

**CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

COURT NO. 4

Appeal No. Service Tax / 52172 / 2016

[Arising out of the Order-in-Appeal No. DLISSVTAX002COM019-15-16 dated 31.03.2016 passed by Commissioner of Service Tax, New Delhi].

M/s. Cushman & Wakefield India Pvt Ltd.
B-6/8 Commercial Complex Opp Deer Park,
Safdarjung Enclave , New Delhi

Appellant

Versus

**Commissioner of Service Tax
Delhi II**

Respondent

Present for the Appellant : Ms Prerna Chopra, Advocate
Present for the Respondent: Shri Sanjay Jain, AR

CORAM:

Hon'ble Mr. C L Mahar, Member (Technical)
Hon'ble Ms. Rachna Gupta, Member (Judicial)

Date of Hearing : 20.12.2018

Date of Decision : 17.06.2019

FINAL ORDER No. 50773 /2019

Per C L Mahar:

The brief facts of the matter are that during the course of audit of the appellant's financial records, it was pointed out by the Audit team that though the appellant have reversed back the cenvat credit amounting to Rs.50,25,246/- in compliance to the requirement of Rule 6(3) of the CENVAT Credit Rules, 2004. However, reversal of cenvat credit has not

been reflected in ST 3 returns for the relevant period i.e. during financial year 2008-2009 and 2009-2010. It is a matter of record that the appellant while filing ST 3 return for the period October, 2010 to March, 2011 on 25 April, 2011, had shown the reversal of cenvat credit amounting to Rs.50,25,246/-. There have been certain correspondences between the department and the appellant between the visit of the Audit party to the appellants premises on 26.10.2010 to 02.11.2010 upto the issuance of Show cause notice on 20.3.2013. It has been submitted by the appellant vide their letter dated February 27, 2012 that they have already reversed back the required amount of cenvat credit of Rs. 50.25 lakh as per the requirement of Cenvat Credit Rule 6(3) of 2004 and it was also mentioned that since there have never been no negative credit in the books of accounts and balance of cenvat credit has always been more than what was required for reversal back of cenvat credits as per the provisions of Rule 6(3) of Cenvat Credit Rules, 2004 and therefore, interest on non-reversed amount is actually not leviable as they have only taken the credit and not utilized the same. The appellant however, had deposited the interest of Rs. 7,78,260/- vide challan No. 01921 dated 31.3.2012 on the insistence of the Department.

2. The Department after due inquiries have issued a show cause notice dated 20.3.2013 whereunder the

cenvat credit amounting to Rs.50,25,246/- has been demanded as per the provisions of Section 73(1) of Finance Act, 1994 read with Rule 14 of Cenvat Credit Rules, 2004. Interest of Rs.7,78,260/- has also been demanded invoking the provisions of section 75 of Finance Act, 1994 read with Rule 14 of Cenvat Credit Rules, 2004

3. A penalty of Rs. 50,25,246/- has also been invoked to be imposed under Rule 15(3) of the Cenvat Credit Rules 2004. The matter has been adjudicated by learned Commissioner vide order dated 31.03.2016 whereunder all the charges as invoked in the Show cause notice has been confirmed.

4. The learned adjudicating authority has imposed penalty of Rs. 50,25,246/- by invoking the provisions of Section 78 of Finance Act, 1994 read with Rule 15(3) of Cenvat Credit Rules, 2004. Though we find that the provisions of Section 78 of Finance Act, 1994 have not been invoked in the Show Cause Notice dated 20.03.2013.

5. The learned advocate appearing on behalf of the appellant has submitted that order in original is legally not sustainable in the facts of the matter as well as on the question of law. Learned advocate has submitted that so far as the reversal of cenvat credit of Rs.50,25,246/- is concerned, they are not contesting the matter, however, it has been mentioned that this appeal is to assail the imposition

of penalty of Rs.50,25,246/- under Section 78 of Finance Act, 1994 read with Rule 15(3) of Cenvat Credit Rule, 2004.

6. The learned advocate has mentioned that on 31.3.2010 the appellants had reversed back the cenvat credit amounting to Rs.50,25,246/- as per requirement of Rule 6(3) of Cenvat Credit Rules, 2004, on their own in their books of accounts and same has already been reflected in their financial statement of financial year 2009-2010. However, only by mistake the appellant failed to reflect the same in their ST 3 returns filed for the financial year 2009-2010. It has also been mentioned that on being pointed out by the audit party that the reversal of cenvat credit as per the requirement of Rule 6(3) of the Cenvat Credit Rules, 2004 have not been reflected in ST 3 returns by the appellant. The lapse has been corrected by the appellant by reflecting the reversal of cenvat credit in their ST 3 returns filed for the period October, 2010 to March, 2011, on 25 April, 2011. It has also been pointed out by the learned advocate that the appellant always maintained cenvat credit balance much above the amount of credits which were required to be reversed as per the provisions of Rule 6(3) of Cenvat Credit Rules, 2004 and therefore the payment of interest as per the provisions of section 75 of Finance Act 2004 read with rule 14 of Cenvat Credit Rules is actually not applicable in their case. Still succumbing

to the pressure of the department, an amount of Rs.7,78,260/- has already been deposited by them towards interest vide challan No. 01921 dated 31.3.2012. It has been the contention of the appellant that though the show cause notice should not have been issued to them, still the department has issued the show cause notice invoking the penal provisions also. The learned advocate has mentioned that as per the judgement of **Commissioner of Central Excise and Service Tax, LTU Bangalore vs. Bill Forge Pvt. Ltd. reported in [2012 (279) ELT 209 - Karnataka High Court** (which has also been endorsed by Apex Court) whereunder the Hon'ble Karnataka High Court has held that reversal of cenvat credit on its own before the utilization of such credits amounts to non taking of cenvat credit and it is further been added that the interest will be leviable only if wrongly availed cenvat credit had been utilized by the assessee.

7. The learned advocate has also relied upon several decisions to prove that penalty under Section 78 read with Rule 15 of the Cenvat Credit Rules was not invokable in the given circumstances of the matter. Learned advocate has relied on the judgement of this Tribunal in the case of **Spectrum Power general Ltd. vs. CCE & Cus & ST Hyderabad** reported in **2017 (3) GSTL 500 (Tri-Hyderabad)** wherein it was held as under:

“ There could be a bona fide error on the appellant’s part of not declaring the amount of Rs. 3.05 crores as the commission received in the ST return, but it is also undisputed that the said amount has been declared in the balance sheet as receipts. In our view, this plea of the appellant that there was a bona fide error in not recording the amount in the ST-3 return is seems to be acceptable. In the facts and circumstances of this case, by invoking the provisions of section 80 of Finance Act, 1994, we set aside the penalty imposed by the adjudicating authority under section 78 of Finance Act, 1994”

8. The learned advocate has also assailed the order in original that provisions of section 78 of the Finance Act 1994 for levy of equal amount of penalty are not invokable in the facts of this matter that no element of any fraud, misstatement or any misrepresentation with an intent to evade payment of duty are present in their case as appellant on its own has debited the cenvat credit which was required to be reversed as per the provisions of Rule 6(3) of Cenvat Credit Rules, 2004 and same was also duly reflected in their Balance sheet much before the visit of Audit party. Only because of an inadvertent mistake they failed to declare the reversal of cenvat credit in their ST 3 return filed for the relevant period. This fact cannot be taken as a suppression or mis-representation as in the account books of the appellant, the credits have already been reversed. The learned advocate has

relied on the judgement of Hon'ble Apex Court in the case of ***Puspam Pharmaceuticals Co. vs. CCE, Bombay*** reported in ***1998 (78) ELT 401*** wherein it was held that-

"4... The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or willful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty."

9. The learned advocate has also taken shelter of following case laws while advancing his case that penalty under Section 78 of Finance Act, 1994 read with Rule 15(3) of Cenvat Credit Rules, 2004, is not imposable in their case.

1. ***Northern Coalfields Ltd. vs CCE, Bhopal [2017]63 GST 390 (New Delhi-CESTAT);***
2. ***Castrol India Ltd. v. CCE, Vapi [2013} 291 ELT 469 (Ahmadabad –CESTAT);***
3. ***Rohan Builders (India) Pvt. Ltd. vs. CCE & ST Pune Appeal No. ST/85691 dated 05.12.2018 (Tri-Mumbai)***
4. ***Escorts Ltd. vs CGST CC & CE Dehradun***

Appeal No. E/51664/2018 SMC dated 08.08.2018 (Tri-Delhi);

5. Grasim Bhiwani Textiles Ltd. vs. CCE, Rohtak [2016 (332) ELT 865 (Tri-Del)];

6. Rallison Electricals Ltd. vs. CCE, Alwar Apepal No. 51040/2017 dated 30.08.2017 (Tri-Delhi)

10. We have also heard learned Departmental Representative who has reiterated the findings as given in the Order-in-original.

11. Having heard the appellant as well as the Departmental Representative and after perusal of record of the appeal, we feel that it will be relevant to have a relook at the facts of the matter. It is a matter of record that before the Audit party visited the appellant between 27.10.2010 to 02.11.2010, the appellants have already reversed back the cenvat credit amounting to Rs. 50,25,246/- in compliance to the requirement of Rule 6(3) of Cenvat Credit Rules, 2004 and same was reflected in the financial accounts including the balance sheet for financial year 2009-2010. It was only on comparison of balance sheet and the ST 3 returns which have been filed by the appellant that the Audit party pointed out that the reversed back amount of Cenvat credit has not been shown as 'reversed back' in their ST 3 return for the relevant period. The appellant while filing ST 3 return for period covering October, 2010 to March, 2011, which was filed on 25 April, 2011, the reversal of Cenvat credit amounting to Rs. 50,25,246/- had properly been

reflected in the ST 3 return. It is also a matter of record that interest which has been demanded by the Department under Show Cause notice amounting to Rs.7,78,260/- has also been deposited by the appellant vide challan No. 01921 dated 31.3.2012, this was much before the issuance of show cause notice on 20.03.2013. With this back drop of the facts, we want to have a look at the provisions of law with regard to demand of Cenvat Credit and imposition of penalty as per the provisions of Section 73 read with Rule 14 of Cenvat Credit Rules and Section 78 of Finance Act, 1994 which reads as under:

"Section 73 (3).....

Where any service tax has not been levied or paid or has been short-levied or short paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer before service of notice on him under sub-section (1) in respect of such service tax, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub section (1) in respect of the amount so paid: ..."

12. It can be seen that as per the provisions of section 73 (3) if the element of fraud, collusion, willful mis-statement or suppression of facts of contravention

of any of the provisions of Finance Act with an intent to evade payment of service tax are not present. In that case, if the assessee deposits any short payment of service tax along with due interest before issue of Show cause notice, in that case no show cause notice is required to be issued as per the provisions of above mentioned section 73 (3) of the Finance Act. We find that the element of fraud, collusion, willful misstatement or suppression of facts or contravention of any of the provisions of Finance Act with an intent to evade payment of service tax are not present at all in the case in hand as the appellant themselves have reversed back the cenvat credit which was required to be reversed in compliance to the provisions of Rule 6(3) of Cenvat Credit Rules, 2004 and same has been duly reflected in their financial account including the balance sheet. Thus, the intention of the appellant has never been to misuse the cenvat credit which was not due to them as per the provisions of Cenvat Credit Rules and same has also been reversed back along with the interest much before the issuance of show cause notice. We feel that the intention of the appellant have never been to misuse the cenvat credit or evade service tax on account of same and therefore, primarily we feel that since they have already reversed the cenvat credit and have also paid interest, there was no need to issue show cause notice left aside invoking the provisions of Rule 15 (3) of the Cenvat

Credit Rules, 2004 for imposition of equal amount of penalty.

13. We also feel that adjudicating authority has travelled beyond the show cause notice, by imposing penalty under the provisions of Section 78 of the Finance Act, 1994 though this provision was not invoked in the impugned show cause notice. We, therefore, feel that the adjudicating authority has travelled beyond the show cause notice and therefore, the imposition of penalty is also not sustainable on this count. We also like to analyze the facts of the matter, in view of various legal pronouncements on utilization of cenvat credit. The facts in this matter indicate that the appellant on its own reversed back the cenvat credit and has reflected the same in their financial books of accounts. There have also been correspondence between the officers of the Department and the appellant which indicate that the appellants have always having credit in their account much more than what was required to be reversed and if such credit have been reversed on its own by the appellant, in view of Karnataka High Court judgement in the case of ***Commissioner of Central Excise and Service Tax, LTU Bangalore vs. Bill Forge Pvt. Ltd.*** (supra), it will amount to non-taking of the cenvat credit. Relevant extract of the judgement are reproduced hereinbelow:

"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."

14. Thus we feel that since the original amount of credit was already reversed as the assessee had claimed that they always had credits in accounts much above the required amount, the credits in a way have not been utilized by the assessee.

15. So far as the imposition of penalty under Section 78 read with Rule 15(3) of Cenvat Credit Rules 2004 is concerned, as stated above, same is not leviable in the facts of this case. However, we also take shelter of decision of this Tribunal in the case of ***M/s. Grasim Bhiwani Textiles Ltd. vs. CCE, Rohtak*** reported in ***[2016 (332) ELT 865 (Tri-Del)]***. Relevant extract of the judgement are reproduced hereinbelow:

"7. Next question to be considered is imposition of penalty. Interestingly, it is seen stated in the show cause notice that the same is issued invoking the extended period of limitation. As per records, the department has come to know about wrongful availment of credit and informed the appellants the same on 9-8-2007. The show cause notice is dated 24-1-2008, which in our view is within the period of limitation. We do not find any ground necessary for invoking the extended period of limitation. Be that as it may, the contention of the appellant that there was no suppression of facts or wilful misstatement is not without force. On 4-7-2006, the appellants have written letter explaining the manner of availing the credit of inputs, capital goods and input service.

Further, when the department called for to furnish the details regarding availment of credit, the appellants had furnished the same. On such score, we hold that the respondent have miserably failed to establish suppression or misstatement with intention to evade payment of duty on the part of the appellants. Pursuant to the above reason, we are of the considered view that the imposition of penalty is unwarranted."

16. In view of the above discussions, we hold that the penalty under section 78 of Finance Act, 1994 read with Rule 15(3) of Cenvat Credit Rules, 2004 is not imposable in the facts of this matter. We, therefore, feel that the impugned order -in-original is without any merits and we set aside the same. The appeal is allowed.

(Pronounced in the open Court on 17.06.2019)

(C. L. Mahar)
Member(Technical)

(Rachna Gupta)
Member(Judicial)