Indsur Global Ltd. Vs Union of India

Court: Gujarat High Court

Date of Decision: Nov. 27, 2014

Acts Referred: Central Excises and Salt Act, 1944 â€" Section 11A, 11AA, 11AC, 35, 35(1)
Constitution of India, 1950 â€" Article 114, 14, 16, 19, 19(1)(g)

Citation: (2014) 310 ELT 833 : (2015) 33 GSTR 103

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

Bench: Division Bench

Advocate: Deven Parikh, Sr. Advocate, Hasit Dilip Dave and Mihir Pathak, Advocate for the Appellant; Devang Vyas, Asstt. Solicitor General, R.J. Oza, Sr. Advocate and Y.N. Ravani, Advocate for the Respondent

Judgement

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Akil Abdul Hamid Kureshi, J.
In this petition, the petitioner has challenged the constitutionality of rule 8(3A) of the Central Excise Rules

2002 insofar as the said rule prohibits an assessee from utilising cenvat credit for payment of excise duty. The petitioner has also prayed for

quashing the order dated 27.2.2009 passed by the adjudicating authority confirming the demand of central excise duty of Rs. 42,86,273/- with

interest and also imposing penalty. Brief facts are as under:

2. The petitioner is a company registered under the Companies Act. The petitioner is engaged in the manufacturing of spheroidal graphite which we

are informed is in the nature of iron castings. As per rule 8(3) of the Central Excise Rules 2002, the petitioner was required to pay excise duty on

clearance of the goods on monthly basis. For the months of August 2007 to November 2007, the petitioner did not pay such duty by the last date

permitted under the said rule. Under such circumstances, by virtue of rule 8(3A) of the Central Excise Rules, 2002, the petitioner was required to

clear the future consignments upon actual payment of duty without utilizing cenvat credit till the outstanding duty with interest was fully cleared. We

are informed that this inability of the petitioner to pay full duty by the due date continued for some time thereafter also, however, the unpaid duty

was only part of the total duty liability of the petitioner for the period under consideration on each occasion. We are further informed that the

petitioner cleared all its due with interest by December 2008. It was, however, clarified that during this period, the petitioner did utilize the cenvat

credit for payment of excise duty.

3. For the defaults in the payment of duty by the due date and utilization of cenvat credit for payment of duty thereafter, though prohibited under

rule 8(3A) of the Central Excise Rules 2002, the competent authority of the Central Excise Department issued show cause notices to the petitioner

for the above mentioned period. These show cause notices culminated into the order dated 27.2.2009 passed by the Additional Commissioner of

Central Excise, Vadodara. He held that the assessee had defaulted in payment of central excise duty on the goods cleared and had not made the

payments in the manner prescribed under rule 8(1) read with rule 8(3A) of the Central Excise Rules, 2002. He held that the duty paid by the

petitioner from the cenvat credit was not in terms of rule 8(3A) of the Central Excise Rules 2002. The petitioner''s defence of precarious financial

condition was not accepted. It was under such circumstances that the adjudicating authority confirmed the duty demand with interest and penalty.

For the remaining periods of defaults, further show cause notices were issued. Proceedings arising out of such show cause notices are pending at

different stages.

4. Against such order, the petitioner preferred appeal to the Commissioner of Central Excise, who dismissed the appeal by his order dated 23rd

November 2009 on the short ground that the appeal was filed 173 days beyond the period of limitation prescribed. As per the statute, the

appellate authority had power to condone the delay upto 60 days and no more. Thus the extent of delay was beyond the Commissioner''s power

to condone.

5. Against such order of the Commissioner, the petitioner preferred further appeal before the Customs, Excise and Service Tax Appellate Tribunal

(''the Tribunal'' for short). The Tribunal by its order dated 11.4.2013 dismissed the appeal refusing to condone the delay of 3 years and 7 days

caused in preferring such appeal before the Tribunal. The Tribunal found no justifiable reason for such delay. The Tribunal also noted that the

appeal before the Commissioner itself was beyond the period of limitation by 173 days which period the Commissioner in terms of section 35(1)

of the Central Excise Act, 1944 could not have condoned and had therefore rightly not entertained such appeal.

6. The petitioner thereupon filed Special Civil Application No. 14319 of 2013 challenging the order passed by the adjudicating authority. Such

petition was withdrawn on 20th November 2013, stating that the petitioner wanted to challenge the vires of rule 8(3A) of the Central Excise Rules

2002. Thereupon, this petition came to be filed.

7. We would advert to relevant statutory provisions a little later. Briefly at this stage, we may note that rule 8 of the Central Excise Rules, 2002

pertains to the manner of payment of duty. Sub-rule (1) thereof permits the assessee to pay the total duty for the entire month on a specified date

of the following month referred to as due date. Sub-rule (3) of rule 8 provides that when an assessee fails to pay the duty by the due date, he shall

be liable to pay interest thereon. Sub-rule (3A) which is at the center of controversy in essence requires an assessee who fails to pay the duty by

the due date and further defaults in clearing the duty and whose defaults continues for a further period of 30 days thereafter, to make clearance

only on payment of excise duty and that too without availing cenvat credit. It is this rule which the petitioner challenges on various grounds.

8. Learned counsel Shri Devan Parikh for the petitioner raised following contentious in support of the challenge.

(1) The rule making authority did not have the power to frame such rules. Inviting our attention to section 37 of the Central Excise Act, 1944, the

counsel contended that such rule cannot be framed in exercise of general powers contained in sub-section (1) thereof. Sub-section (2) of section

37 lays down parameters for framing rules and the power which cannot be traced in any of the clauses of sub-section (2) cannot be traced in the

general rule making power contained in sub-section (1) of section 37. The counsel contended that clause (xiiia) of sub-section (2) of section 37

which pertains to the power to frame rules provide for withdrawal of facility or impose restrictions on manufacturer or exporter or suspension of

registration of dealer, for dealing with evasion of duty or misuse of cenvat credit, would not enable the delegated legislation to frame rules for

withdrawing facility of paying excise duty through cenvat credit. When such specific rules excludes any such power, the delegated legislation cannot

rely on the general provisions contained in sub-section (1) of section 37.

(2) The counsel contended that the rule is discriminatory and makes an artificial distinction amongst the class of assessees, one who is permitted to

avail cenvat credit for payment of excise duty and another who is denied such facility.

(3) The counsel also contended that the rule is wholly arbitrary and unreasonable. An assessee who for genuine financial constraints is unable to

pay even a part of the excise duty by the due date is required to clear all future consignments not only on payment of excise duty but without

availing cenvat credit. This restriction is unreasonable and arbitrary. The cenvat credit flows from excise duty already suffered by an assessee.

Merely because there has been some delay in payment of full excise duty by the due date, imposing such restriction of future clearances without

availing cenvat credit is so harsh as to cripple the manufacturing unit for all times to come.

(4) The counsel also contended that rule (3A) does not distinguish between a willful defaulter and an assessee who on account of genuine financial

hardship is unable to pay full excise duty. Even in such a situation, to withdraw the facility of paying excise duty through cenvat credit is an

unreasonable restriction which would fall foul of not only Article 14 of the Constitution but also would seriously hamper the petitioner''s right to

carry on trade or business under Article 19(1)(g) of the Constitution.

9. In support of the contentions raised, the counsel relied on the following decisions:

(1) In the case of Kerala Samsthana Chethu Thozhilali Union Vs. State of Kerala and Others, , wherein in the background of the State of Kerala

having banned the sale of arrack framed Kerala Abkari Shops Disposal Rules requiring one arrack worker each to be employed in all toddy

shops, the Supreme Court held that the rule was beyond the power of the subordinate legislation. It was observed as under:

37. Furthermore, the terms and conditions which can be imposed by the State for the purpose of parting with its right of exclusive privilege more

or less has been exhaustively dealt with in the illustrations in sub-section (2) of Section 29 of the Act. There cannot be any doubt whatsoever that

the general power to make rules is contained in sub-section (1) of Section 29. The provisions contained in sub-section (2) are illustrative in nature.

But, the factors enumerated in sub-section (2) of Section 29 are indicative of the heads under which the statutory framework should ordinarily be

worked out.

(2) In the case of Hinsa Virodhak Sangh Vs. Mirzapur Moti Kuresh Jamat and Others, , in which it was observed that while judging whether a

restriction is reasonable or not, one important consideration is whether the restriction is disproportionate. In the said decision, the Supreme Court

was considering the validity of the resolution passed by the Municipal Corporation imposing ban on slaughter houses for a period of nine days

during Paryushan festival. It was held that the restriction was for a short period of nine days and was, therefore, reasonable.

(3) Reliance was also placed on the decision of the Supreme Court in the case of Chintaman Rao Vs. The State of Madhya Pradesh, in which

constitution Bench of the Supreme Court observed that 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. The word

reasonable"" implies intelligent care and deliberation, that is a choice of a course which reason dictates.

(4) In the case of State of Madras Vs. V.G. Row, in which it was observed that while judging the reasonableness of the restrictions imposed, both

the substantive and the procedural aspects of the impugned restrictive law should be examined from the point of view of reasonableness.

(5) The decision in the case of Om Kumar and Others Vs. Union of India, was cited for the purpose of contending that while judging the validity of

the rules, the principle of proportionality should be applied. In such judgment, the Supreme Court had after analyzing large number of decisions of

our country as well as other decisions, held as under:

68. Thus, when administrative action is attacked as discriminatory under Article 14, the principle of primary review is for the courts by applying

proportionality. However, where administrative action is questioned as ""arbitrary"" under Article 114, the principle of secondary review based on

Wednesbury principles applies.

(6) In the case of Ganga Ram Moolchandani and Others Vs. State of Rajashthan and Others, , in which the Supreme Court held that the provision

of Rajasthan Higher Judicial Service Rules which required that the candidates for direct recruitment must be advocates who had practiced in

Rajasthan High Court or sub-ordinate courts was ultra vires Articles 14 and 16 of the Constitution. Such classification was arbitrary and

discriminatory.

(7) In the case of Eicher Motors Limited and Another Vs. Union of India and Others Etc., , in which it was observed that Modvat credit is in the

nature of a facility of credit which is as good as tax paid till tax is adjusted on future goods. It was further observed that the right to the credit has

become absolute at any rate when the input is used in the manufacture of final product.

(7a) In the case of Collector of Central Excise, Pune Etc. Etc. Vs. Dai Ichi Karkaria Ltd. Etc. Etc., , where following the decision in the case of

Eicher Motors Ltd. (supra), it was observed as under:

17. It is clear from these Rules, as we read them, that a manufacturer obtains credit for the excise duty paid on raw material to be used by him in

the production of an excisable product 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. There is no provision in the Rules which provides

for a reversal of the credit by the excise authorities except where it has been illegally or irregularly taken, in which event it stands cancelled or, if

utilised, has to be paid for. We are here really concerned with credit that has been validly taken, and its benefit is available to the manufacturer

without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw material in its excisable product. The credit is,

therefore, indefeasible. It should also be noted that there is no co-relation of the raw material and the final product; that is to say, it is not as if

credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be

taken against the excise duty on a final product manufactured on the very day that it becomes available.

18. It is, therefore, that in the case of Eicher Motors Limited and Another Vs. Union of India and Others Etc., this Court said that a credit under

the MODVAT scheme was ""as good as tax paid.

(8) In the case of Samtel India Ltd. Vs. Commissioner of Central Excise, Jaipur, , in which the decision in the case of Eicher Motors Ltd. (supra)

was relied upon and applied.

(9) In the case of Kunj Behari Lal Butail and Others Vs. State of H.P. and Others, , it was observed that:

14. We are of the opinion that a delegated power to legislate by making rules ""for carrying out the purposes of the Act"" is a general delegation

without laying down any guidelines; it cannot be so exercised as to bring into existence substantive rights or obligations or disabilities not

contemplated by the provisions of the Act itself.

(10) In the case of Commissioner of C. Ex. and Customs Vs. Saurashtra Cement Ltd., in which a Division Bench of this Court held that when duty

could not be paid in time due to stringent financial conditions which was later on paid with interest as soon as finance was available, penalty under

rule 25 of the Central Excise Rules could not be imposed.

(11) The decision in the case of Commissioner of Central Excise Vs. Harish Silk Industries, was brought to our notice to point out that though this

Court discussed the applicability of rule 8(3A) of the Central Excise Rules, 2002, in the said judgment, the question of its constitutional validity was

not at issue.

10. On the other hand, learned Senior Counsel Shri R.J. Oza for the department opposed the petition contending that section 37(1) of the Central

Excise Act, 1944 gives sufficiently wide powers to the rule making authority. Sub-section (2) of section 37 specified various purposes for which

such powers can be exercised. He drew our attention to clause (ib) and clause (ibb) of sub-section (2) of section 37 to contend that the delegated

legislature had ample power to frame rule 8(3A) of the Central Excise Rules, 2002. He pointed out that clause (xiiia) of section 37(2) was

introduced with effect from 8.5.2010 whereas rule 8(3A) as applicable in the present case was introduced by the notification dated 1.6.2006.

While interpreting the legislative power, therefore, reference to clause (xiiia) of section 37(2) of the Central Excise Act is redundant.

11. The counsel further submitted that sub-rule (3A) of rule 8 makes special provisions for recovery of unpaid taxes by defaulters. Ordinarily,

excise duty is payable upon clearance of goods. Under sub-rule (1) of rule 8, facility is given for deferred payment at the end of the month by the

due date. Those assessees who do not fulfill their commitments and default in payment of excise duty have to suffer certain restrictions. Such

restrictions follow only when the default continues for 30 days beyond the due date. Sufficient time is, therefore, provided by the Legislature to

enable an assessee to pay the excise duty. For effective recovery of unpaid excise duty, therefore, sub-rule (3A) was introduced making certain

stringent provisions, advisability of which this Court would not go into.

12. The counsel contended that in the field of taxation, the Executive and the Legislature has wider discretion. In complex economic issues, the

Court would not venture into judging the reasonableness of the legislation.

13. The counsel further submitted that those assessees who do not pay the excise duty and commit default form a different class and cannot be

compared with those who fulfill the commitments and would, therefore, continue to enjoy the benefits of payment of excise duty on monthly basis.

14. In support of his contentions, counsel relied on the following decisions:

(1) Reference was made to the decision of the Supreme Court in the case of Mathuram Agrawal Vs. State of Madhya Pradesh, to contend that in

taxing statute, the Court would give effect to the plain language used. For the same purpose, reliance was also placed on the decision in the case of

Baidyanath Ayurved Bhawan (Pvt) Ltd., Jhansi Vs. The Excise Commissioner, U. P. and Others, .

(2) In the case of Indian Agencies (Regd.), Bangalore Vs. Additional Commissioner of Commercial Taxes, Bangalore, , in which it was observed

that the rules may cause hardships to an honest dealer and he may be penalized for something for which he is not responsible. This would,

however, be for the Legislature to intervene and soften the rigour of the provisions and not for the Court to do so. We may, however, notice that in

such decision, question of validity of any rule was not at issue.

(3) In the case of Bhikusa Yamasa Kshatriya and Another Vs. Sangamner Akola Taluka Bidi Kamgar Union and Others, , in which it was

observed that when a legislative enactment is challenged as being discriminatory, the challenger must prove that the enactment is not based on any

classification at all or that it is based on a classification which is not founded upon any intelligible differentia having a rational relation to the object

sought to be attained by the enactment.

(4) In the case of Unirols Airtex Vs. Assistant Commr. of C. Ex., Coimbatore, , in which the Madras High Court held that in view of rule 8(3A) in

case of any defaulter, duty must be paid without availing cenvat credit. In this decision, however, rule 8(3A) was not under challenge.

(5) In the case of Vidushi Wires Pvt. Ltd. and Another Vs. Union of India (UOI) and Another, , in the context of rule 8(1) prevailing at the

relevant time providing facility of paying duty in installments, it was held that such provision was mandatory and non-compliance thereof would

result into penal consequences.

(6) In the case of Elson Packaging Industries Pvt. Ltd. v. Commr. of C. Ex. & Customs, 2010 (257) ELT 509 (Guj.) in the context of prohibition

of utilizing cenvat credit for payment of duty by defaulter, the Court observed that such prohibition per say does not take away or affect the right of

the assessee to cenvat credit which may be available to him in accordance with the cenvat credit scheme.

15. Learned counsel Mr. Ravani for the department also opposed the petition contending that in the matter of taxation, the State would enjoy a

greater degree of discretion. Rule 8(3A) is a provision for effective recovery of unpaid taxes. He relied on the following decisions:

(1) In the case of Dhariyal Chemicals Vs. Union of India (UOI) and Others, in which a Division Bench of the High Court turned down the

challenge to vires of rule 12CC of the Central Excise Rules, 2002 observing that upon reading of the said rule and the impugned notification it

becomes apparent that the rule and the notification have been framed for a specified class of persons having reasonable nexus with the object

sought to be achieved. The notification lays down the monetary limit in which the class of cases the same shall be made applicable.

(2) In the case of R.K. Garg and Others Vs. Union of India (UOI) and Others, in which it was observed as under:

7. Now while considering the constitutional validity of a statute said to be violative of Article 14, it is necessary to bear in mind certain well

established principles which have been evolved by the Courts as rules of guidance in discharge of its constitutional function of judicial review. The

first rule is that there is always a presumption in favour of the constitutionality of a statute and the burden is upon him who attacks it to show that

there has been a clear transgression of the constitutional principles. This rule is based on the assumption, judicially recognised and accepted, that

the legislature understands and correctly appreciates the needs of its own people, its laws are directed to problems made manifest by experience

and its discrimination are based on adequate grounds. The presumption of constitutionality is indeed so strong that in order to sustain it, the Court

may take into consideration matters of common knowledge, matters of common report the history of the times and may assume every state of facts

which can be conceived existing at the time of legislation.

8. Another rule of equal impotence is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights

such as freedom of speech, religion etc.

(3) In the case of Bhavesh D. Parish and Others Vs. Union of India and Another, , the Supreme Court observed that the Court must always

remember that the legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex. Every legislation

particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore

it cannot provide for all possible situations or anticipate all possible abuses.

16. The learned Assistant Solicitor General Shri Vyas also opposed the petition. Supporting the arguments of the other counsel for the respondents

and relying on the decision of the Supreme Court in the case of State of M.P. Vs. Rakesh Kohli and Another, he emphasized that while dealing

with the constitutional validity of a taxing statute, question of hardship is irrelevant and the Legislature enjoys a greater latitude for classification.

17. Having thus heard the learned counsel for the parties, we may peruse the statutory provisions more closely. To enable an assessee to avail of

credit of the duty paid on raw material and capital goods used for manufacture of the excisable goods, detail provisions have been made in the

Cenvat Credit Rules, 2004. Rule 3 thereof pertains to cenvat credit. Sub-rule (1) thereof allows a manufacturer or purchaser of final products or

provider of output service to take credit of cenvat of the various duties specified in clauses (i) to (xi) contained therein. Rule 4 of the Cenvat Credit

Rules, 2004 lays down conditions for allowing cenvat credit. Sub-rule (1) thereof provides that cenvat credit in respect of inputs may be taken

immediately on receipt of the inputs in the factory of the manufacturer or in the premises of the provider of output service. Clause (1) of sub-rule

(2) pertains to availability of cenvat credit in respect of capital goods and provides that in respect of capital goods received in a factory or in the

premises of the provider of output service at any point of time in a given financial year shall be taken only for an amount not exceeding fifty per cent

of the duty paid on such capital gods in the same financial year. There are provisos to this clause with which we are not concerned. Clause (b) of

sub-rule (2) provided that balance of cenvat credit may be taken in any financial year subsequent to the financial year in which the capital goods

were received in the factory of the manufacturer or in the premises of the provider of output service.

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 fro 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 rule 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 The State of Jammu and Kashmir Vs. Shri Triloki Nath Khosa and Others, . 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 Vs. Regional Director, National Council for Teacher Education and Another, , 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 Andhra Pradesh and others, etc. Vs. McDowell and Co. and others, etc., , 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) Private Ltd. and Others Vs. Union of India and Others, , 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.

37. In the present case, the further prayer of the petitioner is for setting aside the order dated 27.2.2009 passed by the adjudicating authority. This

prayer, however, cannot be granted. It is because of the following reasons.

38. Against the order of the adjudicating authority, the petitioner had a statutory right of appeal before the Commissioner in terms of section 35 of

the Central Excise Act, 1944. Such appeal had to be filed within sixty days from the date of communication of the order. The Commissioner, had

power on being satisfied about the sufficient cause preventing the petitioner from preferring such appeal to condone delay upto a maximum period

of 30 days. Undisputedly, the appeal was preferred after 173 days on expiry of the limitation. The Commissioner, therefore, could not have and

rightly did not condone the delay. Yet again, against such order of the Commissioner, the petitioner approached the Tribunal with further delay of

three years. The Tribunal was not convinced about the grounds of delay and was also of the opinion that in any case, the Commissioner''s order

being legal, even if the delay was condoned, no relief could be granted to the petitioner. If now we grant the relief as prayed for by the petitioner,

we would be rendering the entire mechanism of appeal to the Commissioner and the further appeal to the Tribunal nugatory. The first appeal

before the Commissioner comes with a rigid time-frame and cannot be presented under any circumstances beyond 30 days after the period of

limitation. The Legislature having in its wisdom limited the power of the Commissioner to condone delay upto a maximum period prescribed in the

section. Such statutory prescription cannot be rendered meaningless by entertaining the petitioner''s challenge directly now before the High Court

once when the petitioner failed in his attempt before the Commissioner and thereafter also before the Tribunal. Insofar as the petitioner''s second

prayer, therefore, is concerned, the same is rejected. This would, however, not have any effect on our declaration of invalidity of portion of sub-

rule (3A) of rule 8 insofar as the petitioner''s remaining pending proceedings at various stages are concerned.

39. In the result, the petition is disposed of accordingly.

40. At the request of learned counsel Shri Ravani for the department, this judgment is stayed till 15th January 2015.