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

Excise Appeal No.86639 of 2013

(Arising out of Order-in-Original No.06/CEX/2013 dated 24.01.2013 passed by Commissioner of Central Excise, Customs & Service Tax, Nashik)

Commissioner of Central Excise & Customs - Nashik **Appellant**

Kendriya Rajaswa Bhavan, Gadkari Chowk,

Nashik-422 002.

Vs.

M/s. SND Iron Pvt. Ltd. **Respondent**

Plot No. 144-145, Sinnar-Shirdi Road, Musalgaon,

Sinnar, Dist. Nashik.

Excise Appeal No.86796 & 86797 of 2013

(Arising out of Order-in-Original No. 06/CEX/2013 dated 24.01.2013 passed by Commissioner of Central Excise, Customs& Service Tax, Nashik)

Charanjit Paul Jindal **Appellant**

Plot No. 144-145, Sinnar-Shirdi Road, Musalgaon,

Sinnar, Nashik.

Abey Kumar Mohanlal Goyal **Appellant**

Plot No. 144-145, Sinnar-Shirdi Road, Musalgaon,

Sinnar, Nashik.

Vs.

Commissioner of Central Excise & Customs - Nashik **Appellant**

Kendriya Rajaswa Bhavan, Gadkari Chowk,

Nashik-422 002.

Appearance:

Shri Amrendra Kumar Jha, Deputy Commissioner , Authorized Representative for the Revenue

None, for the Appellant in other than revenue appeal

CORAM:

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

Date of Hearing: 31.03.2023
Date of Decision:31.03.2023

FINAL ORDER NO. 85789-85791/2023

PER: SANJIV SRIVASTAVA

This appeal is directed against order-in-original no. 06/CEX/2013 dated 24.01.2013. By the impugned order held as follows:

'(i) I hereby confirm the demand of Rs.1,76,55,000/-(Rupees One Crore Seventy Six Lakh Fifty Five thousand only) and order recovery thereof under proviso to Section 11A(1) of CEA, 1944 and under Section 11A(4) CEA, 1944 for the period w.e.f. 08-04-2011. The amount of Rs. 1,76,55,000/- paid by the assessee during investigation is appropriated against above demand.

(ii) I order recovery of interest under Section 11AB (Section 11AA w.e.f. 08-04-2011) of CEA, 1944 on the above amount. The interest of Rs. 11,54,875/- paid by the assessee against defaulted amount is appropriated.

(iii) Under Section 11AC of CEA, 1944, I impose penalty of Rs.1,76,55,000/- on the assessee. Assessee should note that as per first proviso to Section 11AC of CEA, 1944, if the duty as confirmed by this order and the interest payable thereon are paid within thirty days from the date of receipt of this order, the amount of penalty imposed under Section 11AC liable to be paid by them shall be twenty five per cent of the duty confirmed provided the reduced penalty is also paid within 30 days of receipt of this order.

(iv) I drop the proposal for disallowing credit of Rs.80,99,532/- However I confirm the demand of Rs. 80,99,532/- under proviso to Section 11A(1) (Section 11A(4) w.e.f 08-04-2011) and hold that above duty stands paid by the assessee by utilization of cenvat credit on 5.10.2011.

(v) I order recovery of interest under Section 11AB (Section 11AA w.e.f. 08-04-2011) of CEA, 1944 on the above amount of Rs. 80,99,532/-. The interest is to be calculated from the date of each clearance till 5.10.2011.

(vi) I impose a penalty of Rs.5000/- on the assessee under Rule 27 of Central Excise Rules, 2002.

(vii) Under Rule 25(1) of CER, 2002, I impose penalty of Rs. 15,00,000/-(Rupees Fifteen lakhs) each on both the Directors viz. Shri Abey Kumar Mohanlal Goyal (noticee no1), and Shri Charnjit Paul Jindal (noticee no2).'

2.1 Appellant is engaged in manufacture of excisable goods falling under chapter 72 of the Central Excise Tariff Act, 1985. They are also availing Cenvat credit as admissible to them.

2.2 It was observed that the appellant defaulted in paying Central Excise duty on monthly basis as per Rule 8 of Central Excise Rules, 2002 for the month of June 2010 and October 2010 to April 2011. This default happen due to dishonor of some of their cheques by the bank. Appellant mentioned fictitious GAR-7 challan number on the ER-1 Returns filed by them. Total default for this period was Rs.1,76,55,000/- which was recovered subsequently on various dates during months of April, May, July, August and September, 2011 along with interest of Rs. 11,54,875/- which was entirely paid on 5.10.2011.

2.2 As per Rule 8(3A) of Central Excise Rules, 2002 during the period of default appellant was required to pay the duty on each consignment at the time of removal without utilizing the Cenvat credit from month of August-2010 which was not done. The assesse utilized the Cenvat credit of Rs. 80,99,532/- for payment of duty.

2.3 Alleging the contravention of Rule 8 (3A) a Show cause notice dated 12.03.2012 was issued to the assesse and both the director Shri. Abey Kumar Mohanlal Goyal and Shri.Charanjit Paul Jindal asking them to show cause as to why:-

'i) Central Excise duty of Rs. 1,76,55,000/- not paid by them on the clearances of goods as mentioned in para 4,5 & 6 of SCN should not be demanded & recovered from them under the provisions of Rule 8 of CER, 2002 read with proviso to then Section 11A(1) of CEA, 1944 and now Section 11A(4) of CEA, 1944 w.e.f. 08-04-2011. Further, as to why the amount of Rs. 1,76,55,000/- paid by the said assessee should not appropriated against such demand.

ii) Cenvat credit of Rs. 80,99,532/- wrongly utilized by the assessee for the clearances of goods during August-2010 to April-2011 in contravention of the provisions of Rule 8(3A) of CER, 2002 should not be disallowed and the said amount of duty should not be recovered in account current i.e. from PLA account under the provisions of Rule 8(3A) of CER, 2002 read with proviso to then Section 11A(1) of CEA, 1944 and now Section 11A(4) of CEA, 1944 w.e.f 08-04-2011.

iii) Interest should not be charged and recovered from them under provisions of Section 11AB (Section 11AA w.e.f. 08-04-2011) of CEA, 1944 and the amount of Rs. 8,42,540/- paid by the assessee should not be appropriated against such demand of interest.

iv) Penalty should not imposed on them under the provisions of Section 11AC of CEA, 1944 for intentionally misleading the department by willfully mis- stating the facts with intent to evade the Central Excise duty.

The show cause notice also proposed imposition of penalty under Rule 26 (1) of CER, 2002 on both the Directors.'

2.4 The show cause has been adjudicated by the commissioner as per the impugned order.

2.5 Aggrieved by the penalty imposed as per the impugned order both the directors of the company have filed appeals.

2.6 Revenue has also filed an appeal with following question of question of law

'The demand of Rs. 80,99,532/- should not have been ordered for recovery through PLA/Challan/Cash only from M/s. SND Iron Pvt. Ltd., Sinnar, Nashik (assesse) in terms of Rule 8(3A) of the Central excise Rules, 2002 during the period of default i.e. for the period June 2010 and Oct. 2010 to April 2011 (upto 18.04.2011) and the assesse be allowed to take re-credit of equivalent amount debited in Cenvat credit account earlier.'

3.1 The matter was listed on 31.03.2013. Director Shri. Abey Kumar Mohanlal Goyal (E/86797/2013) and Shri.Charanjit Paul Jindal (E/86796/2013) were absent and the notice sent to them has been returned back with postal endorsement **“Addressee Left”**. It appears that both these appellants are not interested in pursuing their appeals. In terms of Rule 20 of Central Excise Procedures Rule, 1982 we dismiss their appeals for non-prosecution.

3.2 Appeal No. E/86639/2013 filed by revenue was heard on merits as Authorized representative was present. Learned AR reiterates the grounds taken in the appeal.

4.1 The only question which revenue has been raised in the appeal filed has been reproduced earlier.

4.2 The Rule 8(3A) in terms of which revenue has asked for recovery of the amounts paid by the appellant from their cenvat credit account have been quashed by the Hon’ble High Court of Gujarat in case of Indsur Global [2014 (310) E.L.T. 833 (Guj.)] observing as follows:

18. In exercise of powers conferred under Section 37 of the Central Excise Act, 1944, the Central Government has framed the Central Excise Rules, 2002. Rule 4 of the said Rules pertains to duty payable on removal. Sub-rule (1) thereof provides that every person who produces or manufactures any excisable goods, or who stores such goods in a warehouse, shall pay the duty leviable on such goods in the manner provided in Rule 8 or under any other law, and no excisable goods, on which any duty is payable, shall be removed without payment of duty from any place where they are produced or manufactured or from a warehouse unless otherwise provided. Rule 5 of the Central Excise Rules, 2002, pertains to date of determination of duty and tariff valuation. Sub-rule (1) thereof provides the rate of duty or tariff value applicable to any excisable goods other than khandsari molasses shall be the rate or value in force on the date when such goods are removed from a factory or a warehouse, as the case may be. As per rule 6, an assessee has to himself assess the duty payable on any excisable goods. As per Rule 7, if an assessee is unable to determine the value of excisable goods or determine the rate of duty applicable, he may request the Assistant Commissioner of Central Excise or the Deputy Commissioner in writing giving reasons for payment of duty on provisional basis upon which such authority would make an order allowing payment on provisional basis at such rate or on such value as may be specified.

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.

21. From the statutory provisions, it can be seen that ordinarily as per Rule 4, duty on excisable goods is payable on removal. Such payment is to be made in the manner prescribed in Rule 8. Sub-rule (1) of Rule 8 provides for a facility of deferred payment of excise duty. Instead of an assessee paying duty on removal of each consignment, the duty is to be paid for the entire month by the due date which is the 6th day of the following month if the duty is paid electronically through internet banking and in all other cases, it would be the 5th day of the following month. It is in this context, therefore, under sub-rule (2) of Rule 8, it is provided that the duty of excise shall be deemed to have been paid for the purpose of the rules on the excisable goods removed in the manner provided under sub-rule (1) and the credit of such duty shall be allowed as provided under the rules. Combined reading of Rule 4 with Rules 8(1) and 8(2) of the Central Excise Rules would demonstrate that ordinarily excise duty is payable on removal. In terms of sub-rule (1) of Rule 8, deferment is granted by the Legislature and if duty is paid accordingly, as per sub-rule (2) of Rule 8, the same would be deemed to have been paid on removal and the assessee would be entitled to credit of such duty as allowed under any rule.

22. Sub-rule (3) of Rule 8 attaches a liability of paying interest on delayed payment of excise duty. Any assessee who fails to pay duty by the due date would be liable to pay *outstanding amount with interest at the rate specified by the Central Government under a notification. The period of computation of interest would be the first day after the due date till date of actual payment of the outstanding amount.*

23. As noted, the Cenvat Credit Rules, 2004 permit an assessee liable to pay excise duty to avail Cenvat credit for such purpose on various duties paid on the inputs which may either be raw material or capital goods in the manner provided in the said rules. In this context, sub-rule (3A) of Rule 8 makes two fold departure in case of an assessee who has been unable to pay the duty by the due date and such default continues for a further period of 30 days from the due date. If an assessee who was required to pay the entire months of excise duty by the 5th or 6th of the following month, does not do so for a further period of 30 days, the unpleasant consequences envisaged in sub-rule (3A) would follow. Such consequences would be that he would no longer enjoy the facility of payment of excise duty on monthly basis and he would have to clear each consignment on actual payment of duty and secondly that he would not be entitled to avail of Cenvat credit for such purpose.

27-11-2014

24. We may recall that the petitioner has challenged only that portion of sub-rule (3A) of Rule 8 which requires a defaulter to clear the finished product on payment of excise duty without availing the Cenvat credit. We may consider the petitioner's challenge to the vires of such rule in the background of the statutory scheme. Before doing so, however, we may examine the parameters on which a delegated legislation can be called in question. It is by now well settled that a legislation enacted by the Union or the State Legislature enjoys a presumption of constitutionality. Heavy burden is one who questions its constitutionality to establish the same through cogent materials. A reference in this respect can be made to a Constitution Bench decision of the Supreme Court in the case of State of Jammu & Kashmir v. Triloki Nath Khosa - AIR 1974 SC 1. It is also well settled that the principle of presumption of constitutionality also applies to a delegated legislation. In the case of St. Johns Teachers Training Institute v. Regional Director, National Council for Teacher Education - (2003) 3 SCC 321, it was observed that "it is also well settled that in considering the vires of subordinate legislation one should start with the presumption that it is intra vires and if it is open to two constructions, one of which would make it valid and other invalid, the Courts must adopt that construction which makes it valid....".

25. As held by the Supreme Court in the case of State of A.P v. McDowell & Co. - (1996) 3 SCC 709, a law made by the Parliament or the State Legislature can be struck down on two grounds only, namely, lack of legislative competence or violation of any of the fundamental rights guaranteed in part III of the Constitution or any other constitutional provisions. However, the subordinate legislation does not enjoy the same level of immunity from the court's scrutiny. In addition to the two grounds available for challenge to a legislation by the Parliament or the State Legislature, a delegated legislation can be struck down also on other grounds such as, that it is ultra vires the parent Act, the provisions are in conflict with the parent Act or that the same is unreasonable or wholly arbitrary or irrational. In the case of Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India - (1985) 1 SCC 641 = 1999 (110) E.L.T. 3 (S.C.), the Supreme Court observed as under :

"75. A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition it may also be questioned on the ground that it does not conform to the statute under which it is made. It may further be questioned on the ground that it is contrary to some other statute. That is because subordinate legislation must yield to plenary legislation. It may also be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary. In England, the Judges would say "Parliament never intended authority to make such rules. They are unreasonable and ultra vires". The present position of law bearing on the above point is stated by Diplock L. J. in Mixnam. Properties Ltd. v. Chertsey U. D. C. - (1964) 1 QB 214 thus :-

"The various grounds upon which subordinate legislation has sometimes been said to be void …………… can, I think, today be properly regarded as being particular applications of the general rule that subordinate legislation, to be valid, must be shown to be within the powers conferred by the statute. Thus the kind of unreasonableness which invalidates a bye-law is not the antonym of "reasonableness" in the sense of which that expression is used in the common law, but such manifest arbitrariness, injustice or partiality that a court would say : 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires….' If the courts can declare subordinate legislation to be invalid for 'uncertainty,' as distinct from unenforceable ……….this must be because

Parliament is to be presumed not to have intended to authorise the subordinate legislative authority to make changes in the existing law which are uncertain….."

xxxx

"77. In India arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. In India any enquiry into the vires of delegated legislation must be confined to the grounds on which plenary legislation may be questioned, to the ground that it is contrary to the statute under which it is made, to the ground that it is contrary to other statutory provisions or that it is so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution."

26. With these parameters in mind, we may consider the petitioner's ground for challenge. Adverting to the question of lack of power to frame such rule, we may notice that Section 37 of the Central Excise Act, 1944 is the rule making power contained in the said Act. Sub-section (1) thereof provides that the Central Government may make rules to carry into effect the purposes of the Act. Sub-section (2) of Section 37 lists the various purposes for which such rules may provide. It begins with the expression "in particular and without prejudice to the generality of the foregoing power, such rules may ---". Relevant clauses of sub-section (2) of Section 37, for our purpose, are the following :

"(ib) provide for the assessment and collection of duties of excise, the authorities by whom functions under this Act are to be discharged, the issue of notices requiring payment, the manner in which the duties shall be payable, and the recovery of duty not paid'

(ibb) provide for charging or payment of interest in the differential amount of duty which becomes payable or refundable upon finalisation of all or any class of provisional assessments;

xxxx

xxxx

(xiiia) provide for withdrawal of facilities or imposition of restrictions (including restrictions on utilisation of CENVAT credit) on manufacturer or exporter or suspension of registration of dealer, for dealing with evasion of duty or misuse of CENVAT credit;"

27. According to Shri Parikh, when clause (xiiia) of sub-section (2) of Section 37 circumscribes the rule making power in case of evasion of duty, the sub-ordinate *legislation cannot fall back on the general provisions of sub-section (1) of Section 37 and therefore, any power to frame sub-rule (3A) of Rule 8 must be seen to have been by necessary implication taken away. This contention, however, for various reasons cannot be accepted. Firstly clause (xiiia) was introduced in the statute with effect from 8-5-2010. Sub-rule (3A) of Rule 8 was introduced in the year 2006. No guidance, therefore, can be had from clause (xiiia) in the context of discretion of the power of the rule making authority under the delegated legislation. Further, quite apart from sub-section (1) of Section 37 itself giving sufficiently wide powers to the Central Government to frame rules to carry into effect the purposes of the Act, sub-section (2) of Section 37 further clarifies that the purposes enumerated in various clauses under the said sub-section are without prejudice to the generality of the powers flowing from sub-section (1). If, therefore, any rule is framed which would be otherwise within the legislative competence in view of the authority given to the Government under sub-section (1) to carry into effect the purposes of the Act, such rule cannot be targeted as being outside of a particular clause contained in sub-section (2) of Section 37. We must notice that Rule 8 and sub-rule (3A) thereof is not a charging provision. It is a mechanism for collection of tax already become due and payable. Had any new tax been levied or charge or penalty created under such rule, the question of falling back on the general power where specific provisions excluded, such a power would arise. Further, clause (ib) of sub-section (2) of Section 37 authorizes the Government to frame rules to provide for the assessment and collection of duties of excise, the authorities by whom functions under the Act would be discharged, the issue of notices requiring payment, the manner in which the duties shall be payable and the recovery of duty not paid. This clause thus gives ample power to the Government to make rules for providing a mechanism for assessment and calculation of duties of excise, the authorities who would carry out such functions, the manner of payment of duty and most importantly, recovery of duty not paid. The fact that sub-rule (3A) of Rule 8 provides for the mechanism of duty unpaid is beyond cavil. It is precisely when an assessee who was given the facility of deferring the payment of duty beyond the clearance has not been able to pay the same by the due date and further defaults by another 30 days thereafter that sub-rule (3A) of Rule 8 would apply. It enforces the recovery to be made thereafter in a particular manner. Very clearly, the said provision is not beyond the rule making power of the sub-ordinate legislature.*

28. The second contention of the petitioner that the provision creates a hostile discrimination treating equals as unequals needs to be rejected out of hand. Sub-rule (3A) of Rule 8 recognizes two distinct and different classes of assessees. As long as an assessee abides by the time-frame provided in sub-rule (1) of Rule 8 and pays the duty monthly on 5th or 6th day of the month for the previous month, he does not incur any further liability. It is only when he not only misses the crucial date but is unable to or chooses not to pay the duty for another 30 days that sub-rule (3A) of Rule 8 would apply. In such a case, the facility of monthly payment and adjustment of Cenvat credit is taken away. The fact that two sets of assessees form different and distinct class identifiable and differentiated by intelligible differentia cannot be disputed. In one class, we have those assessees who complied with the requirements of the rules and made payment of excise duty by the due date and the other class forms of those assessees who missed the due date by at least 30 days. If the Legislature, therefore, treats these two distinct classes differently, this would certainly not a case of hostile discrimination. An assessee who for whatever reasons is unable to pay the duty within the time prescribed by the statute cannot complain of being differently treated from those who fulfill the statutory requirements. The provisions contained in sub-rule (3A) have a purpose to achieve relatable to the class of assessees who failed to pay the duty in time is also equally clear. It is only when the condition of payment of duty by the 5th or the 6th day of month following the previous month of clearance is not fulfilled by an assessee that the stringent requirement of collection of duty on each consignment and withdrawal of the facility of Cenvat credit follows. These are undoubtedly stringent provisions provided to deal with the class of assessees who are unable to pay the duty in time.

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

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

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

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

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

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

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

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

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

31. This extreme hardship is not the only element of unreasonableness of this provision. It essentially prevents an assessee from availing Cenvat credit of the duty already paid and thereby suspends, if not withdraws, his right to take credit of the duty already paid to the Government. It is true that such a provision is made because of peculiar circumstances the assessee lands himself in. However, when such provision makes no distinction between a willful defaulter and the rest, we must view its reasonableness in the background of an ordinary assessee who would be hit and targeted by such a provision. As held by the Supreme Court in the case of Eicher Motors Ltd. (supra) an assessee would be entitled to take credit of input already used by the manufacturer in the final product. In the said case, the Supreme Court was dealing with Rule 57F which was introduced in the Central Excise Rules, 1944 under which credit lying unutilized in the Modvat credit account of an assessee on 16th March, 1995 would lapse. Such provision was questioned. The Supreme Court held that since excess credit could not have been utilized for payment of the excise duty on any *other product, the unutilised credit was getting accumulated. For the utilization of the credit, all vestitive facts or necessary incidents thereto had taken place prior to 16-3-1995. Thus the assessees became entitled to take the credit of the input instantaneously once the input is received in the factory of the manufacturer of the final product and the final product which had been cleared from the factory was sought to be lapsed. The Supreme Court struck down the rule further observing that if on the inputs the assessee had already paid the taxes on the basis that when the goods are utilized in the manufacture of further products as inputs thereto then the tax on those goods gets adjusted which are finished subsequently. Thus a right had accrued to the assessee on the date when they paid the tax on the raw materials or the inputs and that right would continue until the facility available thereto gets worked out or until those goods existed. We may also recall that in the case of Dai Ichi Karkaria Ltd. (supra) it was reiterated that a manufacture obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable produce immediately it makes the requisite declaration and obtains an acknowledgment thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product.*

32. As held by the Supreme Court in the case of Chantamanrao (supra), the phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(g) and the social control permitted by Clause (6) of Article 19, it must be held to be wanting in that quality.

33. In the case of Om Kumar (supra), the Supreme Court recognized the applicability of the principle of proportionality in judging the validity of a provision on the touchstone of reasonableness under Article 14 of the Constitution. It was observed :

"53. Now under Art. 19(2) to (6), restrictions on fundamental freedoms can be imposed only by legislation. In cases where such legislation is made and the restrictions are reasonable yet, if the concerned statute permitted the administrative authorities to exercise power or discretion while imposing restrictions in individual situations, question frequently arises whether a wrong choice is made by the Administrator for imposing restriction or whether the Administrator has not properly balanced the fundamental right and the need for the restriction or whether he has imposed the least of the restrictions or

the reasonable quantum of restriction etc. In such cases, the administrative action in our country, in our view, has to be tested on the principle of 'proportionality,' just as it is done in the case of the main legislation. This, in fact, is being done by our Courts."

34. By no stretch of imagination, the restriction imposed under sub-rule (3A) of Rule 8 to the extend it requires a defaulter irrespective of its extent, nature and reason for the default to pay the excise duty without availing Cenvat credit to his account can be stated to be a reasonable restriction. It leads to a situation so harsh and a position so unenviable that it would be virtually impossible for an assessee who is trapped in the whirlpool to get out of his financial difficulties. This is quite apart from being wholly reasonable, being irrational and arbitrary and therefore, violative of Article 14 of the Constitution. It prevents him from availing credit of duty already paid by him. It also is a serious affront to his right to carry on his trade or business guaranteed under Article 19(1)(g) of the Constitution. On both the counts, therefore, that portion of sub-rule (3A) of rule must fail.

35. The situation can be looked at slightly different angle. With or without the provisions of sub-rule (3A), liability to pay interest for the default period as per sub-rule (3) of Rule 8 continues. Sub-rule (3A) is basically a mechanism for stringent recovery and does not create a new liability unless this mechanism itself is breached. In such a mechanism to provide for withdrawal of CENVAT credit facility for paying the duty borders to creating a penalty. Insisting on an assessee in default to clear all consignments on payment of duty would be a perfectly legitimate measure. However, to insist that he must pay such duty without utilising CENVAT credit which is nothing but the duty on various inputs already paid by him would be a restriction so harsh and out of proportion to the aim sought to be achieved, the same must be held to be wholly arbitrary and unreasonable. We may recall, the delegated legislature in its wisdom now dismantled this entire mechanism and instead has provided for penalty at the rate of 1% per month on delayed payment of duty.

36. In the result, the condition contained in sub-rule (3A) of Rule 8 for payment of duty without utilizing the Cenvat credit till an assessee pays the outstanding amount including interest is declared unconstitutional. Therefore, the portion "without utilizing the Cenvat credit" of sub-rule (3A) of Rule 8 of the Central Excise Rules, 2002, shall be rendered invalid.

4.3 Hon'ble Bombay High Court has in case in case of Nashik Forge [2019 (368) ELT 20 (Bom)] held 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-existant. 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."

4.4 In view of above decisions of the Hon'ble Bombay High Court and Hon'ble High Court of Gujarat, we don't find any merits in the appeal filed by the revenue.

5.1 Appeal no. 86796 and 86797 of 2013 are dismissed for non- prosecution under Rule 20 of CESTAT Procedures Rule, 1982.

5.2 Appeal No E/86639/2013 is dismissed on merits.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

kpw