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Rule 8 (3A) of CE Rules, 2002 – Is it all pervasive?

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The decision of the Hon'ble Tribunal in the case of Godrej Harshey Vs CCE – (Citation) is sure to send shockwaves among the entire manufacturing community. As the counsel who has argued the case, with utmost respect to the Hon'ble Tribunal, let me analyse the consequence of this judgement.

As per Rule 8 (1) of the Central Excise Rules, 2002, the duty liability for the month has to be paid on or before 6th (in case of online payment) or 5th of the succeeding month. As per sub rule (3A) thereof, if there is any failure to pay the duty within the due date and if the duty is not paid even after 30 days from the due date, the consequences under the said rule, viz., forfeiture of facility to utilise cenvat credit and daily payment of duty in cash would follow.

For ready reference, Rule 8 *ibid*, as it stands today, is reproduced below:

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 :

Provided further that where an assessee is eligible to avail of the exemption under a notification based on the value of clearances in a financial year, the duty on goods cleared during a quarter of the financial year shall be paid by the 6th day of the month following that quarter, if the duty is paid electronically through internet banking and in any other case, by the 5th day of the month following that quarter, except in case of goods removed during the last quarter, starting from the 1st day of January and ending on the 31st day of March, for which the duty shall be paid by the 31st day of March.

Explanation-1. - For the purposes of this proviso, it is hereby clarified that an assessee shall be eligible, if his aggregate value of clearances of all excisable goods for home consumption in the preceding financial year, computed in the manner specified in the said notification, did not exceed rupees four hundred lakhs.

Explanation-2. - The manner of payment as specified in this proviso shall be available to the assessee for the whole of the financial year.

Provided also that an assessee, who has paid [total duty of Rs. ten lakh or more including the amount of duty paid by utilization of CENVAT credit in the preceding financial year], shall thereafter, deposit the duty electronically through internet banking.

Explanation. - For the purposes of this rule,-

(a) the duty liability shall be deemed to have been discharged only if the amount payable is credited to the account of the Central Government by the specified date;

(b) if the assessee deposits the duty by cheque, the date of presentation of the cheque in the bank designated by the Central Board of Excise and Customs for this purpose shall be deemed to be the date on which the duty has been paid subject to realization of that cheque.

(1A) Notwithstanding anything contained in sub-rule (1), the duty on the goods removed from the factory or the warehouse, in the State of Gujarat, during the second fortnight of February, 2002 and the month of March, 2002 shall be paid by the 31st March, 2002 :

Provided that where an assessee in the State of Gujarat is availing of the exemption under a notification based on the value of clearances in a financial year, the duty on goods cleared during the month of February, 2002 shall be paid by the 31st March, 2002.

Explanation. - For removal of doubts, it is hereby clarified that the duty liability shall be deemed to have been discharged only if the amount payable is credited to the account of the Central Government by the specified date.]

(2) 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 duty allowed, as provided by or under any rule.

(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 11AB 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.]

(3A) 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.

(4) The provisions of section 11 of the Act shall be applicable for recovery of the duty as assessed under rule 6 and the interest under sub-rule (3) in the same manner as they are applicable for recovery of any duty or other sums payable to the Central Government.

Explanation.- For the purposes of this rule, the expressions 'duty' or 'duty of excise' shall also include the amount payable in terms of the CENVAT Credit Rules, 2004.

Similar provisions existed in the previous rules also and for ready reference, 173 G (1) (e) of the then Central Excise Rules, 1944 and Rule 8 (4) of the then Central Excise Rules, 2001 are reproduced below:

Rule 173 G (1) (e) of the Central Excise Rules, 1944.

If the manufacturer defaults on account of any of the following reasons, namely :-
full payment of any one instalment is discharged beyond a (i) period of thirty days from the date on which the instalment was due in a financial year, or the due date on which full payment of instalments are to be (ii) made is violated for the third time in a financial year, whether in succession or otherwise,

then the manufacturer shall forfeit the facility to pay the dues in instalments under this sub-rule for a period of two months, starting from the date of communication of an order passed by the proper officer in this regard and during this period the manufacturer shall be required to pay excise duty for each consignment by debit to the account current referred to in clause (b) and in the event of any such failure it will be deemed as if such goods have been cleared without payment of duty and the consequences and penalties as provided in the Central Excise Rules shall follow.";

Rule 8 (4) of the Central Excise Rules, 2001

(4) If the assessee defaults, -

(i) in payment of any one instalment and the same is discharged beyond a period of thirty days from the date on which the instalment was due in a financial year, or

(ii) in payment of instalment by the due date in a financial year, whether in succession or otherwise,

then, the assessee shall forfeit the facility to pay the dues in instalments under this rule for a period of two months, starting from the date of communication of the order passed by the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, in this regard or till such date on which all dues are paid, whichever is later, and during this period the assessee shall be required to pay excise duty for each consignment by debit to the account current 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.

When Central Excise Rules, 2002 was introduced, Rule 8 thereof provided for fortnightly payment of duty, as it existed under the 1944 rules and 2001 rules.

Sub rule (4) of Rule 8 was also worded as

If the assessee defaults,-

(i) in payment of any one instalment and the same is discharged beyond a period of thirty days from the date on which the instalment was due in a financial year, or

(ii) in payment of instalment by the due date for the third time in a financial year, whether in succession or otherwise,

then, the assessee shall forfeit the facility to pay the dues in instalments under this rule for a period of two months, starting from the date of communication of the order passed by the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, in this regard or till such date on which all dues are paid, whichever is later, and during this period the assessee shall be required to pay excise duty for each consignment by debit to the account current 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.

But, when monthly payment of duty was introduced with effect from 01.04.2003, the provisions dealing with default were modified as below.

If the assessee fails to pay the amount of duty by the due date, he shall be liable to pay the outstanding amount along with an interest at the rate of two per cent. per month or rupees one thousand per day, whichever is higher, for the period starting with the first day after due date till the date of actual payment of the outstanding amount:

Provided that the total amount of interest payable in terms of this sub-rule shall not exceed the amount of duty which has not been paid by due date:

Provided further that till such time the amount of duty outstanding and the interest payable thereon are not paid, it shall be deemed that the goods in question in respect of which the duty and interest are outstanding, have been cleared without payment of duty and the consequences and the penalties as provided in these rules shall follow.

This provision, whereby interest of 2 % p.m was prescribed was challenged before the Hon'ble High Court of Rajasthan in the case of Lucid Colloids Limited Vs UOI, reported in 2006 (200) ELT 377, and the said rules were held to be ultra vires Section 11 AB of the Central Excise Act, prescribing the range of interest chargeable.

Hence, a new sub rule (3A) was introduced in Rule 8, vide Notification No. 17/2005 CE NT Dated 31.03.2005, which is reproduced above.

The question before the Hon'ble Tribunal was whether the provisions of Rule 8 (3A) would apply only in case of failure to pay the entire assessed duty for a month or even if there is any short payment in any month, which was noticed after some period, the provisions of Rule 8 (3A) would operate till the short payment was made good.

The Hon'ble Tribunal has observed that the language of the present rule 8 (3A) does not suggest that the same shall apply only when the entire assessed duty is not paid within the due date and even any short payment, non payment, where the duty should have been paid by the due date would also invite the vires of Rule 8 (3A). The Hon'ble Tribunal has observed that perhaps by amending the provisions, the Government would have intended to make the provisions more stringent.

This decision will have far reaching consequences for the entire industry. Whenever any short payment was noticed, due to any reason, be it clerical omission or dispute on valuation, etc. the department can also allege that since the duty arising out of any such reason has not been paid within the due date, the assesses could not have at all utilised cenvat credit and would demand duty payment in cash. As in the case of Godrej Harshey, even a non payment / short payment of paltry amount of duty would lead to crores of demand in PLA. The department can invoke Rule 8 (3A) in each and every show cause notice issued by it, alleging that since the duty demand proposed in the notice has not been paid within the due date, the assesses are liable forfeiture of cenvat credit and daily payment of duty, till such duty is paid. This will lead to total chaos, where crores of amount paid by way of utilisation of cenvat credit would once again be demanded in cash and also demanding interest till then. All clearances effected during the period would be deemed as non duty paid and penalties would also be imposed.

It is strongly believed that the same cannot at all be the intention of the legislature. Section 11 A of the CE Act, 1944 deals with any short payment / non payment / short levy / non levy of duty and attendant penal provisions either under Section 11 AC of the Act or under various provisions of the Central Excise Rules, like Rule 25, 27 would be attracted in such case. The pre existing provisions have clearly laid down that the penal measures of forfeiture of cenvat credit and daily payment of duty would arise only when "full payment of any one instalment" or "payment of any one instalment". In the absence of such clarity in the present Rule 8 (3A) on cannot conclude that it is the intention of the legislature to make the provisions applicable for all cases of short payment of duty.

As per Rule 6 of the CE Rules, 2002, the assessee has to assess the duty payable on the goods removed. Rule 8 prescribes the manner of payment of such duty assessed by the assessee. If there is any default in payment of such assessed duty, then the penal consequences under Rule 8 (3A) would follow. But if any duty has escaped such assessment, leading to short levy, short payment, non levy or non payment, the consequences therefor are provided under Section 11 A of the Act for recovery of such duty and penal provisions under Section 11 AC, Rules 25 of the CE Rules, 2002 and Rule 8 (3A) cannot be invoked in such cases.

Before parting...

It is hoped that the disastrous consequences of the above decision would not at all have been the intention of the Government. It is fervently prayed that the Government, which occasionally uses its power to legislate retrospectively to remove the unintended consequences certain decisions, should use such power in this issue and make the intention of applicability of the provisions of Rule 8 (3A), only when the entire quantum of assessed duty is not paid within the due date, amply clear, in the ensuing budget.

