IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO. 29 OF 2019
WITH
CENTRAL EXCISE APPEAL NO. 31 OF 2019

The Commissioner of Central
Excise, Customs and Service Tax,
Silvassa .. Appellant

v/s.

Shanti Engineering .. Respondent

Mr. Pradeep Jetly and Mr. J.B. Mishra for the appellant
None for the respondent

CORAM : A.S. OKA &
M.S. SANKLECHA, J.J.

DATED : 25th APRIL, 2019

P.C.

1. These two appeals under Section 35G of the Central Excise Act, 1994 (the Act) challenge a common order dated 10th April, 2015 passed by the Customs, Excise and Service Tax Appellate Tribunal (the Tribunal). The common impugned order dated 10th April, 2015 has been passed in two appeals filed by the respondent emanating from two separate show-cause notices dated 9th December, 2010 and 13th May, 2011 seeking to recover excise duty to the extent it cleared its final goods by utilizing the Cenvat credit instead of paying from their

Personal Ledger Account (PLA) in breach of Rule 8(3) of the Central Excise Rules, 2002 (for short "the said Rules").

2. The appellant Revenue has urged the following identical re-framed question of law for our consideration :-

> *"Whether on the facts and circumstances of the case and in law, the Tribunal was justified in holding that the respondent during the default period can pay its excise duty liability on its final products through its Cenvat account and not only through its PLA in the face of Rule 8(3) of the said Rules?"*

3. The respondent manufactures copper tubes and pipelines. In terms of Rule 8(1) of the said Rules, the respondent was required to pay excise duty on removal of goods on monthly basis. Admittedly, the respondent defaulted in paying the duty under the above Rule within the prescribed period, thus triggering the application of Rule 8(3) of the said Rule which reads as under :-

> *"Rule 8. Manner of payment (1) (2) and (3) …….*
> *(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 on each consignment at the time of removal, <u>without utilizing the CENVAT credit till the date the assessee pays the outstanding amount including interest therein</u> 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."*
>
> *(emphasis supplied)*

4. Nevertheless, even after the above default, the respondent continued clearing goods on payment of duty from its Cenvat account instead of paying the same as through its PLA.

5. This led to issue of show-cause notices dated 9th December, 2010 and 13th May, 2011 demanding duty for removal of goods in breach of Rule 8(3A) of the said Rules. The same was confirmed by the two Authorities under the Act.

6. In appeal the Tribunal allowed the respondent assessee's appeal by following the decision of the Gujarat High Court in ***Indsur Global Ltd. Vs. Union of India, (2014) 310 ELT 833*** which declared that to the extent Rule 8(3A) of the said Rules prohibited an assessee from utilizing Cenvat credit to pay the excise duty on removal of its goods is unconstitutional. Thus, allowed the appeal of the respondent.

7. Mr. Jetly, learned Counsel appearing for the appellant Revenue submits that the impugned order is without reasons, thus bad. Moreover, the decision of the Gujarat High Court in Indsur Global Ltd. (supra) is now a subject matter of challenge before the Hon'ble Supreme Court which has admitted the Revenue's appeal on 10th July, 2018. Thus, the present appeal ought to be admitted and kept pending till the decision of the Apex Court on the above appeal in case of Indsur Global Ltd. (supra).

8. We note that once Rule 8(3A) of the said Rules has been declared as unconstitutional to the extent it prohibited utilizing Cenvat credit, the discharge of payment of duty on the final products, the said provision to the above extent ceases to apply. The Act and the said Rules being all India in its application, the decision rendering a part of it as unconstitutional would equally apply within the State of Maharashtra, in the absence of any contrary view or the appellant showing that the view of the Gujarat High Court in Indsur Global Ltd. (supra) is *ex-facie* unsustainable. In fact, in identical circumstances, where a different High Court has declared a provision unconstitutional and there is no contrary view, this Court has in ***Commissioner of***

Income Tax Vs. Godavaridevi Saraf (1978) 2 ELT 624 and ***Commissioner of Central Excise Vs. Valson Dyeing Bleaching & Printing Works, 259 ELT 53*** has refused to entertain the appeals from the orders of the Tribunal which have followed the decision of the another High Court declaring a particular provision to be an unconstitutional. In fact, in Godavaridevi Ssaraf (supra) this Court has observed as under :-

> *"8. …..... It should not be overlooked that the Income Tax Act is an All-India statute and if an Income-tax Tribunal in Madras, in view of the decision of the Madras High Court, has no proceed on the footing that Section 140A(3) was non-existent, the order of penalty thereunder cannot be imposed by the authority under the Act. Until contrary decision is given by any other competent High Court, which is binding on a Tribunal in the State of Bombay, it has to proceed on the footing that the law declared by the High Court, though of another State, is the final law of the land. When the Tribunal set aside the order of penalty it did not go into the question of intra vires or ultra vires. It did not go into the question of constitutionality of Section 140A(3). That section was already declared ultra vires by a competent High Court in the country and an authority like an Income-tax Tribunal acting anywhere in the country has to respect the law laid down by the High Court, though of a different State, so long as there is no contrary decision of any other High Court on that question. ……………..."*

9. The same principle would apply in the present case. Therefore, no interference with the view of the Tribunal is called for. Moreover, mere filing and admission of the appeal would not amount to a stay of the decision of the Gujarat High Court in Indsur Global Ltd. (supra). Thus, Rule 8(3A) of the said Rules to the extent it is declared unconstitutional continues to be so. In these facts, as the Tribunal was following the decision of the Gujarat High Court in Indsur Global Ltd. (supra) and not having jurisdiction to go into the vires of the statute, no independent reasons were required to be given by the Tribunal.

10. Thus, the question as proposed does not give rise to any substantial question of law. Thus, not entertained.

11. Both the appeals are dismissed. No order as to costs.

(M.S. SANKLECHA, J.) **(A. S. OKA, J.)**