them to have transferred to Plant-VII as per Rule 12A (4) of the CENVAT Credit Rules, 2004. In fact in their return for the month of March 2013, they have against the head **“Credit utilized for other payment (Rs)”** indicated amount of Rs 43,26,500/-.

Table 2: ER-1 Return of the Supermax Personal Care Private Ltd (Plant-VII)

Month: March 2013

Opening Balance (Rs)	89115	9678	6752	0	0	0
<i>Credit taken on inputs on invoices issued by manufacturers (Rs.)</i>	462633 6	92527	46264	0	0	0
<i>Credit taken on inputs on Invoices issued by I or II stage dealers (Rs.)</i>	595200	11904	5952	0	0	0
<i>Credit taken on inputs on imported inputs (RS.)</i>	53220	0	0	0	0	0
<i>Credit taken on Capital Goods on invoices issued by manufacturer or by I or II stage dealers (Rs.)</i>	0	0	0	0	0	0
<i>Credit taken on Imported Capital Goods (Rs)</i>	0	0	0	0	0	0
Credit Taken on Input services (Rs)	0	0	0	0	0	0
Credit taken from inter unit Transfer of Credit under Rule 10A of CENVAT Credit Rules, 2004	0	0	0	0	0	0
Total Credit Available	5363871	114109	58968	0	0	0
Credit utilized for payment of Duty on Goods (Rs)	478949 9	85285	42249	0	0	0

Credit utilized when inputs goods are removed as such (Rs.)	434846	7654	3827	0	0	0
Credit utilized when Capital Goods are removed as such (Rs.)	0	0	0	0	0	0
Credit utilized for payment of amount in terms of Rule 6 of CENVAT Credit Rules, 2004 (Rs)	0	0	0	0	0	0
Credit utilized for other payment (Rs)	0	0	0	0	0	0
Credit utilized for payment of tax on Services (Rs)	0	0	0	0	0	0
Credit utilized towards Inter Unit transfer of Credit under Rule 10A of CENVAT Credit Rules, 2004	0	0	0	0	0	0
Closing Balance (Rs)	139526	21170	12892	0	0	0

While making his observations in para 16 and 17 of the impugned order Commissioner has taken into account only the factual matrix as stated in the return of Plant-VII. He has not taken into account the return filed by the Plant-IX , wherein clearly it has been stated that unit has utilized an amount of Rs 43,26,500/- for purposes other than payment of duty on the finished goods and inputs cleared as such. While doing so he has also ignored the document **"CENVAT CREDIT TRANSFER UNDER RULE 12 A (4) of 2004., CHALLAN No 01/2012-13 dated 26.03.2013"** issued by the Plant-XI transferring this amount to Plant – VII. Commissioner has not recorded any findings in respect of any of these documents. If these were

taken into account by him his findings as recorded in para 17 and 18 would not have been the same. However we direct the Commissioner to record his findings on these documents evidencing the transfer of credit from Plant –IX to Plant-VII on 26.03.2018. For this limited purpose matter needs to be remanded back to the Commissioner.

4.7 Commissioner has recorded in the para 19, that since the credit which was used for payment of arrears was not available with the appellants at the end of the month February, 2013, the debit made from the credit earned in the month of March, 2013 cannot be considered as valid payment of the duty due for the month of February 2013. Thus he has proceeded to invoke Rule 8 (3A) for demanding the duty in cash in respect of all the clearances made subsequently.

4.8 The provisions of Rule 8 as they existed during the relevant period have been noted by the Hon'ble High Court of Gujarat in their decision in the case of Indsur Global referred earlier in following manner.

"19. Rule 8 of the Central Excise Rules pertains to the manner of payment. Sub-rule (1) of Rule 8 requires that the duty of the goods removed from the factory or the warehouse during a month shall be paid by the 6th day of the following month, if the duty is paid electronically through internet banking and by the 5th day of the following month, in any other case. First proviso to sub-rule (1) provides that in case of goods removed during the month of March, the duty shall be paid by the 31st day of March. Relevant portion of sub-rule (1) of Rule 8 reads as under :

"Rule 8. Manner of payment - (1) The duty on the goods removed from the factory or the warehouse during a month shall be paid by the 6th day of the following month, if the duty is paid electronically through internet banking and by the 5th day of the following month, in any other case :

Provided that in case of goods removed during the month of March, the duty shall be paid by the 31st day of March....."

Sub-rule (2) of Rule 8 provides that the duty of excise shall be deemed to have been paid for the purposes of these rules on the

excisable goods removed in the manner provided under sub-rule (1) and the credit of such allowed, as provided by or under any rule.

Sub-rule (3) of Rule 8 requires the assessee who fails to pay the duty by due date to pay the same along with interest. Sub-rule (3) reads as under :

"(3) If the assessee fails to pay the amount of duty by due date, he shall be liable to pay the outstanding amount along with interest at the rate specified by the Central Government vide notification under Section 11AA of the Act on the outstanding amount, for the period starting with the first day after due date till the date of actual payment of the outstanding amount."

Sub-rule (3A), a portion of which is under challenge before us, as it stood at the relevant time, reads as under :

"If the assessee defaults in payment of duty beyond thirty days from the due date, as prescribed in sub-rule (1), then notwithstanding anything contained in said sub-rule (1) and sub-rule (4) of Rule 3 of CENVAT Credit Rules, 2004, the assessee shall, pay excise duty for each consignment at the time of removal, without utilizing the CENVAT credit till the date the assessee pays the outstanding amount including interest thereon and in the event of any failure, it shall be deemed that such goods have been cleared without payment of duty and the consequences and penalties as provided in these rules shall follow."

As per this sub-rule, in case of an assessee who has defaulted in payment of duty beyond thirty days from the due date, has to pay excise duty for each consignment at the time of removal without utilizing the Cenvat credit till he pays the outstanding amount including interest. In the event of failure, it would be deemed that such goods have been cleared without payment of duty and the consequences and penalties as provided in the rules would follow.

20. *We may record that sub-rule (3A) which was introduced with effect from 1-6-2006 has since been substituted by notification, dated 11th July 2014 and the current applicable sub-rule (3A) reads as under :*

"(3A) If the assessee fails to pay the duty declared as payable by him in the return within a period of one month from the due date, then the assessee is liable to pay the penalty at the rate of one per cent. on such amount of the duty not paid, for each month or part thereof calculated from the due date, for the period during which such failure continues."

It can thus be seen that with the substitution of sub-rule (3A) of Rule 8, the requirement of the defaulter to clear the goods on payment without availing Cenvat credit has been done away with. Instead, such an assessee would invite penalty at the rate of one per cent for each month or part thereof calculated from the due date."

The provisions of Rule 8 (3A) have been held unconstitutional by the said decision of Hon'ble High Court stating as follows:

"34. *By no stretch of imagination, the restriction imposed under sub-rule (3A) of Rule 8 to the extent 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."*

4.7 This decision of Hon'ble Gujarat High Court has been affirmed by the Hon'ble Bombay High Court in case of Nashik Forge Pvt Ltd [2019 (368) ELT 20 (BOM)] stating as follows:

"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).

4. In the above view the impugned order allows the respondent's Appeal as the Rule under which the proceedings

were commenced against the respondent were held to be unconstitutional.

5. We find that when a provision has been declared unconstitutional by a Court, then the Tribunal is bound to follow it as held by this Court in *C.C.E., Mumbai-III v. Valson Dyeing Bleaching & Printing Works* - 2010 (259) E.L.T. 33 (Bom.). In the above case, the Tribunal allowed the appeal of the respondent holding that the basis of the proceeding therein was on account of breach of Notification No. 42 of 1998 (N.T.), dated 10th December, 1998. This notification had been declared ultra vires by the Madras High Court in the case of *Beauty Dyers v. Union of India* - 2004 (166) E.L.T. 27 (Mad.). This Court after placing reliance upon its earlier decision in the case of *C.I.T. v. Godavaridevi Saraf* - (1978) 113 ITR 589 = 1978 (2) E.L.T. (J624) (Bom.) which held that the Tribunal was justified in following the judgment of the Madras High Court in the case of *Beauty Dyers* (supra). Once the provision has been declared ultra vires by any High Court then one has to proceed on the basis that the provision which has been declared as unconstitutional is non-existent. Therefore, unless a contrary decision is given by any other competent Court, the Tribunal in the State has to proceed with the decision of the other High Court as it is the law of land and binding upon it. Nothing has been shown to us as to why we should not follow the decision of our Court in *Valson Dyeing* (supra) and *Godavaridevi Saraf* (supra). No submission has been made before us as to why the decision of the other High Courts declaring Rule 8(3A) of the Central Excise Rules, 2002 unconstitutional, should not be accepted by this Court."

4.8 By referring to certain decision learned Authorized Representative emphasized before us that these matters should be remanded back to the original authority for the final decision after the decision of Hon'ble Apex Court in SLP/ Appeal filed by the revenue against the decision of the Hon'ble High Court of Gujarat, or else the matter be kept in abeyance for the same reason. However we are not in agreement with the arguments advanced by the authorized representative as the said argument has been rejected by the Hon'ble Bombay High Court in case of

Twenty First Century Wires Rods Ltd [2019 (26) G.S.T.L. 478 (Bom.)] stating as follows:

"5. No distinguishing features in these two cases with above cases in law and/or facts has been shown to us, which would justify our taking a different view in these two appeals.

6. However, it must be pointed out that Mr. Ochani, Learned Counsel appearing for the Appellant invited our attention to an order dated 5th February, 2018 passed by this Court in Central Excise Appeal Nos. 24 of 2016 and 28 of 2016 wherein, the Court was informed that an identical issue had been raised before the Apex Court and this Court had adjourned both the appeals sine die. This for awaiting the decision of the Supreme Court on appeal filed by the State against the decision of the Gujarat High Court in Indsur Global Limited (supra) [2014 (310) E.L.T. 833 (Guj.)]. It must be pointed out that the aforesaid order dated 5th February, 2018 was not pointed out to the bench which passed an order on 25th April, 2019 (M.S. Sanklecha, J. was a member of the bench which passed the order on 25th April, 2019). Thus, this Court examined the issue on merits and passed a final order on 25th April, 2019.

7. As our order dated 25th April, 2019 has already taken a view on the issue raised in these two appeals, therefore, we are inclined to follow the same. We, thus dispose of the present appeal."

4.9 In view of the above decision of the jurisdictional High Court we are not inclined to agree to the argument raised by the authorized representative. Further we also note that the issue involved in the present case is not in respect of the validity of Rule 8 (3A). In the present case it is the claim of the appellant that they have complied with the provisions of Rule 8 (3A) and have made goods the default on 26.03.2013, hence the demand made against them after 26.03.2013 cannot be sustained. In fact there are two issues for consideration as follows:

i. Whether the payment of Rs 5,00,000/- by the appellants on 26.03.2013, from their CENVAT account, can be considered as payment of the defaulted duty for the month of February, 2013 as per Rule 8 of the Central Excise Rules, 2002.

ii. Whether the rigors of Rule 8 (3A) shall apply to the clearances made by the appellant after that date and demand of Rs 4,13,14,846/- for the clearance made during the period 26.03.2013 to 28.02.2014 could have been made by the revenue by invoking provisions of Section 11A of the Central Excise Act, 1944.

4.10 Now we examine the provisions of the law vis a vis the facts in hand to determine the issue in hand. The first issue that needs to be considered is whether the payment of Rs 5,00,000/- the amount of defaulted duty in terms of Rule 8 for the month of January 2013, could have been paid through the CENVAT Account the appellants. In terms of the Proforma of ER-1 reproduced above and the provisions of Rule 8, there appears to be no bar created on utilization of the CENVAT Credit for the payment of defaulted duty. However proviso to Rule 3 (4) of the CENVAT Credit Rule, 2004 provided as follows:

"(4) The Cenvat credit may be utilized for payment of -

- (a) any duty of excise on any final product; or*
- (b) an amount equal to Cenvat credit taken on inputs if such inputs are removed as such or after being partially processed; or*
- (c) an amount equal to the Cenvat credit taken on capital goods if such capital goods are removed as such; or*
- (d) an amount under sub-rule (2) of Rule 16 of Central Excise Rules, 2002; or*
- (e) service tax on any output service :*

Provided that while paying duty of excise or service tax, as the case may be, the Cenvat credit shall be utilized only to the extent such credit is available on the last day of the month or quarter, as the case may be, for payment of duty or tax relating to that month or the quarter, as the case may be :

Provided further that"

4.11 Board has considered issue of payments of arrears from the CENVAT Credit account that, have arisen in terms of the Rule 8 of the Central Excise Rules 2002 and other arrears, and

has clarified vide Circular No.962/05/2012-CX, dated the 28th March, 2012 as follows:

"Payment of arrears from Cenvat Credit earned at a later date Reference was received from the field formation seeking clarification on the issue as to whether the arrears of duty can be paid by utilizing the cenvat credit which has accrued subsequent to the period to which the arrears pertained. Such clarification has been sought in view of first proviso to rule 3(4) of the Cenvat Credit Rules, 2004. As per this proviso, "while paying duty of excise or service tax, as the case may be, the cenvat credit shall be utilized only to the extent such credit is available on the last day of the month or quarter, as the case may be, for payment of duty or tax relating to that month or the quarter, as the case may be."

2. Doubts have been raised whether these restrictions will be applicable to duty payable in terms of Section 11A or duty paid after due date in terms of rule 8 of the Central Excise Rules, 2002.

3. The matter has been examined in the Board. Practice ascertained from field formations points out that in majority of cases the payment of demands confirmed under Section 11A are being permitted to be paid by utilizing cenvat credit without linking the same to the period to which these demand pertain.

4. A harmonious reading of rule 8 of Central Excise Rules' 2002 and first proviso to rule 3 (4) of the Cenvat Credit Rules, 2004 indicates that the restriction with regard to the utilization of cenvat credit is relating to the normal payment of duty in terms of rule 8 of the Central Excise Rules, 2002, where duty for a particular month or quarter is to be discharged by the 5th of the next month. For this proviso, the cenvat credit allowed to be used is what was in balance on the last date of that month or quarter and not what accrued thereafter. Even in case of duty paid late in terms of rule 8, the credit available for utilization will remain same i.e. the credit in balance on the last date of month or quarter, as the case may be.

5. Further duty payable under rule 8 is on a different footing from duty payable under Section 11A. Duty under Rule 8 is paid

after self determination by the assessee unlike Duty payable under Section 11A where generally the duty is determined by the Central Excise officer and the payment is mandated after such determination. There is no time limit prescribed under Section 11A i.e., monthly or quarterly unlike the date prescribed under Rule 8 (i.e., 5th of the next month). Therefore, the restriction on the utilization of the cenvat credit accruing subsequent to the last date of the month or quarter in which the arrears arise, is not applicable to the demands confirmed under Section 11A of the Central Excise Act, 1944."

In view of the above clarification issued by the Board there seem to be no requirement, that the arrears that have arisen under Rule 8 were required to be paid in cash only, utilization of the CENVAT Credit for payment of the said arrears is permissible, subject to the condition that the balance was available in the account of the appellant.

4.12 Hon'ble Gujarat High Court has in the case of Advance Surfactant [2017 (358) ELT 53 (Guj)] has held this proviso to be unconstitutional stating as follows:

"Considering Rule 3 of the Cenvat Credit Rules, 2004, which are framed in exercise of powers under Section 37 of the Central Excise Act, 1944 it provides for Cenvat Credit allowable to the manufacturer or producer of final products. A manufacturer or producer of the final product is entitled to Cenvat Credit under Rule 3. However, while allowing Cenvat Credit allowable under Rule 3 of the Cenvat Credit Rules first proviso to sub-rule (4) of Rule 3 restricts utilization of Cenvat Credit for discharging the duty liability incurred by the manufacturer and as per the said provisions Cenvat Credit shall be utilized only to the extent such credit is available on the last day of the month or quarter, as the case may be, for payment of duty relating to that month or quarter, as the case may be. Thus, the effect of the said proviso would be that though a manufacturer is obliged to discharge excise duty liability by 5th or 6th day of the next month, the Cenvat Credit taken by the manufacturer only till the end of the month to which the excise duty related, could be utilized and Cenvat Credit legally availed during the first 5 days or 6 days of the subsequent months is not permitted to be utilized for paying

the duty of excise for the goods cleared in the previous month, and therefore, on one hand manufacturer is allowed as per Rule 8(1) of the Central Excise Rules, 2002 to pay the duties on the goods removed from the factory during the month by the 6th day of the following month. On the other hand, though the manufacturer may have Cenvat Credit in his account the same cannot be permitted to be utilized after the end of the month, more particularly, between the last day of the month and the 6th day of the following month, and therefore, proviso to sub-rule (4) of Rule 3 of the Cenvat Credit Rules would be just contrary and/or in conflict with Rule 8(1) of the Central Excise Rules, 2002. A manufacturer can be and should be permitted to utilize the Cenvat Credit legally availed during the first 5 days or 6 days of the subsequent month for paying the duty of the excise for the goods cleared in the previous month.

5.2 Even otherwise, proviso to sub-rule (4) of Rule 3 of the Cenvat Credit Rules can be said to be ultra vires to Rule 3(1) of the Cenvat Credit Rules as it does not have any nexus with the object sought to be achieved by the Rules and in fact runs contrary to the principles of Cenvat Credit Rules. At this stage, it is required to be noted that as per catena of decisions of the Hon'ble Supreme Court as well as this Court and other High Courts, Cenvat Credit is indefeasible and there is no correlation of the raw-material and the final product. It is not as if credit could be taken on a final product, which is manufactured out of a particular raw material to which the credit was related. The credit may be taken against excise duty on the final product manufactured on the very day that it becomes available. Thus, as such, credit under the Cenvat Scheme is "as good as tax paid". If any decision is needed on the aforesaid decision of the Hon'ble Supreme Court in the case of Dai Ichi Karkaria Ltd. (supra) and Eicher Motors Ltd. (supra) are required to be referred to. In the aforesaid decision, it is specifically held that utilization of legally availed Cenvat credit is a right vested in the manufacturer the moment duty paid inputs or input services are received by him because there is no one to one correlation between input/inputs services on one hand and the final excisable product on the other hand. Therefore, proviso to Sub

Rule (4) of Rule 3 of the Cenvat Credit Rules, which disentitles the manufacturer utilization of Cenvat Credit availed in a particular month for the goods manufactured in the preceding month can be said to be contrary to the law laid down by the Hon'ble Supreme Court in the aforesaid decisions as well as contrary to the CENVAT Credit Scheme, and therefore, the same is invalid and unconstitutional".

In view of the said decision of Hon'ble Gujarat High Court and the clarification issued by the Board there seem to be nothing wrong in the appellants discharging the defaulted duty liability as per Rule 8 from their CENVAT account.

4.13 Appellant had filed the "Consent Form For Companies Participating in LTUs" which was received in the Office of The Chief Commissioner LTU Mumbai, on 9th March 2012. However they were given the permission to operate as LTU vide letter dated 28.02.2013, nearly one year after filing the consent form. The text of the letter dated 28.02.2013 is reproduced below:

"No. CC/LTU/Consent/041

February 28, 2013

PAN: AAOCS7144Q

Sub: Large Taxpayer Unit - Consent Form - Acceptance - reg.

Ref : Your Letter dated 09.03.2012 & 25.12.2012.

I am directed to inform you that 'the Chief Commissioner, Large Taxpayer Unit, Mumbai, is pleased to accept your consent for joining the Large Taxpayer Unit, Mumbai. You will now be eligible to avail all the facilities extended to a Large Taxpayer in the LTU in accordance with various Instructions, Circulars and Notifications issued by CBDT and CBEC. Your LTU Membership number is LTU/MUM/3306. The same may be quoted in all future correspondence along with your PAN.

Your Client Executive is Mr. Ashok J Verma, Joint Commissioner (CX & ST) Large Taxpayer Unit, Mumbai who will be a single point interface for any assistance, clarification and grievance redressal for Income Tax, Central Excise and Service Tax matters. "

4.14 From the above correspondences it is quite evident that the revenue authorities took nearly one year to give consent to the appellant to operate as an LTU. In the meantime as per the show cause notice certain defaults in term of Rule 8, were noticed in the payment of Central Excise duty by the due date for the Month of February 2013.

4.15 Rule 12 A (4) of the CENVAT Credit Rules permitted the transfer of CENVAT Credit from unit of the person operating under the LTU scheme to the other unit of the same person. Appellant Plant-IX, was having sufficient credit balance of Rs in their CENVAT Account at the close of the February 2013. If they the appellant request to operate under the LTU scheme was allowed during any month prior to the month in which default occurred, they would have transferred this balance to their Plant -VII and would have utilized the same for payment of the duty. In fact appellant's claim that they transferred this amount from their Plant -IX after being accorded the permission to join LTU on 28.02.2013. They utilized this transferred credit for payment of the defaulted duty for the month of February 2013. The delay in according the permission to operate as LTU, was primary reason for the delay in transfer of available credit from the Plant -IX to Plant-VII. Hon'ble Delhi High Court has in similar circumstances held as follows:

"2. The brief facts are that the liability of the appellant for the month of April, 2012 - payable by 5-3-2012 was Rs 10,10,590/- whereas the Cenvat credit was utilized to the extent of Rs 7,10,590/- and Rs. 1,00,000/- through PLA. As such there was short payment of about Rs. 2,00,000/-. Undisputedly, the respondent had Rs 3,27,000/- lying in its Cenvat credit. Its explanation was that there was an error in his computer system which could be detected only later. The assessee paid the balance amount of duty on 19-12-2012 together with interest. Claiming that the assessee was bound to discharge full liability on a month to month basis along with penalty and interest, the assessing authorities sought to recover those amounts by applying Rule 8(3A). The CESTAT by its impugned order noticed that rule itself was declared unconstitutional and set aside in Indsur Global Ltd. v. UOI - 2014 (310) E.L.T. 833 (Guj.), a

decision which had been followed subsequently by Punjab and Haryana High Court in Sandley Industries v. UOI - 2015 (326) E.L.T. 256 (P & H) and Malladi Drugs & Pharmaceuticals Ltd. v. UOI - 2015 (323) E.L.T. 489 (Mad.).

3. We notice that there is absolutely no dispute about two critical elements, i.e., firstly that there was about Rs 3.27 lakhs lying to the credit of the assessee in its Cenvat account and secondly he in fact did pay the amount claiming that the short payment was due to oversight.

4. Having regard to these facts and the circumstance that Rule 8(3A) itself has been struck down and is no longer in existence, which we entirely concur with, we find no infirmity with the CESTAT's order. No question of law arises. The appeal is consequently dismissed."

4.14 In view of the above we do not find any justification in holding that the payment of amount of Rs 5,00,000/- from their CENVAT account (subject to verification of the transfer made on 26.03.2013) was not enough to discharge the duty arrears for the month of February-2013 in terms of Rule 8 of the Central Excise Rules, 2013.

4.15 Undisputedly appellants have discharged the duty as demanded in the show cause notice and confirmed against them for the subsequent period from their CENVAT account. The demands have been made against them considering that the payment of the defaulted duty for the Month of February-2013 on 26.03.2013 from their CENVAT Account was not a valid payment. Once we hold that the payment from their CENVAT account was valid payment the demands for the subsequent period will automatically be not sustained. However as we have observed in para 4.6 above the fact in regards to transfer of CENVAT Credit of Rs 43,26,000/- by the Plant-IX to Plant -VII needs to be verified by concerned Commissioner.

4.16 It is interesting to note that the show cause notice raises the demand by invoking "Rule 8(3A) of Central Excise Rules, 2002 read with Section 11A of Central Excise Act, 1944." Adjudicating authority has confirmed the demand under the same provisions. If that is so as per para 5 of the Board Circular

of 2012, referred to by us earlier after confirmation of the demand these demands can be paid by utilization of the CENVAT Credit.

4.17 Plain reading of Rule 8 (3A) as it was then would clearly show that it is not amenable to Section 11A of the Central Excise Act, 1944. Rule itself declares that in cases where the rule apply, the clearances are to be made on payment of duty in cash and on consignment basis. In case of default from the same the goods will be treated to be cleared without payment of duty and consequences as per law will follow. By making the demand as above nearly one year later, for the clearances made without payment of duty revenue was not only soft pedaling the issue but was permitting the clearance without payment of duty. The natural consequence of the clearances made without payment of duty was to seize and confiscate all the goods that were cleared by the appellant without payment of duty. Might be revenue mulled over the issue during the intervening period as to what would be correct course of action. After permitting the clearances contrary to provisions of Rule 8 (3A) revenue authorities cannot subsequently turn back and make demand by invoking the provisions of Section 11A.

4.18 Undisputedly appellants have paid the defaulted duty for the month of February 2013, by making a debit entry in the CENVAT Account on 26.03.2013. Even if this debit was to be considered as not a valid payment of duty, then also the Appellant could not have been proceeded against for the clearances made after 26.03.2013, in terms of Rule 8 (3A). Hypothetically consider the situation whereby an assessee discharges the duty liability for a month on or before the due date as per Rule 8, by way of debit entry in the credit account and subsequently the debit so made is found to be erroneous/ malafide, then also the rigors of Rule 8 (3A) will not come into picture because in the first instance assessee has discharge the duty payable by the due date albeit subsequently found to be erroneous/ malafide. In such case the revenue proceeds against such defaulter by way of initiation of proceedings for short/ non-payment of duty in terms of Section 11A of the Central Excise Act, 1944. This short/ non-payment cannot tiger the Rule 8 (3A)

automatically into action. In our view Rule 8 (3A), as it existed then provided a mechanism for ensuring the payment of the admitted duty liability of the month by the due date as per Rule 8. In the present case admittedly during the period of default appellants have acted as per the provisions of Rule 8 (3A) and have discharged duty consignment wise without utilizing the CENVAT Credit available with them.

4.18 In the case of Sharp Industry referred by the authorized representative, tribunal has held as follows:

"7. In view of the above decision of the Hon'ble Madras High Court and also the fact that Rule 8(3A) is specifically prohibits utilization of Cenvat credit during the period in which default continues, we are of the view that even when the said amount is required to be paid as arrears of revenue the same have to be paid in cash without utilization of the Cenvat credit. Any other interpretation will make the restriction relating to utilization of credit meaningless. It is settled law that what is not allowed directly cannot be allowed/claimed indirectly. Board's Circular dated 28th March, 2012 will not be applicable in view of reasons stated earlier. We, therefore, hold that the appellants are required to pay an amount of Rs. 8,00,09,346 which is equivalent to the Cenvat credit utilized during the period 6-12-2010 to 4-7-2011 in cash. They will, however, be free to take Cenvat credit of equivalent amount and utilize it for future clearances. Learned Counsel has cited certain judgments of this Tribunal. In view of the above analysis as also the fact that these were delivered before the Hon'ble Madras/Karnataka High Court judgments, we do not consider it necessary to discuss these."

This decision was rendered by the tribunal following the decision of Single Judge of Hon'ble Madras High Court in case of Unirols Airtex [2013 (296) ELT 449 (Mad)].

4.19 A division bench of Madras High Court has in case of Malladi Drugs and Pharmaceuticals Ltd, concurred with the decision of the Hon'ble Gujarat High Court stating as follows:

"5. It is not the case of the Department in this batch of writ petitions that the petitioners-assessees have illegally or irregularly taken the Cenvat credit. It is to be mentioned herein

that sub-rule (1) of Rule 8 provides for the manner of payment of duty on the goods removed from the factory or the warehouse as provided thereunder. Sub-rule (2) of Rule 8 extends the benefit of duty to the third party purchaser, who buys the excisable goods removed by the assessee and such goods are deemed to have suffered duty of excise. Under sub-rule (3) of Rule 8, interest is liable to be paid on the outstanding amount, if the assessee fails to pay the duty by the due date. In contradiction to this procedure, sub-rule (3A) of Rule 8 provides that in default of the payment of duty beyond thirty days from the due date as prescribed under sub-rule (1), notwithstanding anything contained in sub-rule (1) and sub-rule (4) of Rule 3 of Cenvat Credit Rules, 2004, the assessee is bound to pay excise duty at the time of removal without utilizing the Cenvat credit till the date the assessee pays the outstanding amount including interest thereon. The right to pay duty by utilising the Cenvat credit that had accrued cannot be defeated, unless it is a case of illegal or irregular credit (See the decision of the Supreme Court in Dai Ichi Karkaria Ltd., referred supra). To that extent, we find this sub-rule (3A) arbitrary and therefore violative of Article 14. The right that has accrued to an assessee by way of Cenvat credit, that is duty paid on the inputs, cannot be taken away under a rule, which only provides for the manner and method of payment of duty and for levying of interest, if there is a default. The object of the term "without utilizing the Cenvat credit" would run counter to the scheme of availment of the Cenvat credit on the duty paid inputs. It is a legitimate right that has accrued to an assessee and that cannot be denied arbitrarily under the provision under challenge. We, therefore, have no hesitation to concur with the reasoning of the Gujarat High Court that Rule 8(3A) is ultra vires of Article 14 on the ground of arbitrariness.

6. Now coming to the challenge to the proceedings initiated by the Department by invoking Rule 8(3A) of the Central Excise Rules, 2002 and the consequential orders passed by the original authority or appellate authority, as the case may be, in demanding duty along with interest, the Gujarat High Court in the case of Precision Fasteners Ltd. v. Commissioner of Central Excise, 2014 - TIOL - 2211 - HC-AHM - CX, has held as follows :-

"4. When the statutory basis for issuance of a show cause notice and raising tax demand is knocked down, the very proceedings would have to be struck down.

5. Learned counsel Shri Oza for the revenue, however, submitted that during the pendency of this petition, the adjudicating authority passed the final order which has not been challenged. He drew our attention to the later portion of the said decision in case of *Indsur Global Ltd. (supra)* in which this Court even while striking down the portion of sub-rule (3A) of Rule 8, did not disturb the orders passed by the Revenue authorities as upheld by the Tribunal, since such dispute had achieved finality. Counsel would urge that in the present case also the same course should be adopted.

6. In our opinion, however, there is vital difference between the two sets of facts. In the present case, the petitioner had raised the challenge to the statutory provisions even before the Adjudicating Authority had taken a final decision. He had, along with rule, also challenged the show cause notice. In the case of *Indsur Global Ltd. (supra)* the petitioner had unsuccessfully challenged the order of the Adjudicating Authority. The appeal was dismissed by the Commissioner on the ground of delay beyond his power to condone. The Tribunal had dismissed further appeal on the ground of gross delay of three years in preferring the appeal before the Tribunal as also on the ground that in any case the Commissioner was right in not entertaining the appeal of the assessee which was presented along with the application for condonation of delay after the maximum period which the Commissioner could have condoned. It was in this background the Court held that the issues which are closed cannot be reopened. It was noted that there were other proceedings between the same assessee and department pending at various stages on same issue. It was, therefore, provided that the particular order in challenge would not be disturbed but that the benefit of declaration of invalidity of the rule would be available to the petitioner in other pending proceedings.

7. In view of such clear distinction in facts, the modus adopted in the said case in case of *Indsur Global Ltd., (supra)* cannot be

applied in the present case. The impugned tax demands and show cause notice are set aside. Resultantly, all subsequent actions, if any, taken by the department would be set at naught. Petition is allowed. Rule is made absolute accordingly."

7. In the light of the aforesaid judgment of the Gujarat High Court, to which view we are agreeable, all the proceedings initiated by the Department in respect of the respective assessees, invoking the said rule by demanding duty along with interest by denying the benefit of Cenvat credit have to be necessarily set aside. Accordingly, the impugned proceedings are set aside. In the result, all the writ petitions are allowed."

4.19 In the case of Shivam Pressing referred by the authorized representative, tribunal has in para 4.1, after referring to the order of Hon'ble Gujarat High Court in case of Indsur Global, observed as follows:

*"A reading of the above paras would clearly indicate that the Hon'ble High Court of Gujarat has only declared "without utilizing the cenvat credit" in Rule 8((3A) as unconstitutional. In fact in para 35 as also the earlier paras, all other provisions of Rule 8(3A) have been considered as correct and perfectly legitimate. Keeping in view the judgment of the Hon'ble High Court of Gujarat, Rule 8(3A) would imply that if the assessee defaults in payment of duty beyond 30 days from the due date, the assessee shall pay excise duty for each consignment at the time of removal till the date the assessee pays the outstanding amount including interest thereon and in the event of any failure, it shall be deemed that such goods have been cleared without payment of duty and the consequences and penalties as provided in these rules shall follow. **Thus, as per rule 8(3A) and the judgment of the Hon'ble Gujarat High Court, the appellant was expected to clear the goods for each consignment at the time of removal till the outstanding amount including interest is paid. It is not in dispute that for the demands made, the appellant has not paid the duty consignment-wise either through cenvat credit account or through PLA.** Obviously they have violated Rule 8(3A) and the said rule provides that it shall be deemed that such goods have been cleared without payment of duty and*

consequences and penalties as provided in these rules shall follow."

And in para 4.4, dropped the demand of duty made treating the payments made through CENVAT account as proper payment of duty in respect of the consignments cleared during the period of default, stating as follows:

"4.4 As far as the demand of duty is concerned, since the amount is paid later through credit/cash the same will not survive in view of the decision of the Hon'ble High Court of Gujarat in the case of Indsur Global Ltd. (supra)."

Thus by application of the ratio of this judgment, the demand of duty made by the revenue for the period after 26.03.2013, the demand of duty needs to be set aside.

5.1 In view of above discussions the appeal is allowed and matter remanded to the original authority for very limited purpose verification of the fact of transfer of CENVAT Credit amount of Rs 43,26,000/- from Plant – IX to Plant –VII in terms of Rule 12A (4) of the CENVAT Credit Rules, 2004. Except for this limited purpose for which matter is remanded back appeal is allowed on all other accounts.

5.2 Since matter is substantially old adjudicating authority should record his findings in the remand proceedings within three months of the receipt of this order.

(Order pronounced in the open court on 15.07.2022)

(Sanjiv Srivastava)
Member (Technical)

(Ajay Sharma)
Member (Judicial)