CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT No. I

Service Tax Appeal No.70267 of 2017

(Arising out of Order-in-Original No.LKO/EXCUS/000/COM/ST/003/2016-17 dated 31.08.2016 passed by Commissioner of Central Excise & Service Tax, Lucknow)

M/s Bharat Sanchar Nigam Ltd., **.....Appellant**
(Telecom Complex, Shivpura, Sigra Varanasi)

VERSUS

Commissioner of Central Excise &
Service Tax, Lucknow **....Respondent**
(7A Ashok Marg, Lucknow)

APPEARANCE:

Shri Santosh Kumar Mishra, Advocate & Shri Utkarsh Kumar Mishra, Advocate for the Appellant
Ms. Chitra Srivastava, Authorized Representative for the Respondent

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

FINAL ORDER NO.- 70656/2024

DATE OF HEARING : 09.10.2024
DATE OF DECISION : 09.10.2024

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Original No.LKO/EXCUS/000/COM/ST/003/2016-17 dated 31.08.2016 passed by Commissioner of Central Excise & Service Tax, Lucknow. By the impugned order following have been held as under:-

ORDER

I. *I confirm the demand of the inadmissible 50% CENVAT credit on capital goods amounting to Rs.52,89,508/- (including Education Cess and SHE Cess) taken in the same financial year, under the proviso to Section 73(1) of the Finance Act, 2994 read with Rule 14 of the Cenvat Credit Rules, 2004.*

II. *I confirm the interest on irregularly availed amount of Cenvat credit of Rs.52,89,508/- (including Education Cess and SHE Cess) during the period October, 2009 to September, 2010 (taken 100% instead of 50% on capital goods), under Section 75 of the Finance Act, 1`994 read with Rule 14 of Cenvat Credit Rules, 2004 when it was not due to them.*

III. *I also impose penalty of Rs.52,89,508/- upon them under Rule 15 of Cenvat Credit Rules, 2004 read with Section 78 of the Finance Act, 1994 for the aforesaid contravention.*

IV. *I also impose a penalty of Rs.10,000/- upon them under Section 77(1)(b) of the Finance Act, 1994 for not maintaining the proper books of accounts.*

V. *I also impose a penalty of Rs.10,000/- upon them under Section 77(1)(c) of the Finance Act, 1994 for not producing the documents on demand.*

VI. *I do not impose any penalty under Section 77(2) of the Finance Act, 1994 as penalties were already imposed for the specific violations of the relevant Rules.*

2.1 Appellant is a public sector undertaking engaged in providing telecom services. They are availing the benefit of Cenvat credit.

2.2 It was observed that in respect of certain capital goods Appellant have availed the Cenvat credit of total amount of duty paid in the first year itself.

2.3 As for the provision of the Cenvat Credit Rules Appellant was entitled only to the 50% of the credit in the first year and 50% could have taken in any subsequent financial year. Show cause notice dated 22.04.2015 was issued to the Appellant asking him to show cause as to why:-

> *"I. The inadmissible CENVAT Credit amounting to Rs.52,89,508/- (including Education Cess and SHE Cess), should not be demanded and recovered under the proviso to Section 73(1) of the Finance Act, 1994 read with Rule 14 of Cenvat Credit Rules, 2004.*

> *II. Interest due thereon at the applicable rate should not be demanded and recovered from them under Section 75 of the Finance Act, 1994, read with Rule 14 of Cenvat Credit Rules, 2004.*
>
> *III. Penalty should not be imposed under Section 78 of the Finance Act, 1994 read with Rule 15 (3) of Cenvat Credit Rules, 2004 for the aforesaid contraventions.*
>
> *IV. Penalty should not be imposed upon them under Section 77(1)(b) of the Finance Act, 1994 for the aforesaid contraventions.*
>
> *V. Penalty should not be imposed upon them under Section 77(1)(C) of the Finance Act, 1994 for the aforesaid contraventions.*
>
> *VI. Penalty should not be imposed upon them under Section 77(2) of the Finance Act, 1994 for the aforesaid contraventions."*

2.4 Show cause notice has been adjudicated as per the impugned order.

2.5 Aggrieved Appellant has filed the appeal.

3.1 We have heard Shri Santosh Kumar Mishra Advocate for the Appellant and Ms. Chitra Srivastava Departmental Authorized Representative for the Revenue.

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

4.2 Undisputedly Appellant by taking the credit on entire duty paid on capital goods in the first year itself have acted in contravention of provision of Cenvat Credit Rules. However the said credit was admissible to him on the first date of the next financial year i.e. 1st April of the next financial year. It is also observed that Commissioner as in the impugned order recorded as under:-

> "15. The last issue is related to imposition of penalties and I discuss the proposals of penalties section-wise as follows:-
>
> (i) *Since the party has taken 100% CENVAT credit in the same financial year and willfully suppressed all*

the material facts deliberately and intentionally in order to evade the payment of Service Tax as discussed in Para 13 above, therefore it renders them liable to pay a penalty of equal amount under Section 78 of the Finance Act, 1994 read with Rule 15(3) of Cenvat Credit Rules, 2004.

(ii) *Party failed to maintain books of accounts in proper manner in as much they could not trace and provide ATDs related to F.Y. 2009-10 as submitted in their letter dated 09.04.2013. They admitted to have mentioned the 100% credit of duty by mistake instead of 50% and further submitted that they reversed the excess credit when pointed by the divisional Superintendent but could not provide the details of any reversal done by them. Party as big and responsible as BSNL cannot take excuse of not being able to maintaining proper books of accounts, not being able to produce the ATDs/invoices of the related periods on the basis of which the CENVAT credit has been taken and not having the knowledge of Law and Procedures appears not to be tenable. This act of the party renders them liable to Penalty under Section 77(1)(b) and Section 77(1)(c) of the Finance Act, 1994 for the aforesaid contraventions."*

4.3 In case of Deewan Reclaim Rubber [2017 (350) E.L.T. 105 (Tri. - All.)] following has been held:-

"6. *So far as the 3rd issue is concerned, the same is regarding disallowance of Cenvat credit being 50% of the eligible credit, which was required to be taken in the subsequent year, but was taken in the 1st year itself. As per the SCN, the appellant during the course of investigation/audit, had reversed an amount of Rs. 74,863/- by way of depositing the duty vide e-payment challan dated 5-4-2012 along with interest of Rs. 11,347/- for the year, 2010 and Rs. 6886/- being interest for the year, 2011. The ld. Counsel for the appellant has* *stated that the reason for taking of credit before it was due, was due to oversight and no mala fide was on the part of the appellant. The credit was anyway available after few months in the next financial year. Accordingly, only the liability for interest survives, no penalty is imposable on the appellant. Moreover, the reversal of substantial amount of Rs. 74,833/- out of Rs. 85,667/- also shows that the appellant became aware of the mistake, on being so pointed out by the Revenue. Considering the facts and circumstances and the credit being so available after few months, I set aside the demand of Rs. 85,667/-. Further, the interest is held payable and the same is confirmed."*

4.4 In case of Nidhi Pipes [2016 (343) E.L.T. 1014 (Tri. - Chan.)] Chandigarh bench held as follows:-

"5. *…. I also hold that on capital goods, the appellant is entitled to take Cenvat credit 50% of the first year and remaining in the next year. Therefore, they are entitled to take Cenvat credit to the tune of 100% of the capital goods is at the most, the appellant is required to pay interest for intervening period. .."*

4.5 In case of Bombay Paints Ltd. [2015 (326) E.L.T. 335 (Tri. - Mumbai)] Mumbai bench held as follows:

4. *Although the appellant is not in dispute as these are not capital goods and they are entitled to take CENVAT Credit to the tune of 50% of duty paid in the first year as per Rule 4(b) of Cenvat Credit Rules, 2004. Therefore, for the first year availment of CENVAT Credit is restricted to 50% of the duty paid but the appellant is entitled to take the remaining 50% CENVAT Credit in the subsequent year. In the circumstance, at the most, interest for the intervening period was required to be demanded from the appellant. The adjudicating authority has directed the appellant to reverse the excess 50% of CENVAT Credit for the first year along with the interest and also imposed* *penalty which were not required. In these circumstances, I dispose of the appeal of the appellant by confirming the demand of interest for the intervening period and setting aside the demand of duty and penalty against the appellant.*

4.6 In case of Sanghi Industries [2013 (294) E.L.T. 303 (Tri. - Ahmd.)] Ahmedabad bench held as under:

2. I find that there is no dispute on facts. Admittedly, the appellants have availed the entire 100% Cenvat credit in the first year itself, whereas in terms of Rule 4(2) of Cenvat Credit Rules, 2004, they were required to avail 50% of the credit in the first year and balance 50% credit in the next financial year. However, the fact that they availed the entire 100% credit in the first year, will not make balance 50% as non-available to the appellant. Admittedly, the balance 50% credit was available in the next financial year. As such, the demand of duty cannot be confirmed on this account.

3. This brings me to the question of interest. The appellant having availed the entire 100% credit in the first year, whereas they were entitled to avail 50% credit, has resulted in excess availment of 50% of the credit. The said 50% credit was available to the appellant in the next financial year only. As such, they are admittedly liable to interest for the excess availed credit. Accordingly, I confirm the interest against the appellant.

4. As regards penalty, the appellants have contended that there was no mala fide on their part to avail excess credit. In any case, the entire credit being available to the appellant, it was the timing of the availment of credit, which is being disputed by the Revenue. In such a scenario, when the credit was availed by making entries in the statutory records, no mala fide can be attributed to them.

5. I find that the Tribunal in the case of V.V.F. Ltd. v. C.C.E., Daman as reported in 2009 (246) E.L.T. 206 (Tri.-Ahmd.), while dealing with the identical issue has observed as under :

> *"3. After hearing the learned S.D.R., I find that the appellants were admittedly entitled to the Modvat credit of the entire duty paid on the capital goods. It is only the timing of taking credit which is the subject matter of dispute. Instead of availing the credit to the extent of 50%, the appellant availed the entire 100% at the time of receipt of the goods itself. As the said credit so availed was not even utilised by the appellant, the same was more or less in the nature of a paper entry. As such it can be concluded that there was no mala fide on the part of the appellant to avail excess credit in the first year itself so as to invoke penal action against them. Accordingly, I set aside the penalties imposed upon the appellant in both the cases. The appeals are disposed off in above manner."*

6. Similarly, the Tribunal, in the case of C.C.E., Pune v. Panse Autocomp Pvt. Ltd. as reported in 2008 (223) E.L.T. 253 (Tri.-Mum.) has held as under :

> *"4. On a perusal of the records it is seen that the allegation against the respondent which result the confirmation of demand of duty was in respect of wrong availment of Cenvat credit on the capital goods. The respondents had availed 100% credit on the capital goods while they are permitted to avail only 50% credit. In all I find that the allegations on the respondents were falling short of the ingredients that are mentioned under Section 11AC for imposition of penalty. As such the findings reached by the Commissioner (Appeals) in this case are correct and does not warrant any interference."*

> *7. In view of the declaration of law in the above referred judgments, I hold that imposition of penalty on the appellant in terms of Section 11AC was not called for. The same is, accordingly, set aside.*

4.7 In case of Real Plastics [2009 (236) E.L.T. 121 (Tri. - Ahmd.)] Ahmedabad bench held as under:

> ***2.** The dispute relates to availment of Modvat credit in respect of capital goods received by the appellant during the year 2000-01. The appellant was required to take 50% of the credit in that year and the balance 50% in the next financial year that is as on 1-4-2001. As the appellant took the entire credit prior to 1-4-2001 and filed return with the Department, no objection was taken. Subsequently, as per audit objection on April, 2004, the above discrepancy was noticed and the appellant was directed to make reverse entries in 2004 and again took credit subsequently. Accordingly, the appellant reversed the credit on 23rd April, 2004 and took credit on the same the very day. Subsequently, proceedings were initiated by way of issuance of show cause notice on 23rd December, 2005 proposing confirmation of interest and imposition of penalty upon them. The said proceeding culminated into an order passed by the Deputy Commissioner vide which he confirmed interest amount of Rs. 18,815/- and also imposed penalty of Rs. 10,000/-. The said order of the Deputy Commissioner was appealed against by the assessee as well as by the Revenue for enhancement of penalty. Commissioner (Appeals) vide his impugned order rejected the assessee's appeal but allowed the Revenue's appeal by enhancing the penalty equivalent to the duty amount. Hence the present appeal.*
>
> ***3.** The appellant's contention is that though they have availed the entire credit in the very first year itself but only 50% of the credit was utilized and the balance 50%*

> *was utilized in the next financial year. As such, it only remained as paper entry in record which should not invite any penal action confirming interest against them. In any case, submits the learned Advocate that they became entitled to avail the balance 50% of the credit as on 1-4-2001 and as such, if interest is required to be confirmed it should be till the date of their entitlement to avail credit that is till 1-4-2001, in which case, it will come approximately to around Rs. 1300/-. As such, he submits that the amount being small, he is not contesting the quantum of interest and is ready to pay the same.*
>
> ***4.** I find force in the above contention of the learned Advocate. Without expressing any opinion as to whether the interest would be leviable on the quantum of Modvat credit which remains unutilized by them till the date of their entitlement, I direct the Authorities to calculate the interest from the date of availment till 1-4-2001, when they were admittedly entitled to take Cenvat credit in their record and to utilize the same. The appellants filed the requisite Return reflecting the fact and taking credit and thus bringing the same to the notice of the Revenue, no mala fide intention is attributed to them. In any case, the said credit was taken was not utilized prior to 1-4-01 and as such, it cannot be said that the same was taken with mala fide intention. As such, I do not find it a fit case for imposition of penalty. The same is accordingly, set aside. The appeal is disposed of by way of remand. Stay petition also gets disposed of.*

4.8 In the catena of judgements it has been observed that in such cases that credit would not have been denied. There could be a case for recovery of interest. It is also observed that if said credit which was taken was not utilized then there should be no interest liability as has been held in following cases:-

- Commissioner of C. Ex., Delhi-III vs. Maruti Udyog Ltd. 2007 (214) E.L.T. 173 (P&H).
- Rana Sugar Ltd. vs. Commissioner of C. Ex., Meerut-II 2010 (249) E.L.T. 247 (Tri.-Del.).
- Commissioner Vs. Superfil Products – 2009 (237) E.L.T. 551 (Tribunal).
- Pooja Forge Ltd. Vs. Commissioner – 2004 (177) E.L.T. 302 (Tribunal).

4.9 Taking note of the above judgements, we find no merits in the impugned order to the effect that credit is to be denied and penalties are to be imposed only liability that can arise upon the Appellant is payment of interest for the period in which excess credit was taken and that subject to verification that the credit was taken utilized by the Appellant for payment of duty. In case credit has not been utilized there would be no liability for interest as have been held by Hon'ble High Court of Karnataka in the case of Commissioner of Central Excise & Service Tax LTU, Bangalore vs. Bill Forge Pvt. Ltd. reported as 2012 (279) E.L.T. 209 (Kar.).

4.10 In case of Veetech Valves Pvt. Ltd. [2010 (261) E.L.T. 204 (Tri. - Bang.)] Bangalore bench held as under:

> ***4.*** *Learned DR would reiterate the grounds of appeal.*
>
> *(i) The assessee has not disputed about the incorrect availment of cenvat credit on capital goods, i.e., 100% availment instead of 50% as contemplated in Rule 4(2)(a) of Cenvat Credit Rules, 2004.*
>
> *(ii) The excess availment of Cenvat credit to the extent of Rs. 1,91,823/- + 3,835/- (Ed. Cess) totaling Rs. 1,95,658/- was reversed by the assessee only after pointing out of the irregularity by the Range Officer, on 29-12-2005 while credit was availed in the month of June 2005. Therefore, the assessee has enjoyed undue financial accommodation in the form of availment of irregular*

Cenvat credit till the time the same was pointed out by the department.

(iii) Rule 14 of Cenvat Credit Rules, 2004 envisages that "where the Cenvat credit has been taken or utilized wrongly, the same along with interest shall be recovered from the manufacturer." Thus, Rule 14 does not provide any option to the Adjudicating Authority/Appellate Authority to waive the interest if the credit wrongly taken is not utilized and shows as balance in the cenvat credit account of the assessee/manufacturer. In other words, Rule 14 empowers the officers to charge interest in either case, i.e., in respect of cenvat credit taken or utilized wrongly. Thus, either taking the credit wrongly or utilizing the credit wrongly will attract interest in terms of Rule 14 of Cenvat Credit Rules, 2004. The Adjudicating Authority/Appellate Authority has mis-interpreted the provisions of Rule 14 of Cenvat Credit Rules, 2004, while passing the Order-in-Original in so far as charging of interest is concerned.

5. *We have considered the submissions made by the learned DR and perused the records. It is seen from the records that the respondents' contention that they have not utilized the amount of credit taken by them is not being disputed by the Revenue in their grounds of appeal. It is also a factual finding by the learned Commissioner that the credit availed by the assessee was always in balance and was not used for paying duty till the date of its reversal. The grounds of appeal as reproduced by us herein above did not indicate any contrary evidences to the findings of the facts. In the absence of any contrary evidence, we are of the view that the learned Commissioner (Appeals) findings as herein above reproduced are correct and legal and does not suffer from any infirmity.*

4.11 Appellant should produce a certificate from the statutory auditor to the effect, whether the excess credit taken by the Appellant during the first year of receipt of the capital goods has been utilized or not utilized before its reversal or till the first day of the next financial year as the case may be. Any interest on the credit so utilized if any should be paid forthwith.

4.12 In view of our findings as above, we do not find any merits in this order to the extent it confirms the recovery of CENVAT Credit and penalties imposed.

5.1 Appeal allowed, Subject to verification as indicated in paragraph 4.11.

(Dictated and pronounced in open court)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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