

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE  
TRIBUNAL,  
WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB

COURT – IV

**Service Tax Appeal No. ST/50044/2015 [DB]**

[Arising out of Order-in-Original No. JAI-EXCUS-001-COM-41-14-15 dated 30/09/2014 passed by the Commissioner, Central Excise, Jaipur-I]

**B.S.N.L.** **...Appellant**  
**vs.**  
**C.C.E. & S.T., Jaipur-I** **...Respondent**

Present for the Appellant : Mr. Sameer Agarwal, Advocate  
Present for the Respondent: Mr. G.R. Singh, DR

**Coram: HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)**  
**HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)**

**Date of Hearing /Decision : 20.12.2018**

**FINAL ORDER NO. 53530/2018**

**PER: RACHNA GUPTA**

The appellants are engaged in providing Telecommunication Services. During the course of scrutiny of service tax record of the appellant by the audit it was observed that the appellant has wrongly availed cenvat credit amounting to Rs. 1,21,60,874/- during the month of April as 50% of duty paid on capital goods on which 100% credit was already taken by 2008-09. Though on being pointed out the said availed credit was reversed from the credit balance of the appellant in the month of March 2010 itself but the Department vide SCN No. 793 dated 27.05.2013 on the ground that the impugned

cenvat credit availed was not admissible to the appellant in terms of Rule 4(2a) of Cenvat Credit Rules, 2004 (hereinafter referred to CCR) and as such was proposed recoverable alongwith the interest. The appropriation of the cenvat credit of Rs. 21,60,874/- in addition, the interest amounting to Rs. 15,80,913/- on the aforesaid amount was also proposed alongwith the penalty in view of Rule 15(3) of CCR read with Section 78 of the Finance Act, 1994. The Commissioner vide Order No. 41-14-15 dated 30.09.2014 had ordered to appropriate the impugned amount of wrongly availed cenvat credit which was reversed. Recovery of interest on the said amount was also confirmed and the penalty of same amount was imposed upon the appellant. Being aggrieved the appellant is before this Tribunal.

2. We have heard Shri Sameer Aggarwal who has challenged the said Order for SCN dated 27.05.2013 to be barred by time for the reason that the credit was wrongly availed as per an inadvertent entry in the account books as was made in the month of April 2009. It came to the notice of the Department in the year 2009 itself and on being pointed out the wrongly availed credit was reversed in the month of March 2010 itself. The SCN served beyond three years is barred by limitation. The Order is also not sustainable as far as the imposition of penalty is concerned for there is no apparent intentional malafide on part of the appellant nor

arises any question of imposition of interest as the credit was never taken nor utilised. It was merely availed whereof it was reversed. Order is accordingly prayed to be set aside. Appeal is prayed to be allowed.

3. Shri G.R. Singh, Ld. DR while rebutting these arguments has justified the Order and while relying upon Rule 14 of CCR, 2004 and the Board's Circular dated 03.09.2009 has impressed upon that the payment of interest was a mandate for reversal being beyond the prescribed period. The Order therefore has no infirmity. Appeal is prayed to be dismissed.

4. After hearing both the parties, we observe that the cenvat credit of Rs. 1,21,60,874/- is acknowledged to have been wrongly availed by the appellant. It is also the admitted fact that the moment this inadvertence in the books of accounts of the appellant was brought to their notice that they reversed the amount in excess from their credit balance in the month of March 2010 itself. It therefore becomes the revenue neutral situation as far as the books of accounts of the appellant are concerned and since the stage of taking or utilising the credit had not yet come, there is no occasion for revenue to suffer any loss on this account. The Order of appropriation of the reverse amount as passed by the Commissioner has no practical meaning in view of this discussion.

5. Now coming to the aspect of imposition of interest, the Commissioner while confirming the imposition of interest as relied upon Rule 14 of CCR, 2004 which has on date is Rule 16 which reads as follows:

***Rule 16. Recovery of Cenvat credit wrongly taken or erroneously refunded – (1)***

*Where the cenvat credit has been taken wrongly but not utilised, the same shall be recovered from the manufacturer and the provisions of Section 11A of the Excise Act shall apply mutatis mutandis for effecting such recoveries;*

*(2) Where the cenvat credit has been taken and utilised wrongly or has been erroneously refunded the same shall be recovered alongwith interest from the manufacturer and the provisions of Section 11A and 11AA of the Excise Act shall apply mutatis mutandis for effecting such recoveries.*

The provision has categorised two separate situations where the cenvat credit is taken but not utilised and where the credit has been taken and utilised, Section 11AA of Central Excise Act which talks about imposition of interest on the delayed payments is applicable only to a situation where cenvat credit is taken and utilised. Admittedly, in the present case, the cenvat credit was not utilised. It was nor even taken, rather it was merely availed in the books of accounts. Since the initial representation as early as dated 20.09.2011 (copy of letter on record) the appellant is conveying that in the month of April 2009, the cenvat credit was inadvertently availed and that the same stands reversed in the month of March 2010 itself. The Commissioner (Appeals) is therefore opined to have ignored the true spirit of the provisions and even the intimation sent to the Department by the appellant.

Apparently present is not the case of imposition of interest. We draw our support from the decision of Hon'ble High Court of Karnataka in the case of **C.C.E., Bangalore Vs. Pearl Insulation Ltd. 2012 (281) E.L.T. 192 (Kar.)** wherein it was held where the assessee has not taken or utilised the credit but has only availed a wrong credit in their books of accounts and on pointing out the mistake as immediately reversed the entry. It is clear that no benefit of wrong entry in account books was taken. Interest in the given circumstances is not payable. Hon'ble High Court of Punjab and Haryana also in the case **C.C.E. Delhi Vs. Maruti Udyog Ltd. 2007 (214) E.L.T. 173** has upheld the Order of Tribunal holding that the assessee is not liable to pay interest in the case where the credit was only taken and not utilised. The SLP against this Order was also dismissed by the Hon'ble Supreme Court.

6. Though the Commissioner has relied upon Board's Circular No. 897 dated 03.09.2009 but the statutory provision as discussed above stands otherwise. The constitutional court have taken a view contrary to the impugned Commissioner's view. In the given circumstances, mere Circular cannot be allowed to supersede the law which has already been laid down by the statute as well as by the Jurisdictional Courts.

7. Now coming to the aspect of imposition of penalty, we observe that since the wrongly availed cenvat credit stands reversed way back in March 2010 and since the appellant

immediately has acknowledged the said wrong availment as inadvertent mistake that too in books of account only, there remains no question of any wilful intention to evade duty or to have the unjust enrichment on the part of the appellant. The question of imposition of penalty does not at all arises. Rather it is a fit case and where benefit of Section 80 of Finance Act 1944 should have been given to the appellant and it is also a fit case where not even a SCN should have been issued. Question of imposition of penalty is absolutely irrelevant. For the same reason as that of absence of any wilful mis-representation or suppression of facts on the part of the assessee, the Department was not entitled to invoke proviso to Section 73(3) of Finance Act, 1944. The fact of inadvertent mistake and the reversal of wrongly availed cenvat credit in March 2010, i.e., much prior to the issuance of the impugned SCN of the year 2013 was very much in the knowledge of the Department. Seeing from any angle SCN is held barred by time.

8. As a result of entire above discussion, the Order under challenge is hereby set aside. Appeal stands allowed.

[Operative part pronounced in the open Court]

**(C.L. MAHAR)**  
**MEMBER (TECHNICAL)**  
D.J.

**(RACHNA GUPTA)**  
**MEMBER (JUDICIAL)**