

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

Excise Appeal No. 776 of 2012

(Arising out of Order-in-Appeal No. PI/RKS/27-28/2012 dated 15/02/2012 passed by the Commissioner of Central Excise (Appeals), Pune-I)

M/s. Fabricam Engineers

Plot No. 212, Sector-7, PNCNTDA,
Pune-411 026.

Appellant

Vs.

Commissioner of Central Excise, Pune-I

Respondent

F wing, 3rd Floor, ICE House,
Sassoon Road, Pune-411 001.

Appearance:

Shri Makarand Joshi, Advocate, for the Appellant

Shri Anantha Krishnan, Commissioner, Authorized Representative, for the Respondent

CORAM:

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

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

Date of Hearing: 13/07/2022

Date of Decision: 13/07/2022

FINAL ORDER NO. A/85651/2022

PER: SANJIV SRIVASTAVA

This appeal is directed against order in appeal No PI/RKS/S/27-28/2012 dated 14.02.2012 of the Commissioner Central Excise (Appeal) Pune -I. By the impugned order Commissioner (Appeal) has held as follows:

"ORDER

10.1 I uphold the impugned Order in Original No PI/ADC/CEX/34/2011 dated 08-11-2011, passed by the Additional Commissioner, Central Excise, Pune-I

Commissionerate, in so far as it relates to confirmation of duty, interest and penalties imposed on the appellants.

10.2 However, I set aside the penalty of Rs 17,30,130/- imposed on Smt Sneha Deshpande, Partner of the appellant firm, under Rule 26 of the Central excise Rules, 2002, read with Section 9AA of The Central excise Act, 1944 as discussed and held in para 9 above.

10.2 Consequently, the appeal (Appeal No 05/CEX/2012) filed by the Appellant No 1 is rejected. However, the appeal (Appeal No 06/CEX/2012) filed by Smt Sneha Deshpande, Partner (Appellant No. 2) is allowed with consequential relief."

1.2 Additional Commissioner has vide his order in original held as follows:

"40. In view of my findings, I pass the following order:

- i. I confirm and order recovery of the Central Excise Duty Rs.17,30,130/ - (Rs. Seventeen lakhs thirty thousand one hundred thirty only) including Education Cess, as detailed in Annexure A the show cause notice from the assessee under the provisions of Section 11A (2) of Central Excise Act, 1944,*
- ii. I appropriate Central Excise Duty amounting to Rs.9,01,096/- (Nine Lakhs One thousand ninety six only) already paid by the assessee against the aforesaid confirmed demand.*
- iii. I confirm and order recovery of interest at the appropriate rate on the aforesaid confirmed demand from the assessee, under Section 11AB of the Act,*
- iv. I appropriate interest amounting to Rs.78075/-(Seventy eight thousand seventy five only) already paid by them against the aforesaid confirmed demand of interest.*

- v. *I impose Penalty of Rs 5000/- (Five Thousand only) upon the assessee under Rule 27 of Central Excise Rules, 2002 for non-filing of ER-1 Return within due date;*
- vi. *I impose Penalty of Rs. 17,30,130/- (Rs. Seventeen lakhs thirty thousand one hundred thirty only) upon the assessee under Section 11AC of Central Excise Act, 1944 read with Rule 15(2) of Cenvat Credit Rules 2004;*
However, the assessee has an option under the provisos to Section 11AC of Central Excise Act, 1944 to pay the reduced penalty of 25% (twenty five percent) of the duty amount so determined provided that the above duty determined and the interest payable thereon under Section 11AB is paid within 30 days from the date of communication of this Order and provided further that the benefit of said reduced penalty shall be available to the assessee if the amount of penalty so determined is also paid by them within the period of thirty days referred to above.
- vii. *I impose penalty of Rs. 17,30,130/- (Rs. Seventeen lakhs thirty thousand one hundred thirty only) upon Smt. Sneha Deshpande, partner of the firm, under Rule 26 of the Rules read with Section 9As of the Act, for her active role in availing and utilizing credit of amount without depositing the said amounts into Govt. Account, filed ER-1 returns with the department showing these fictitious credits and willfully suppressed the actual facts from the officers with intent to evade payment of duty.*

41. This Order is issued without prejudice to any other action which may be initiated against assessee or any other person concerned in the matter under the Central Excise Act, 1944 and Rules made thereunder on any other law for the time being in force within the Republic of India."

2.1 Appellant is a partnership firm and are manufacturers of excisable goods viz. trolleys, base frames etc. for D.G Sets,

falling under Chapter 84 of the first Schedule to Central Excise Tariff Act, 1985. They are also availing Cenvat Credit of duty paid on inputs and input services under Cenvat Credit Rules, 2004 and utilizing the same for payment of Central Excise duty on finished products.

2.2 The appellants failed to submit monthly ER-1 returns for the period August 2008 to May 2009, within the stipulated period as required under Rule 12 of Central Excise Rules, 2002, read with Rule 9(7) of Cenvat Credit Rules, 2004. The said returns were submitted by the appellants only on 17-06-2009. On perusal of the ER-I Return for this period, it was noticed that the appellants had defaulted in payment of duty, as is indicated from the Table below:

Month	Duty Payable (Rs)	Duty Paid (RS)		Duty Default (Rs)
		PLA	CENVAT	
Aug 2008	737287	0	479887	257400
Sept 2008	291000	0	137356	153644
Oct 2008	50114	0	50114	0
Nov 2008	276871	0	230871	37000
Dec 2008	240031	0	187532	52500
Jan 2008	152092	0	63492	88600
Feb 2008	71844	0	55444	16400
Mar 2008	45432	45432	0	0
Apr 2008	34171	33684	487	0
May 2008	20779	0	20779	0

2.3 Appellants deposited the duty defaulted for the month of September 2008 and December 2008 in Government Account on 04-02-2009, and the duty defaulted for the months of November

2008, January 2009 and February 2009, on 18-03-2009 and 31-03-09 respectively, alongwith interest.

2.4 As per provisions of sub-rule(3) of Rule 8 of Central Excise Rules, 2002, if an assessee fails to pay the duty by due date, he shall be liable to pay the outstanding amount alongwith interest at the rate specified under Section 11AB of the Central Excise Act, 1944. Sub-rule (3A) of Rule 8 of Central Excise Rules, 2002, provided that if an assessee defaults in payment of duty beyond thirty days from the due date, as prescribed in sub-rule (1), then the assessee shall, pay excise duty for each consignment at the time of removal of excisable goods, without utilizing the Cenvat credit till the date of payment of 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.

2.5 In view of the default in payment of the duty by the due date, a show cause notice dated 28.05.2010 was issued to the appellant asking them to show cause as to why-

a) Duty of Rs. 17,30,130/- Rs. Seventeen lakhs thirty thousand one hundred & thirty only) including Education Cess, as detailed in Annexure A above should not be demanded and recovered from them under the proviso to Section 11A (1), read with Section 11 of the Act;.

b) Duty amounting to Rs.9,01,096/- (Nine Lakhs One thousand and ninety six only) already paid by them should not be appropriated against the aforesaid demand.

c) Interest at the appropriate rate, should not be charged and recovered from them, from the due date till the date of payment of duty and Education Cess, under Section 11AB of the Act,

d) Interest amounting to Rs.78075/-(seventy eight thousand and seventy five only) already paid by them should not be appropriated against the interest payable.

e) Penalty under Section 11AC of the Act should not be imposed upon them for deliberate non - payment of duty, suppression of facts and production of forged documents to the department, as evidence of payment of duty;

f) Penalty should not be imposed upon them under Rule 27 of Central Excise Rules, 2002 for non-filing of ER-1 Return within due date;

g) Penalty should not be imposed under Rule 15(2) of the B. KHALADKAR Rules, 2004 for wrongly utilizing Cenvat Credit towards clearances made i during the period of default.

h) Penalty should not be imposed on Smt. Sneha Deshpande, partner of the firm, under Rule 26 of the Rules read with Section 9AA the Act, for her active role in availing and utilizing credit of amount without depositing the said amounts into Govt. Account, filed ER-1 returns with the department showing these fictitious credits and willfully suppressed the actual facts from the officers with intent to evade payment of duty.

2.5 Show cause notice was adjudicated by the Additional Commissioner as per order in original as indicated in para 1.2 above.

2.6 Against order of Additional Commissioner appellant filed the appeal to Commissioner (Appeal) who disposed of the appeal as per impugned order referred in para 1 above.

3.1 We have heard Shri Makarand Joshi, Advocate for the appellant and Shri Anantha Krishnan, Commissioner, for the revenue.

3.2 Arguing for the appellant learned counsel submits that

- the issue involved is in respect of the demands made, disallowing the payments made by them utilizing the CENVAT Credit, in terms of Rule 8 (3A) of Central Excise Rules, 2002
- Appellants had defaulted in payment of the part duty payable by them during the month of August 2008. As the default in payment continued beyond the period of 30

days, revenue has invoked provisions of Rule 8 (3A) for making this demand for the period September 2008 to May 2009.

- Rule 8 (3A) as it was then was considered by the Hon'ble Gujarat High Court in the case of Indsur Global [2014 (810) ELT 833 (Guj)] and held to be unconstitutional to the extent that it disallowed the payment of Central Excise duty from the CENVAT Account.
- Jurisdiction High Court, Hon'ble Bombay High Court has expressed the similar view in cases as follows:
 - Nashik Forge [2019 (368) ELT 20 (Bom)]
 - Twenty First Century Wire Rods Ltd. [2019 (26) G.S.T.L. 478 (Bom.)]
- Similar Views have been expressed by the Hon'ble High Courts of Madras, Delhi, Allahabad and Punjab & Haryana.
 - A.R. Metallurgicals P. Ltd [2015 (329) ELT 49 (Mad)]
 - Malladi Drugs & Pharmaceutical Ltd [2015 (323) E.L.T. 489 (Mad)]
 - Space Telelink Link Ltd [2017 (355) E.L.T. 189 (Del)]
 - A T V Projects Ltd [2016 (341) E.L.T. 603 (All)]
 - Sandley Industries [2015 (326) E.L.T. 256 (P & H)]
- Tribunal has followed the said decisions in series of decisions.
 - Shivam Pressings [2015 (326) E.L.T. 351 (Tri. - Mumbai)]
 - Praweg Coneyors [2016 (337) E.L.T. 450 (Tri. - Mumbai)]
- Accordingly the demands need to be redetermined after taking into account the above decisions, for which the matter may be remanded to the original authority.

3.3 Arguing for the revenue learned authorized representative submitted that:

- Against the decision of Hon'ble High Court of Gujarat in case of Indsur Global and other decisions referred to by the counsel, revenue has filed SLP in Hon'ble Supreme

Court, these SLP have been admitted and in some of these stay has also be granted.

- 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 impugned order along with the submissions made in appeal and during the course of arguments.

4.2 In case of Twenty First Century Wire Rods Ltd, referred by the counsel, Hon'ble Bombay High Court has after taking the note of the fact that SLP's/ Appeals have been filed by the revenue against the orders of various High Court, holding Rule 8 (3A), to the extent that it disallowed the payment of Central Excise Duty from the CENVAT account constitutional has held as follows:

"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."

4.3 In view of the above we are not inclined to agree with submissions made by the authorized representative to keep the matter in abeyance awaiting the decision of Hon'ble Supreme Court in the matter.

4.4 In case of Shivam Casting, Mumbai Bench has after taking the note of the decision of Hon'ble Gujarat High Court has held as follow:

4.1 *I have also gone through the judgment of the Hon'ble High Court of Gujarat in the case of Indsur Global Ltd. (supra). I find that the Hon'ble High Court in paras 34, 35 and 36 has observed as under :-*

"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."

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.

4.3 *I have also gone through the judgment of the Hon'ble High Court of Gujarat in the case of Saurashtra Cement Ltd. reported in 2010 (260) E.L.T. 71 (Guj.). In the said case, the Hon'ble High Court has come to the conclusion that the appellant has not violated any of the sub-clauses (a), (b), (c) or (d) of Rule 25(1) and, therefore, no penalty is imposable under Rule 25. It is to be mentioned that the said decision was relating to Rule 8(3) alone. Rule 8(3A) was introduced with effect from 1-6-2006 and the earlier Rule did not have any provision for clearing the goods consignment-wise and in those situations the Hon'ble High Court has come to the conclusion that Rule 25 is not violated and, therefore, penalty cannot be imposed under Rule 25 and in those circumstances, even Section 11AC of the Central Excise Act is not applicable. The position has changed after the introduction of Rule 8(3A) and as in the present case, the goods were cleared without payment of duty consignment-wise and hence the ratio of the said judgment will not be applicable. Further, it is a well settled law by now that in case of taxing statute, various penal provisions are in the nature of civil obligations and do not require any mens rea or wilful intention until and unless the relevant provision provides for the same. Under the circumstances, I am of the considered view that the appellant has violated Rule 8(3A) and hence the goods covered by the show cause notice are liable to confiscation and the appellant is liable to penalty under Rule 25 of the Central Excise Rules, 2002. However, keeping in view the fact that the duty involved is Rs. 7,16,391/- and also keeping in view the number of days when the appellant was supposed to clear the goods consignment-wise, it is felt that penalty of Rs. 3,00,000/- is on the higher side and the same is reduced to Rs. 50,000/-.*

4.5 In view of above in our view the ends of justice will be met if the matter is remanded back to original authority for reconsideration and re-computing the duty demand and penalties, after taking note of the above decisions and the observations made by us in this order.

5. Appeal allowed by way of remand.

(Sanjiv Srivastava)
Member (Technical)

(Ajay Sharma)
Member (Judicial)

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