IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Appeal No.E/622/2010

(Arising out of Order-in-Original No.27/Commr./Denovo/Bol/2010 dated 10.05.2010 passed by the Commissioner of Central Excise, Bolpur)

M/s Philips Carbon Black Ltd.

Applicant (s)/Appellant (s)

Vs.

Commissioner of Central Excise, Bolpur

Respondent (s)

Appearance:
Shri B.N.Chattopadhyay, Consultant for the Appellant (s)
Shri S.Mukhopadhyay, Suptd.(AR) for the Respondent (s)

CORAM:
Hon'ble SHRI P.K.CHOUDHARY, Member (Judicial)
Hon'ble SHRI C.L.Mahar, Member (Technical)

Date of Hearing:- 28.06.2018

Date of Pronouncement: 11.10.2018

ORDER NO.FO/76816/2018

Per Shri P.K.Choudhary

The appellant filed this appeal against the demand of interest under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11AB of Central Excise Act, 1944 and imposition of penalty of Rs.2,000.00 under Rule 15(3) of the Cenvat Credit Rules, 2004.

2. Heard both sides and perused the appeal records.

3. We find from the Adjudication Order that the appellant had taken the credit, but had not utilized the same, and reversed the same prior to the issuance of the show cause notice. The Adjudicating Authority following the Board's Circular No.897/17/2009-CX dated 03.09.2009 observed that interest is payable even when credit has not been utilized. We find that the Larger Bench of the Tribunal in the case of J.K.Tyre & Industries Ltd. vs.

Asst. Commr. Of C.Ex, Mysore [2016 (340) E.L.T. 393 (Tri.-LB)] held that on account of wrong availment of cenvat credit, interest is not payable, if reversed before utilization. The Tribunal in the case of Garden Silk Mills Ltd. vs. Commr. Of Central Excise, Customs & Service Tax-Surat [2016(332) E.L.T. 820 (Tri.-Ahmd.)] held in favour of the assessee. The relevant portion of the said decision is reproduced below:

> ***"4.*** *The learned Authorised Representative for the Revenue strongly refutes the arguments of the learned Counsel and submits that the appellants had reversed the Credit only after the audit pointed out the same and after persuasion by the officers. He also submits that on the issue of interest, there are other decisions by the Hon'ble High Court of Madras and also decision of the Hon'ble Tribunal. He also counters the Citations made by the Learned Counsel. He submits the Apex Court's decision in Ind-Swift Laboratories Ltd (supra) is in the favour of Revenue stand. He also cited the decision of Hon'ble Madras High Court in the case of CCE, Chennai v. Delphi TVS Diesel Systems Ltd - 2015 (322) E.L.T. 279 (Mad.) and decision of this Hon'ble Tribunal in Force Motors Ltd v. CCE., Pune - 2015-TIOL-1833-CESTAT-Mum = 2015 (329) E.L.T. 543 (Tribunal). The learned Authorised Representative strongly argued that if the audit had not pointed out the wrong availment of cenvat credit, it would have resulted in short levy and by simple filing returns by itself will not rescue the appellants from the mischief of suppression.*
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> ***5.*** *We find that the appellants had taken Cenvat credit on the basis of invoices raised in the name of their Head Office. The said Cenvat Credit has been taken by one of their manufacturing unit. There is no allegation of double availment of the said Cenvat Credit by any other unit. It is also observed that the appellants had reversed the Cenvat Credit on being pointed out by the audit. The appellants have not seriously contested the necessity or correctness of reversal of the Cenvat Credit before the lower authorities. However, they are seriously contesting the levy of interest and penalty. On the issue of levy of interest, there are conflicting decisions by various Hon'ble High Courts and different Benches of the Hon'ble Tribunal. It is seen that the Hon'ble High Court of Gujarat has observed in Para 7 in the case of Dynaflex Pvt. Ltd. (supra), as under :*
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> *"7. In this regard it may be germane to refer to the decision of the Apex Court in the case of Commissioner of C. Ex., Mumbai-I v. Bombay Dyeing & Mfg. Co. Ltd., 2007 (215) E.L.T. 3 (S.C.),*

wherein it has held been that when an entry has been reversed before utilization the same amounts to not taking credit. Rule 14 of the Rules makes provision for recovery of interest where the CENVAT credit has been taken or utilized wrongly or has been erroneously refunded. Thus, both, in case where CENVAT credit has been wrongly taken or wrongly utilized, interest, is recoverable under Rule 14 of the Rules. However, in the light of the aforesaid decision of the Supreme Court, when the entry has been reversed before utilization, the same amounts to not taking credit. In the circumstances, where CENVAT credit is taken wrongly, but reversed before the same is utilized, it amounts to not taking credit. Accordingly, when no credit is taken, the provisions of Rule 14 of the Rules would not be attracted. The view adopted by the Tribunal as well as the authorities below is, therefore, in consonance with the view taken by the Supreme Court in the above referred decision."

6. *We find that in this case the appellant had reversed the credit as soon as it was pointed out that they had wrongly availed the same, and they had not utilised the Cenvat Credit so availed till the time of reversal of the same. Therefore, the decision of Hon'ble Jurisdictional High Court, relying upon the decision of the Hon'ble Supreme Court on the very same issue is applicable in this case. We, therefore, hold that no interest is payable in the present case. On the issue of penalty under Section 11AC, it is seen that the same is not leviable as there were no intention to evade duty, as is evident from the facts of the case.*

7. *In the light of the above analysis, we set aside the demand of interest under the provisions of Rule 14 of Cenvat Credit Rules 2004, and penalty under Section 11AC of Central Excise Act 1944. Order-in-Original is upheld with the above modifications. The appeal is allowed on these terms."*

4. In view of the above discussions, we hold that the demand of interest on unutilized cenvat credit cannot be sustained. In the present case penalty imposed for contravention of the Rules and the same is warranted.

5. In view of the above discussions, the impugned order is modified to the extent that the demand of interest is set aside. The appeal filed by the appellant is thus partly allowed.

(Pronounced in the Open Court on 11.10.2018)

S/d. S/d.

(C.L.Mahar)
Member (Technical)

(P.K.Choudhary)
Member (Judicial)

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