IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. III

Excise Appeal No. 40351 of 2014

(Arising out of Order-in-Original No. LTUC/441/2013-C dated 26.11.2013 passed by Commissioner of Central Excise and Service Tax, LTU, No. 1775, Jawaharlal Nehru Inner Ring Road, Anna Nagar Western Extension, Chennai – 600 101)

M/s. Mobis India Ltd. **...Appellant**
G1, SIPCOT Industrial Park
Irrungattukottai,
Sriperumbudur,
Kancheepuram – 602 105.

Versus

Commissioner of Central Excise and Service Tax **...Respondent**
Large Tax Payer Unit,
1775, JN Inner Ring Road,
Anna Nagar West,
Chennai – 600 101.

APPEARANCE:

For the Appellant : Shri K. Senguttuvan, Advocate

For the Respondent : Shri R. Rajaraman, Assistant Commissioner / A.R.

CORAM:

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

DATE OF HEARING : 05.10.2023
DATE OF DECISION : 09.11.2023

FINAL ORDER No. 41026 / 2023

Order :- [Per MR. VASA SESHAGIRI RAO]

M/s. Mobis India Ltd., the appellant herein is a manufacturer of Motor Vehicle Parts and are availing CENVAT Credit of the duty paid on inputs, input services and capital goods for payment of duty on their final products. This appeal is filed assailing the Order-in-Original No. LTUC/441/2013-C dated 26.11.2013 passed by the Commissioner of Central Excise and Service Tax, LTU, Chennai, wherein demand of Rs.1,87,69,233/- was confirmed being ineligible credit availed by the appellant under Rule 14 of the CENVAT Credit Rules, 2004 read with Section 11A(4) / 11A(1) of the Central Excise Act, 1944. Recovery of appropriate interest on the above demand was also ordered and a penalty of Rs.1,87,69,233/- was imposed on the appellant under Rule 15(2) of the CENVAT Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944.

2.1 Brief facts of the appeal are as given below:-

2.2 During the Audit of the accounts of the appellant, it was seen that the appellant have availed following wrong / double credits in their CENVAT Accounts: -

i. CENVAT credit of duty paid on inputs, was availed twice on one and the same input documents (Annexure A of SCN). The excess CENVAT Credit taken thus is to the tune of Rs.89,75,790/- on 382 input documents.

ii. Availed CENVAT credit twice on the same procurement, quoting two different source documents (Annexure B of SCN) on four occasions. While doing so, the appellant cited two different input documents as the basis for the credit. The wrong credit so availed, totally amounted to Rs.75,06,661/-

iii. The appellant had also availed CENVAT credit of Rs.3,92,303/- twice, on 14 procurements of inputs citing same source documents with subtle differences having the same SAP reference (Annexure C of SCN).

iv. They also availed CENVAT Credit of Rs.16,05,463/- (Annexure F of SCN) twice on the same input documents.

2.3 The appellant was also found to have availed 100% credit of Rs.12,42,083/- on capital goods in the first year itself, in violation of Rule 4(2)(a) of the CENVAT Credit Rules, 2004. Interest liability for availing 50% of the additional credit on the capital goods was computed to be Rs.76,530/-. Further, the appellant had availed capital goods credit on Factory Lighting and Pallets treating them as 'capital goods'.

2.4 The appellant have not disputed about the irregular availment of CENVAT Credit and have reversed entire credit along with the interest payable except on factory lighting and pallets. The adjudicating authority has appropriated such amounts in Order-in-Original No. LTUC/441/2013-C dated 26.11.2013.

2.5 Later on the appellant have disputed the liability for payment of interest on the ground that the above credit though availed wrongly had not been utilized towards payment of duty relying on the decisions rendered in the cases of

i. *Commissioner of Central Excise and Service Tax, LTU, Bangalore Vs. Bill Forge Pvt. Ltd. [2012 (279) ELT 209 (Kar.)]*
ii. *Sharavathy Conductors Pvt. Ltd. [2013 (31) STR 47 (Tri. – Bang.)]*
iii. *Commissioner of Central Excise, Bangalore II Vs. Gokuldas Images (P) Ltd. 2012 (278) ELT 590 (Kar.)]*
iv. *Gary Pharmaceuticals (P) Ltd. Vs. Commissioner of Central Excise, Ludhiana [2013 (297) ELT 391 (Tri. – Del.)]*

2.6 It was submitted that no interest would become liable to be paid in case wrongly availed CENVAT Credit is reversed without utilizing the same. In case of wrong availment of CENVAT Credit if the entry is reversed it amounts to not taking the credit at all and so the question of payment of interest would not arise.

2.7 Whereas the Ld. Adjudicating authority has relied upon the Hon'ble Supreme Court's decision in the case of *Union of*

India Vs. Ind-Swift Laboratories Ltd. [2011 (265) ELT 3 (SC)] wherein it was held that the interest is payable on wrong availment / mere taking of ineligible credit. On the question of whether interest on irregular credit whether arises from the date of availaing such credit or date of utilisation, it was held that as Rule 14 of CENVAT Credit Rules, 2004 specifically providing for interest when CENVAT Credit taken or utilised wrongly or erroneously refunded interest on irregular credit arises from the date of taking such credit.

3.1 The Ld. Advocate Shri K. Senguttuvan representing the appellant has submitted that interest is only payable when the wrong availment has caused benefit to the appellant or loss of revenue to the Government. Availment of credit twice on the documents was completely unintentional and due to negligence of their employee and the Government did not loose any revenue as they were having enough credit balance in their CENVAT accounts. He has argued that the adjudicating authority's reliance on the Apex Court's decision in the case of *Union of India Vs. Ind-Swift Laboratories Ltd. [2011 (265) ELT 3 (SC)]* is misplaced and is not applicable to the facts of this appeal. In the case of Ind-Swift Laboratories Ltd., fake invoice credit was involved whereas excess credit availed in the instant case is on account of human error. He has given a table which distinguishes the instant appeal from the case of Ind-Swift Laboratories Ltd. :-

#	**Ind-Swift Laboratories Case**	**Appellant Case**
1	Credit based on Fake Invoices	Credit availed twice unintentionally on the valid and eligible invoices;
2	Such credits resulted in non-payment of cash through PLA	Even without availing credit twice unintentionally, it would not have resulted in CASH payment through PLA since CENVAT closing balance in Excise Records were minimum

		10 fold of credit availed twice unintentionally during relevant period and afterwards.
3	Approached settlement Commission to get relief from penalty since commissions or omissions are with an intention to get benefit	Huge CENVAT closing balance during relevant period demonstrates that the appellant couldn't have got any such benefit.

3.2 The Ld. Advocate has also adverted to the decision rendered by the Hon'ble High Court of Karnataka in the case of *Commissioner of Central Excise and Service Tax, LTU, Bangalore Vs. Bill Forge Pvt. Ltd. [2012 (279) ELT 209 (Kar.)]* to argue that the decision has been followed by many High Courts in subsequent cases which were not contested at higher fora by the Department.

4.1 The Ld. Authorised Representative Shri R. Rajaraman Assistant Commissioner has argued for the Department. He has supported the findings and detailed reasoning given in the impugned order. He has referred to Rule 14 which reads as given below at that relevant time:-

> "***RULE 14. Recovery of CENVAT credit wrongly taken or erroneously refunded***.-
>
> *Where the CENVAT credit has taken or utilized wrongly or has been erroneously refunded, the same along with interest shall be recovered from the manufacturer or the provider of the output service and the provisions of sections 11A and 11AB of the Excise Act or sections 73 and 75 of the Finance Act, shall apply mutatis mutandis for effecting such recoveries."*

4.2 He has submitted that the words used by the legislature in the above provision are 'taken or utilized wrongly'. Plain and straight interpretation of the above provision makes it clear that interest becomes payable "when CENVAT Credit has been taken wrongly" or "the credit so taken has been utilized". The appellant's argument that interest liability does not arise just by availing ineligible credit, but, arises only when credit so availed is utilized is an attempt to substitute the word 'or' in the above definition by 'And'. It is a well settled legal principle that any statute should be interpreted as it is even if the intention is imperfect, imprecise or there is an obvious omission. He has referred to the decision rendered by the Hon'ble Supreme Court's decision in the case of Union of India Vs. Ind-Swift Laboratories Ltd. *(supra).* The Hon'ble Supreme Court has held that while interpreting Rule 14 of the CENVAT Credit Rules, 2004, the attempt of the High Court to read down the provision by way of substituting the word 'or' by an 'And', so as to give relief to the assessee is found to be erroneous and once the CENVAT Credit is taken, as the beneficiary is at liberty to utilize the same immediately or thereafter interest is payable thus setting aside the order passed by the Punjab & Haryana High Court.

5. Heard both sides and carefully considered all the evidences available in the appeal. The following two issues arise for decision in this appeal:-

i. Whether interest is demandable on irregular CENVAT Credit availed but not utilized?
ii. Whether invocation of extended period of time and imposition of penalty under Rule 15(2) of the CENVAT Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944 is justified?

6. We find that there is another issue relating to availment of capital goods credit on ineligible goods. The appellant has availed input tax credit on Factory Lighting and Pallets. A perusal of the grounds of appeal indicate that the party has argued for eligibility of the credit on these goods which were utilized in the factory either as capital goods or as inputs. The Ld. adjudicating authority has dropped the demand of CENVAT Credit availed on these goods to an extent of Rs.7,82,900/- and also held that payment of interest on this demand would not arise. As such there is no need to give any finding on this demand.

Whether interest is demandable on irregular CENVAT Credit availed but not utilized?

7.1.1 The facts indicate that the appellant has reversed the irregularly availed CENVAT Credit as detailed in paragraph 2.4 above. He has also reversed the interest amount on such irregularly or wrongly taken CENVAT Credit. The lower adjudicating authority has strictly and literally interpreted Rule 14 of the CENVAT Credit Rules, 2004. The words used in that Rule are 'taken or utilized wrongly'. The Rule provides for recovery of irregularly or wrongly taken credit along with interest. However, we find that regarding demand of interest for merely taking CENVAT Credit but not utilizing the same was considered and decided in favour of the appellant in many case laws.

7.1.2 The issue of unutilized CENVAT Credit was a subject matter before the Hon'ble Supreme Court in the case of *Ind-Swift Laboratories Ltd. (supra)* and the decision was considered by the Hon'ble High Courts and co-ordinate Benches of the Tribunal in the following decisions among others:-

i. *Commissioner of Central Excise and Service Tax, LTU, Bangalore Vs. Bill Forge Pvt. Ltd. [2012 (279) ELT 209 (Kar.)]*

ii. *M/s. SAIL Vs. Commissioner of GST and Central Excise, Bolpur [E/78557 of 2018 dated 20.09.2019]*

7.1.3 The relevant portion of the judgment of the Hon'ble High Court in the case of *Bill Forge Pvt. Ltd. (supra)* is extracted below:-

> ***"19.*** *Rule 14 of the CENVAT Credit Rules, 2004 reads as under :*
>
> *Rule 14. Recovery of CENVAT credit wrongly taken or erroneously refunded. - Where the CENVAT credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest shall be recovered from the manufacture or the provider of the output service and the provisions of sections 11A and 11AB of the Excise Act or sections 73 and 75 of the*

Finance Act, shall apply mutatis mutandis for effecting such recoveries.

A reading of the aforesaid provisions makes it very clear that the said provision is attracted where the Cenvat Credit has been taken or utilized wrongly or has been erroneously refunded. In view of the aforesaid judgment of the Apex Court, the question of reading the word 'and' in place of 'or' would not arise. It is also to be noticed that in the aforesaid Rule, the word 'avail' is not used. The words used are 'taken' or 'utilized wrongly'. Further the said provision makes it clear that the interest shall be recovered in terms of Section 11A and 11B of the Act.

20. *From the aforesaid discussion what emerges is that the credit of excise duty in the register maintained for the said purpose is only a book entry. It might be utilised later for payment of excise duty on the excisable product. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. It matures when the excisable product is received from the factory and the stage for payment of excise duty is reached. Actually, the credit is taken, at the time of the removal of the excisable product. It is in the nature of a set off or an adjustment. The assessee uses the credit to make payment of excise duty on excisable product. Instead of paying excise duty, the cenvat credit is utilized, thereby it is adjusted or set off against the duty payable and a debit entry is made in the register. Therefore, this is a procedure whereby the manufacturers can utilise the credit to make payment of duty to discharge his liability. Before utilization of such credit, the entry has been reversed, it amounts to not taking credit. Reversal of cenvat credit amounts to non-taking of credit on the inputs.*

21. *Interest is compensatory in character, and is imposed on an assessee, who has withheld payment of any tax, as and when it is due and payable. The levy of interest is on the actual amount which is withheld and the extent of delay in paying tax on the due date. If there is no liability to pay tax, there is no liability to pay interest. Section 11AB of the Act is attracted only on delayed payment of duty i.e., where only duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, the person liable to pay duty, shall in addition to the duty is liable to pay interest. Section do not stipulate interest is payable from the date of book entry, showing entitlement of Cenvat credit. Interest cannot be claimed from the date of wrong availment of CENVAT credit and that the interest would be payable from the date CENVAT credit is taken or utilized wrongly.*

22. *In the instant case, the facts are not in dispute. The assessee had availed wrongly the Cenvat credit on capital goods. Before the credit was taken or utilized, the mistake was brought to its notice. The assessee accepted the mistake and immediately reversed the entry. Thus the assessee did not take the benefit of the wrong entry in the account books. As he had taken credit in a* *sum of Rs. 11,691-00, a sum of Rs. 154-00 was the interest payable from the date the duty was payable, which they promptly paid. The claim of the Revenue was, though the assessee has not taken or utilized this Cenvat credit, because they admitted the mistake, the assessee is liable to pay interest from the date the entry was made in the register showing the availment of credit. According to the Revenue, once tax is paid on input or input service or service rendered and a corresponding entry is made in the account books of the assessee, it amounts to taking the benefit of Cenvat credit. Therefore interest is payable from that date, though, in fact by such entry the Revenue is not put to any loss at all. When once the wrong entry was pointed out, being convinced, the assessee has promptly reversed the entry. In other words, he did not take the advantage of wrong entry. He did not take the Cenvat credit or utilized the Cenvat Credit. It is in those circumstances the Tribunal was justified in holding that when the assessee has not taken the benefit of the Cenvat credit, there is no liability to pay interest. Before it can be taken, it had been reversed. In other words, once the entry was reversed, it is as if that the Cenvat credit was not available. Therefore, the said judgment of the Apex Court has no application to the facts of this case. It is only when the assessee had taken the credit, in other words by taking such credit, if he had not paid the duty which is legally due to the Government, the Government would have sustained loss to that extent. Then the liability to pay interest from the date the amount became due arises under Section 11AB, in order to compensate the Government which was deprived of the duty on the date it became due. Without the liability to pay duty, the liability to pay interest would not arise. The liability to pay interest would arise only when the duty is not paid on the due date. If duty is not payable, the liability to pay interest would not arise.*

23. *Under these circumstances, we do not see any error committed by the Tribunal in passing the impugned order. Accordingly, the substantial question of law framed is answered against the Revenue and in favour of the assessee."*

7.1.4 The Hon'ble Madras High Court in the case of *Commissioner of Central Excise Vs. M/s. Strategic Engineering (P) Ltd. [2014-TIOL-466-HC-MAD-CX]*, paragraph 11 of the decision is worth quoting, which is extracted below:-

"11. *It is an admitted fact that Rule 14 of the Cenvat Credit Rules as been subsequently amended, wherein it has been clearly stated as "taken and utilised". Therefore, it is quite clear that mere taking itself would not compel the assessee to pay interest as well as penalty. Further, as pointed out earlier, the subsequent amendment has given befitting answer to all doubts existed earlier. Since, the subsequent amendment has cleared all doubts existed earlier in respect of Rule 14 of the said Rules, it is needless to say that the argument advanced by the learned counsel appearing for the appellant/Department is erroneous, whereas the argument advanced on the side of the respondent is really having merit and the substantial questions of law settled in the present Civil Miscellaneous Appeal are not having substance*

> *and altogether the present Civil Miscellaneous Appeal deserves to be dismissed."*

7.1.5 In the case of *J.K. Tyre and Industries Ltd. Vs. Assistant Commissioner of Central Excise, Mysore [2016 (340) ELT 193 (Tri. –LB)]*, Tribunal Large Bench has come to the conclusion that interest liability would not arise when the assessee had merely availed credit and had reversed the same before utilizing the availed credit for remittance of duty.

7.1.6 The same view was taken by the Tribunal in the following cases:-

i. Commissioner of Central Excise Vs. Sharda Energy & Minerals Ltd. [2013 (291) ELT 404 (Tri.-Del.)]
ii. Gary Pharmaceuticals (P) Ltd. Vs. Commissioner of Central Excise, [2013 (297) ELT 391 (Tri.-Del.)]
iii. Commissioner of Central Excise Vs. Balrampur Chini Mills Ltd., [2013-TIOL-1142- CESTAT-Del]
iv. M/s. Gurmehar Construction Vs. Commissioner of Central Excise [2014-TIOL-1205- CESTAT-Del]

7.1.7 Appreciating the ratio of above decisions, we find that the recovery of interest is not legally justified and not maintainable.

Whether the extended period is invokable and imposition of penalty sustainable?

7.2.1 It is on record that the appellant has reversed the entire CENVAT Credit wrongly taken or irregularly availed on being pointed out as a result of the Audit of its accounts. The appellant has not only reversed the credit irregularly availed, but also applicable interest. It is not disputed that they were having enough credit balance in their accounts and they have not utilized such irregularly availed CENVAT Credit toward payment of any duty. We find that the Show Cause Notice was issued on

17.06.2013 but the credit reversal was done on 31.08.2012 and 15.09.2012 which is much before the issuance of the Show Cause Notice. The availment of double credit or irregular credit was reportedly caused by the mischief of one of the employees of the appellant against whom they have taken disciplinary action by terminating his services. The appellant has contended that wrongly taken credit was never utilized and so no penalty is imposable. It was also submitted that the onus is on the Department to prove the intention to evade payment for invoking extended period under Section 11A(4) or proviso to Section 11A(1) of the Central Excise Act, 1944. As their accounts were audited every year, no discrepancies of excise payment noticed by the Department, as returns were filed and submitted periodically, the penalty cannot be imposed without firm establishing an intent to evade tax. They relied on the decision rendered in the case of *Synthokem Labs Pvt. Limited Vs. Commissioner of Central Excise [Excise Appeal No. 30595/2019].* The relevant paragraph is extracted below:-

> *"8. This Tribunal at Allahabad Bench in the case of Jaypee Greens vs CC & CE & ST, NOIDA reported in [2020 (33) GSTL 109] has held that where wrongly availed credit so reversed by the appellants by reflecting in their ST 3 return even prior to show cause notice issue, the longer period of limitation cannot be invoked. The demand raised by the department was held to be barred by time. The decision of Hon'ble High Court of Delhi in the case of Hindustan Insecticide vs. CCE reported in 2013-TIOL-631-HC- DEL-CX was relied upon. Infact when there was reversal even before the issue of show cause notice, infact show cause notice was not required to be issued in terms of provisions of section 11A (2)(b), as it was held by this Tribunal Delhi Bench in the case of Krishna Electrical Industries Ltd. vs CCE, Indore reported in [2013 (292) ELT 385]. No doubt tax scheme is self assessment scheme and the onus lies upon the assessee to disclose the information to the department as has been impressed upon by the department but each non disclosure cannot be called as the suppression, that too with malafide intent to evade payment of duty. It is only in this case that extended period of limitation can be invoked and the penalty can be imposed. Hon'ble Apex Court in the case of Continental Foundation Jt. Venture vs. CCE reported in [2007 (216) ELT 177(SC)] has held that something positive other than mere inaction or non-payment of duty is required for invoking extended period under proviso to section 11 A (1) of Central Excise Act and that suppression means failure to disclose full information with intent to evade the payment of duty and mere omission to give certain information is not suppression of fact unless it is deliberate with intention to evade the payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. Above all, suppression of facts is clearly qualified by word wilful in the*

> *section. Hence, presence of mensrea to evade duty has to be there. From the facts as discussed above since there has been prompt reversal by the appellant that too of a such amount which was meant for the appellants own both units, however was utilised only by one unit. Hence allegation of wilful misstatement with an intent to evade payment rather not at all justified. Though the adjudicating authority below had been right while dropping the demand on the same ground by holding it to be mere clerical error, they have definitely got wrong while still imposing penalty. The order accordingly is hereby set aside. Consequent to above discussion, appeal stands allowed."*

7.2.2 We find that the appellant though have taken credit irregularly or wrongly in the books it was never utilized. So, it is not justified to attribute any motive to evade tax to the conduct of the appellant. Even irregularly availed CENVAT Credit has been reversed by the appellant on being pointed out much before the issuance of the Show Cause Notice. As such, invoking extended period is not justified in this appeal. Thus, the appellant succeeds on limitation also.

8. In view of the above findings, the impugned order No. LTUC/441/2013-C dated 26.11.2013 is upheld as far as the demand of Rs.1,87,69,233/- being the ineligible credit availed by the appellant and its appropriation. The demand of recovery of interest on such ineligible CENVAT Credit availed but not utilized, along with the penalty imposed, are set aside.

9. The appeal is partly allowed as above with consequential relief, if any, as per law.

(Order pronounced in open court on 09.11.2023)

Sd/-	Sd/-
(VASA SESHAGIRI RAO)	**(SULEKHA BEEVI C.S.)**
MEMBER (TECHNICAL)	MEMBER (JUDICIAL)

MK