CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

EXCISE APPEAL NO: 511 OF 2012

[Arising out of Order-in-Original No: 82/BR-82/Th-I/2011 dated 26th December 2011 passed by the Commissioner of Central Excise, Thane – I.]

Sri Dudeshwarnath Steel Pvt Ltd
Plot No. 226,277 & 412, Village Abitghar
Tal: Wada, Dist: Thane … ***Appellant***

versus

Commissioner of Central Excise
Thane – I
4th Floor, Navprabhat Chambers, Ranade Road
Dadar (W), Mumbai - 400028 ***…Respondent***

APPEARANCE:

Shri Sunil Navandar and Shri Abhishek Kapadia, Advocates for the appellant

Shri S Ananthakrishnan, Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A/85043 / 2023

DATE OF HEARING: 25/07/2022
DATE OF DECISION: 20/01/2023

PER: C J MATHEW

The issue in this appeal of M/s Sri Dudeshwarnath Steel Pvt Ltd, against order-in-original no. 82/BR-82/Th-I/2011 dated 26th

December 2011 of Commissioner of Central Excise, Thane – I ordering recovery of ₹ 5,28,08,484/- as duty liability for the period from November 2008 to September 2010, is the alleged breach of rule 8 of Central Excise Rules, 2002, for which the adjudicating authority has, in addition, imposed penalty of like amount under section 11AC of Central Excise Act, 1944 read with rule 25 of Central Excise Rules, 2002 while imposing fine of ₹ 10,00,00,000/- under section 34 of Central Excise Act, 1944.

2. In accordance with the provisions of rule 8, and with the appellant having opted for 'compounded levy scheme', duties of central excise were liable to be discharged by the 6th of the month following clearance of goods and any failure thereof mandating payments thereafter, till deficiency was made good, by debit of 'account current' owing to disbarment from resort to CENVAT credit account and the continued debit thereof by the appellant herein for discharge of duty liability, being in breach of rule 8(3A) of Central Excise Rules, 2002, led to proceedings against them; the confirmation of the said demands is the issue now raised by the appellant in this appeal. Narrating the background, Learned Counsel for the appellant submitted that the management had changed hands on 28th November 2008 with the registration ultimately surrendered on 28th December 2010 and that, on noting discrepancy between challans available on record and returns for the relevant period, the deficiency was brought

to the notice of central excise authorities who conducted audit in November 2009 upon which they had made good the amount said to be deficient. It was further submitted by Learned Counsel that a further audit was conducted in February 2011 for the period from September 2009 to October 2010 following which two show cause notices, dated 23rd September 2011, comprising demand of ₹ 2,88,18,934/- for the period from November 2008 to October 2009 and ₹ 2,06,42,695/- for the period from November 2009 to September 2010 and dated 28th October 2011 for October 2010 for recovery of an amount of ₹ 33,46,055/-, were issued and, notwithstanding closure of the unit in November 2010, was confirmed in the impugned order.

3. According to Learned Counsel for the appellant, demand under rule 8(3A) was not sustainable in the light of the decisions of the Hon'ble High Court of Bombay in *Commissioner of CGST & Central Excise, Vapi-Daman v. Twenty First Century Wires Rods Ltd [2019 (26) GSTL 478 (Bom.)],* and in *Commissioner of Central Excise & Customs, Nashik – II v. Nashik Forge Pvt Ltd [2019 (368) ELT 20 (Bom)],* of the Hon'ble High Court of Delhi in *Principal Commissioner of Central Excise, Delhi – I v. Space Telelink Ltd [2017 (355) ELT 189 (Del.)],* upholding the decision of the Tribunal, of the Hon'ble High Court of Madras in *Malladi Drugs & Pharmaceuticals Ltd v. Union of India [2015 (323) ELT 489 (Mad.)]* and of the Hon'ble High Court of Punjab & Haryana in *Sandley*

Industries v. Union of India [2015 (326) ELT 256 (P&H)] that the interim stay of the Hon'ble Supreme Court in the challenge of Revenue to the decision of the Hon'ble High Court of Gujarat in *Indsur Global Ltd v. Union of India [2014 (310) ELT 833 (Guj.)]* does not override. It was further argued by Learned Counsel that the decisions of the Tribunal in *Sigma Solvents Pvt Ltd v. Commissioner of Central Excise, Thane – I [2018-TIOL-3858-CESTAT-MUM]* and of the Hon'ble High Court of Telangana in *Commissioner of Central Excise v. DRD Body Techs India Pvt Ltd [2022 (379) ELT 106 (Telangana)]* favoured that very submission.

4. According to Learned Counsel, the deposit of ₹ 17,00,000/- in 'account current' on 15^{th} December 2008 effectively rendered the alleged breach of rule 8(3A) of Central Excise Rules, 2002 to be a non-starter for which reliance was placed on the decision of the Hon'ble Supreme Court in *Commissioner of Income Tax-II v. Modipon Ltd [2017 (356) ELT 481 (SC)]*. It is also argued that payment of duty, along with interest and 25% of the penalty should have sufficed for termination of proceedings without issue of show cause notice under section 11A of Central Excise Act, 1944 and that invoking of extended period of limitation was not tenable as the appellant had, in good faith, brought the discrepancies before the central excise authorities besides complying by prompt payment of duty even though they were, themselves, not responsible for the

default. It was contended that the failure of the central excise authorities to scrutinize returns for remedial action, as well as the absence of any evidence of mis-declaration or suppression, immunized the appellant from fine and penalties.

5. *Per contra*, Learned Authorised Representative submitted that the provisions of rule 8(3A) are abundantly clear and that, notwithstanding the decision of the Hon'ble High Court of Gujarat in *re Indsur Global Ltd*, several decisions of the Tribunal, including that in *RV Refractories v. Commissioner of Central Excise, Chennai-II [2018-TIOL-1408-CESTAT-MAD],* had reverted the matter back to lower authorities to await the outcome of proceedings before the Hon'ble Supreme Court. It was also submitted that discharge of duty liability cannot be said to have occurred till 'account current' was debited and balance therein did not suffice as payment of duty. It was further argued that the claim of the appellant to be in ignorance of the alleged fraud perpetuated by the erstwhile owners is not acceptable as they had taken over a 'going concern' and therefore, could not have been oblivious of the deficiency.

6. Having considered the rival submissions, it would appear that the provisions of rule 8 of Central Excise Rules, 2002, as prevalent in September and October 2008, had been breached and that the appellant herein upon being aware of the breach had not made good

the deficiency immediately but awaited the report of audit in 2009. On the surface, it would appear that the discharge of duty liability in November 2009 did not suffice to restore the privilege of clearance of goods by debit of CENVAT credit account as the appellant continued to be in breach for the period till then. It is not recorded anywhere that the debit had ceased at any stage before surrender of the registration certificate in December 2010. Nonetheless, neither the decision of the Hon’ble High Court of Gujarat in *re Indsur Global Ltd* nor the subsequent decisions of the Tribunal on confirmation of duty liability in the face of pendency of the matter before the Hon’ble Supreme Court be overlooked by us.

7. At the same time, we are inclined to take note of the developments between the takeover of the undertaking in November 2008 leading to subsequent closure including addition in the ‘account current’ with no record of the same having been refunded to appellant thereafter. It would also appear that the plea of the appellant on incorrectness of demand under section 11A of Central Excise Act, 1944 beyond the normal period as well as the drawing of attention of central excise authorities to the deficiency in the returns had been ignored as is evident from the finding of the adjudicating authority that the memorandum of understanding (MoU) between the erstwhile management and the appellant, which was relevant, had not been furnished. Considering the totality of the circumstances and the

peculiar facts of operation of the manufacturing facility for limited period under the new management, such cursory disposal of the plea against invoking of the extended period of limitation does not, in our opinion, appear to be just.

8. To remedy these deficiencies, it would be necessary for the adjudicating authority to take stock of these facts and circumstances noted *supra*, to enable which it would be appropriate to set aside the impugned order and remand the matter back to the adjudicating authority. Needless to say, it shall be the responsibility of the appellant herein to place all relevant records noted by us *supra* before the adjudicating authority for determination of liability and detriment in accordance with law, as enacted, and judicially determined.

9. Appeal is accordingly disposed off.

(Order pronounced in the open court on 20/01/2023)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*