

(2014) 12 GUJ CK 0041
In the Gujarat High Court

Case No : Special Civil Application No. 1177 of 2011

Shreeji Surface Coatings Pvt. Ltd.

APPELLANT

Vs

Union of India

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) 320 ELT 764

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

Bench : Division Bench

Advocate : Paresh M. Dave, Advocate for the Appellant; Devang Vyas and Kalpesh N. Shastri, Advocate for the Respondent

Judgement

Akil Abdul Hamid Kureshi, J.—The petitioners have challenged the order dated 27.07.2010 passed by the adjudicating authority as also an appellate order dated 21.12.2010 passed by the Commissioner (Appeals) confirming the order in original.

2. Brief facts are as under:

2.1. The petitioners are engaged in manufacture of excisable goods. As per Rule 8(1) of the Central Excise Rules, 2002, the petitioners are required to pay excise duty on clearance of such finished products on 5th or 6th day of the following month dependent on the mode of payment of the duty. As per Sub-rule (3) of Rule 8, if the assessee fails to pay the amount of duty by due date, it would invite interest liability. Sub-rule (3A) of Rule 8 provides that in case an assessee, who defaults in payment of such duty beyond 30 days from the due date, would have to clear the goods on actual payment of duty and that too without availing Cenvat Credit. In other words, in case of such defaulters the facility of monthly payment of excise duty is withdrawn and the clearance to be made on actual payment of duty would have to be without availing Cenvat Credit. Sub-rule (3A) of Rule 8 further provides that in case of any default to comply with this

condition, it shall be deemed that such goods have been cleared without payment of duty and the consequences and penalties as provided in these Rules would follow.

2.2. On one occasion, the petitioners were required to pay interest of Rs. 11,400/- on delayed payment of excise duty. The petitioners paid such interest, however, by utilizing the Cenvat Credit. The department holding a belief that until such interest of delayed payment of due was paid in cash, all subsequent clearances by utilizing Cenvat Credit would be irregular. Thus, for the subsequent period, though the petitioners did pay the excise duty of Rs. 19,16,737/- but did so by utilizing Cenvat Credit, according to the department, this was also irregular and tainted in view of Sub-rule (3A) of Rule 8 of the Central Excise Rules, 2002. On such premise, the adjudicating authority issued a show-cause notice dated 03.03.2010 under which the petitioner has been called upon to show-cause as to why the duty of Rs. 19,16,737/- paid through current account be not demanded and recovered through personal ledger account as per Sub-rule (3A) of Rule 8 of the Central Excise Rules, 2002 with interest and penalties. The petitioners' opposition to the said proposal was repealed. The adjudicating authority passed the impugned order dated 27.07.2010 confirming duty demand with interest. He also imposed penalties. Such order was challenged before the appellate authority, who by his order dated 21.12.2010, dismissed the appeal.

3. The validity of Sub-rule (3A) of Rule 8 of Central Excise Rules, 2002 came up for consideration before this Court in case of Indsur Global Ltd. v. Union of India, wherein, in a judgment dated 26-27/11/2014 in Special Civil Application No. 3344 of 2014, 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 entire show-cause notice, order in original and appellate order are based on Sub-rule (3A) of Rule 8, the portion of which came to be struck down, such orders cannot survive. We have narrated facts only to demonstrate that the facts of the present case squarely fall within the portion of the Rule which was declared as ultra vires by the Court. It was only because the petitioner paid interest of barely about Rs. 12,000/- through Cenvat Credit instead of paying it in cash, their all subsequent clearances were stigmatized. This was solely relying on the portion of Sub-rule (3A) of Rule 8, which required that the future clearances of a defaulter must be without utilization of the Cenvat Credit.

5. Under the circumstances, impugned orders are set aside. Petition is allowed. Rule is made absolute.