

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH - COURT NO.I

Excise Appeal No.70096 of 2022

(Arising out of Order-in-Appeal No.NOI-EXCUS-002-APP-772-21-22 dated 08/11/2021 passed by Commissioner (Appeals) Central Goods & Services Tax, Noida)

M/s Covestro (India) Pvt. Ltd.,
(Plot No.1A, Udyog Kendra,
Sector-Ecotech-III, Noida)

.....Appellant

VERSUS

Commissioner of Central Excise

....Respondent

(Wegmans Business Park, KP-III, Noida-201306)

APPEARANCE:

Shri Vinay Kansara, Advocate for the Appellant

Shri Sandeep Pandey, Authorised Representative for the Respondent

**CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**

FINAL ORDER NO.70324/2024

DATE OF HEARING : 14 March, 2024
DATE OF DECISION : 14 March, 2024

SANJIV SRIVASTAVA:

This appeal is directed against the impugned Order-in-Appeal No. NOI-EXCUS-002-APP-772-2021-22 DATED 08.11.2021 of Commissioner Central GST & Central Excise (Appeals), NOIDA. By the impugned order following has been observed:

"5.1 Rule 7 of the CCR, 2004 w.e.f 2012 is reproduced below:

7. Manner of distribution of credit by input service distributor.-The input service distributor may distribute the CENVAT credit in respect of the service tax paid on the input service to its manufacturing units or units providing output service, subject to the following condition s, namely:—

- (a) the credit distributed against a document referred to in rule 9 does not exceed the amount of service tax paid thereon;*
- (b) credit of service tax attributable to service used in a unit exclusively engaged in manufacture of exempted goods or providing of exempted services shall not be distributed;*
- (c) credit of service tax attributable to service used wholly in a unit shall be distributed only to that unit; and*
- (d) credit of service tax attributable to service used in more than one unit shall be distributed pro-rata on the basis of the turnover of the concerned unit to the sum total of the turnover of all the units to which the service relates.*

Further, w.e.f 01.04.2016, in the above rule, the word 'may distribute the CENVAT credit' were replaced by the words 'shall distribute the CENVAT credit'

5.2 I find that in the show cause notice, the demand of inadmissible cenvat credit has been made for the period October 2014 to June 2017. I find that in opening lines of the Rule 7, the words 'may distribute the cenvat credit' remained existed till 31.03.2016 and after that the same was substituted by words 'shall distribute the cenvat credit'. Thus, the period of dispute is divided in two parts i.e. October 2014 to March 2016 and April 2016 to June 2017. I find that the appellant in their written reply submitted that in accordance with Rule 7 as existed pre April 2016 covering audit period involved (October 2014 to March 2016) ISD was allowed to distribute credit of common input services as it may deemed fit without any compulsion of mandatorily distributing the same in ratio of turnovers only. I find that from the submission of the appellant, it is presumed that for the period April 2016 to June 2017, they have accepted the violation of Rule 7 of the CCR, 20094 and thus the demand of this period is confirmed.

5.3 Secondly, the distribution of CENVAT Credit was required to be made on pro-rata basis in accordance with Rule 7 (d) of

CCR, 2004 during the period October 2014 to June 2017. From the said rule, it is observed that **"credit of service tax attributable to service used in more than one unit shall be distributed pro rata on basis of turnover**", thus, the distribution of cenvat credit on pro rata basis always remained mandatory in terms of Rule 7 (d) of the CCR, 2004 irrespective of change in definition.

5.4 I find that the appellant has relied upon following case laws;

- a. CGST, Pune I v/s M/s Oerlikon Balzers Coating India Pvt. Ltd. 2019 (366) ELT 624 (Bom)
- b. M/s Titan Industries Ltd. v/s CCE & ST, Chennai 2019-TIOL-2525-CESTAT-Mad.

I have gone through the judgments. I find that adjudicating authority has rightly observed that these judgment pertains to the period prior to the amendments made in CCR, 2004 in 2012. Thus the ratio of these judgments are not applicable in the instant case.

5.5 I also find that the appellant has brought the concept of Revenue neutrality in their case, but I do not find any force in the aforesaid argument of the noticee as ISD was required to distribute the CENVAT credit as per statutory provisions of CCR, 2004, which they failed to comply."

2.1 The appellant is engaged in the manufacture of excisable goods and are availing credit of inputs and capital goods, input services under the CENVAT Credit Rules, 2004.

2.2 The Head Office of the appellant is located in Thane, which is registered as ISD, for the distribution of ISD credit. During audit of Head Office-Thane Unit it was observed that the distributor had distributed common credit amongst its three manufacturing units without considering the ISD unit (self), alleging that the Head Office-ISD Unit was also a service provider unit. This has resulted in transfer of excess common CENVAT Credit to the other three units.

2.3 A Show Cause Notice dated 30.12.2020 was issued to the appellant alleging that the appellant had availed excess amount of ineligible CENVAT Credit of Rs.88,28,040/- which was distributed to them by its ISD in contravention of the provisions of Rules 3 and 7 of the CCR, 2004. The appellant had suppressed wilfully the above fact with an intention to evade payment of Central Excise Duty and a proposal was made to recover the above excess credit. They were thus asked to show cause as to why:

- (i) *An amount of Rs 88,28,040.00 (Rupees Eighty Eight Lakh Twenty Eight Thousand and Forty only) in terms of Rule 7 (d) of CENVAT Credit Rules, 2004 should not be demanded and recovered from them, for the period October 2014 to June 2017 under erstwhile Rule 14 of CENVAT Credit Rules, 2004 read with Section 11 A (4) of the Central Excise Act, 1944 and read with Section 174 of the CGST Act, 2017.*
- (ii) *Interest at applicable rate, on the above said amount should not be demanded and recovered from them in terms of erstwhile Rule 14 of CENVAT Credit Rules, 2004 read with Section 11 AA of the Central Excise Act, 1944 and read with Section 174 of the CGST Act, 2017*
- (iii) *Penalty should not be imposed upon them in terms of erstwhile Rule 15 (2) of CENVAT Credit Rules, 2004 read with Section 11 AC of the Central Excise Act, 1944 and read with Section 174 of the CGST Act, 2017*

2.4 The show cause notice was adjudicated by the order in original dated 31.03.2021 holding as follows:

"ORDER

- a. I hereby confirm the demand of CENVAT Credit of Rs 88,28,040.00 (Rupees Eighty Eight Lakh Twenty Eight Thousand and Forty only) alongwith interest due thereon, from M/s Covestro India Private Limited, Plot No 1A, Ecotech-III, Udyog kendra, Surajpur, Gautam Buddh Nagar*

(UP), the noticee, in terms of Rule 14 of CENVAT Credit Rules, 2004 read with Section 11 A (4) and Section 11AA of the Central Excise Act, 1944 as well as provisions of Section 174 of the CGST Act, 2017.

b. I hereby impose penalty of Rs 88,28,040.00 (Rupees Eighty Eight Lakh Twenty Eight Thousand and Forty only) upon the noticee, in terms of Rule 15 (2) of CENVAT Credit Rules, 2004 read with Section 11 AC of the Central Excise Act, 1944 as well as provisions of Section 174 of the CGST Act, 2017

The dues adjudged above shall be paid forth with."

2.5 Appeal filed by the appellant before the first appellate authority has been dismissed as per the impugned order.

2.6 Aggrieved appellant has filed this appeal.

3.1 We have heard Shri Vinay Kansara, Advocate for the appellant and Shri A K Choudhary, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned counsel while making detailed submission on the merits of the case, placed on record Final order No 40021/2023 dated 31.01.2023 whereby the same issue in the appellants unit located in Tiruchirapalli has been decided by the Chennai Bench.

3.3 Arguing for revenue learned authorized representative reiterated the findings recorded in the impugned order.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 The only issue that has to be decided in the present case is whether the disallowance of credit in the hands of the appellant which was distributed by their Head Quarter at Thane as Input service distributor is correct or otherwise.

4.3 We find that exactly the same issue in case of Appellant's Tiruchirapalli unit has been decided by the Chennai Bench vide Final Order No 40021/2023 dated 31.03.2023 [**2023-TIOL-112-CESTAT-MAD**], observing as follows:

"7.1 The lower authorities have pressed into service Rules 3 and 7 of the CCR, 2004 to disallow and recover the CENVAT Credit availed by the recipient-appellant unit, but however, when the audit took place at the Head Office unit, which is the ISD unit, nothing is placed on record as to whether any Show Cause Notice was issued to the said unit which chose to distribute (to which Rule 7 of the CCR applies) alleging that the distribution by the ISD was wrong. There is also nothing brought out on record if the appellant, being a recipient unit, had any role or influence in the manner of distribution so that a case of wilful suppression with an intention to evade payment of duty, etc., could be justified. When the appellant took consistent stand inter alia that its Head office-ISD unit was regularly filing its ER-1 return, that the service provider unit at Head Office had Service Tax liability every year, which was paid in cash and that the entire tax liability was paid in cash every year rather than paying through the CENVAT Credit, the lower authorities have not denied anywhere the above facts. There is also no denial by the lower authorities that the amount of tax paid in cash by the Head Office unit was much more than the amount of credit that should have been distributed to the Head Office unit, which fact stood duly verified even during the audit. This is, therefore, clearly a revenue neutral situation since there is no Revenue loss at all to the Government and hence, the question of wilful suppression, that too with an intent to evade payment of tax, etc., would never arise.

7.2 I find that the co-ordinate Mumbai Bench of the CESTAT in the case of M/s. Oerlikon Balzers Coating India Pvt. Ltd. v. Commissioner of Central Excise, Pune-II [2017 (4) G.S.T.L. 62 (Tri. – Mumbai)] in its Final Order has, under similar circumstances, held as under:-

"5. We find that the services on which Cenvat credit has been availed are being used for providing output services is not in dispute. If at all Pune unit of the appellant distributes this credit to various other units on pro rata

basis Cenvat credit was available to the other units also and it is also not in dispute that during the period the other units were also discharging service tax liability in cash also. Therefore, the entire exercise would have been revenue neutral. Hence we hold that rejecting the claim of Cenvat credit of the appellant is unsustainable and liable to be set aside and we do so."

The Hon'ble Bombay High Court, thereafter, vide its judgement against the above order of CESTAT Mumbai [2019 (366) E.L.T. 624 (Bom.)], has upheld the above order of the Tribunal and the Hon'ble Court has also looked into the amended Rule 7 of the CCR.

8. Further, I also find that in the following cases, it has been held that recovery / demand cannot be raised at the recipient's end:-

- (i) M/s. V.G. Steel Industry v. Commissioner of Central Excise [2011 (271) E.L.T. 508 (P & H)];*
- (ii) M/s. Titan Industries Ltd. v. Commissioner of Central Excise & Service Tax, Chennai [2019-TIOL-2525-CESTAT-MAD]*

9. It is also the settled position of law that the Show Cause Notice in the case on hand has been served beyond the normal period, for which the only allegation levelled is wilful suppression with an intent to evade tax, but however, no supporting document/evidence is placed on record to justify suppression by the appellant, who is only a recipient, and consequently, the demand also cannot sustain being hit by time-bar. The following judgements / orders support my above view:-

- (i) Commissioner of Central Excise v. M/s. Dashion Ltd. [2016 (41) S.T.R. 884 (Guj.)];*
- (ii) M/s. Titan Industries Ltd. v. Commissioner of Central Excise & Service Tax, Chennai [2019-TIOL-2525-CESTATMAD]*

10. It is clear from the facts as borne out of the records and also as forthcoming from the orders of lower authorities that

a mere allegation has been made as to the wilful suppression with an intent to evade tax which, if considered for the sake of arguments, may at the most justify invoking the extended period of limitation. But in any case that alone is not sufficient since the Department has to prove that there is a revenue loss to the exchequer. The above arguments would remain so because the Department was aware of both sides of the coin, that is to say, they came to know of input service distribution by the ISD unit in the particular manner when they conducted audit there. This means that they are aware of the distribution of input credit in the particular manner. When this is the situation, then there is no question of suppression, much less of any receipt of the input credit by the appellant.

11. In view of the above discussions, I am of the clear view that the disallowance of CENVAT Credit in the hands of the recipient-appellant, as confirmed in the impugned order, is incorrect and not sustainable in the eye of law, for which reason the impugned order is set aside."

4.5 In view of the decision of the Chennai Bench which squarely is applicable to the facts of present case we do not find any merits in the impugned order.

5.1 Appeal is allowed.

(Operative part of the order pronounced in open court)

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)