

(2014) 12 GUJ CK 0016
In the Gujarat High Court

Case No : Special Civil Application No. 12357 of 2008

Precision Fasteners Ltd.

APPELLANT

Vs

Commissioner of Central Excise

RESPONDENT

Date of Decision : 04-12-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 11AC
Constitution of India, 1950 — Article 14, 19, 19(1)(g), 19(2)

Citation : (2015) 316 ELT 595

Hon'ble Judges : V.M. Pancholi, J; Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Devan Parikh, Advocate for the Appellant; R.J. Oza, Advocate for the Respondent

Judgement

Akil Abdul Hamid Kureshi, J.—The petitioners have challenged the vires of Sub-rule (3A) of Rule 8 of the Central Excise Rules, 2002. They have also challenged the communications dated 09.09.2008 and 12.09.2008 as at Annexures - H and I respectively, under which the department raised the duty demand from the petitioners relying on such statutory provision. The petitioners have further challenged a show-cause notice as at Annexure-JJJ, under which the adjudicating authority proposed to levy excise duty of Rs. 1,06,26,770/- with interest and penalty.

2. Sub-rule (3A) of Rule 8 of the Central Excise Rules, 2002, pertains to a situation where an assessee has not paid monthly excise duty by due date and has further defaulted by period of 30 days thereafter. Under such circumstances, Sub-rule (3A) of Rule 8 of the Central Excise Rules, 2002, provides that the assessee would pay excise duty on every individual clearance and that such payment would be without availing Cenvat Credit available in the accounts of the assessee. It is undisputed that the duty demands under challenge as well as the impugned show cause notice arise out of this background and the department relies primarily on Sub-rule (3A) of Rule 8 of the Central Excise Rules, 2002.

3. In a judgment dated 26-27/11/2014 in Special Civil Application No. 3344 of 2014 in case of Indsur Global Ltd. v. Union of India, this Court considered a similar challenge of the petitioner to the vires of Sub-rule (3A) of Rule 8 of the Central Excise Rules, 2002. Portion of the said rule which provides that the assessee would clear the goods on payment of excise duty "without utilizing cenvat credit" to the extent the group of words indicated in the inverted comma were declared ultra vires and unconstitutional. It was observed as under:

"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 assessee 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 assessee 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 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. When the statutory basis for issuance of a show-cause notice and raising tax demand is knock 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.