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

Appeal No.E/282/2009

(Arising out of Order-in-Original No.35/Commr./Bol/2009 dated 05.02.2009 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 Arvind Baheti, CA for the Appellant (s)
Shri A.Roy, Suptd.(AR) for the Respondent (s)

CORAM:
Hon'ble SHRI P.K.CHOUDHARY, Member (Judicial)
Hon'ble SHRI Bijay Kumar, Member (Technical)

Date of Hearing:- 04.07.2018

Date of Pronouncement:05.11.2018

Order No.FO/76938/2018

Per Shri P.K.Choudhary

The brief facts of the case are that the appellant is engaged in the manufacture and sale of Carbon Black with its head office located at Kolkata. The Durgapur factory is registered with the jurisdictional central excise authorities for manufacture of carbon black. The head office of the appellant holds a centralized service tax registration for discharging the service tax liability in respect of services taxable on a reverse charge basis. Besides, the head office is also registered as an input service distributor (ISD) for distributing the credit of service tax paid on reverse charge basis as also the service received from various service providers in accordance with Rule 7A of the Cenvat Credit Rules, to its plants. During the month of July, 2007 to March, 2008 (the relevant period), the head office interalia issued the below mentioned 7 No ISD invoices to its Durgapur plant distributing the credit of Rs.1,16,63,635/- (including Education Cess and the S&H Education Cess) pertaining to GTA Services.

S. No.	Invoice No.	Invoice Date	Month of taking credit	Service Tax	Education Cess & SHE	Total
1	PCBL/Input Credit/01/07-08	23.7.2007	July, 07	48,84,143.00	109947	4994090
2	PCBL/Input Credit/03/07-08	21.09.2007	Sept,07	15,94,544.00	47836	1642380
3	PCBL/Input Credit/05/07-08	08.10.2007	Oct,07	7,72,569.00	23177	795746
4	PCBL/Input Credit/07/07-08	13.12.2007	Dec,07	16,11,985.00	48360	1660345
5	PCBL/Input Credit/09/07-08	21.01.2007	Jn,08	8,65,794.00	25974	891768
6	PCBL/Input Credit/11/07-08	25.02.2008	Feb,08	7,62,297.00	22869	785166
7	PCBL/Input Credit/13/07-08	25.03.2008	March,08	8,68,097.00	26043	894140
	Grand Total			1,13,59,429.00	304206	11663635

The Durgapur plant of the appellant had taken service tax credit and disclosed it in their monthly ER-1 returns filed for the respective months. Such credit remained in the books of the plant at all times until it was discovered that the cenvat credit of Rs.66,69,545 comprised in the invoices referred at Sl.No.2 to 7 was inadvertently distributed to the Durgapur Plant. Accordingly, such credit was reversed by the Durgapur plant on 26.07.2008 from its cenvat credit register except a part of the education cess and higher education cess aggregating Rs.17362 paid from PLA on 05.08.2008. The credit so reversed and paid by the plant was duly disclosed in the returns filed for August, 2008. Show cause notice dated 30.07.2008 was issued covering all the 7 invoices proposing denial of cenvat credit to the appellant on the ground that the said ISD invoices were incomplete in as much as

a) The invoices neither contain the name and address of the person providing the service nor the serial no and date of invoice issued by the service provider as required under Rule 4A(1) and Rule 4A(2) of the Service Tax Rules.

b) The ISD invoices have been issued in clear violation of the provisions of Rule 9(1)(g) and Rule 9(2) of the Cenvat Credit Rules, 2004.

The show cause notice has been confirmed by the ld. Commissioner on the following grounds;

i) GTA is undoubtedly an input service but the tax thereon should have been paid by the factory and not the corporate office.

ii) Consolidated statements annexed to the invoice cannot be considered as a substitute for the details required in the ISD invoice.

iii) The noticee failed to produce evidence that the credit received by it against the ISD invoices did not exceed the tax paid by the input service provider.

2. Ld. Counsel for the appellant submits the following;

a) The ld. Adjudicating Authority erred in appreciating the concept of ISD, as contained in Rule 2(m) of the CCR as also the fact that the freight services availed by the Durgapur Plant was being paid from the corporate office duly registered as an ISD. Therefore, the corporate office alone was liable to pay service tax on a reverse charge basis.

b) More than 3000-line items could not have been accommodated in the body of the invoice and hence the annexure to the invoice containing all the details of the GTA service provider as required in terms of Rule 4A of the Service Tax Rules. An annexure to the invoice has to be considered as an integral part of the invoice and a substantive benefit of cenvat cannot be denied citing technical infractions more so when all the details were available in the annxure to the invoice. He cited the following judgments in support of his submission;

i) Laxi Organic Industries vs. CCE, Raigad [2017-TIOL-2722 Cestat-Mum]

ii) BSNL vs. CCE, Salem [2012(28) STR 624 (Tri.-Chennai)]

c) He further submits that service tax in the instant case was paid by the Head office on the GTA services under the reverse charge provisions. The notice and the Order-in-Original passed thereunder also does not dispute the eligibility of credit on GTA services as both inward transportation to the factory premises and outward transportation from the factory premises were covered by the definition of input service.

d) He also submits that verification of ISD invoices vis-à-vis tax paid so as to ensure compliance with Rule 7 of the CCR had to be carried out at the end of ISD holding registration with Kolkata I Commissionerate and filing statutory returns in terms of the CCR.

e) He finally submitted that on the self-same issue for the prior and subsequent period in the appellant's case, the Tribunal has remanded the matter back to the adjudicating authority for verification of the annexures, by Final Order No.75249/2015 dated 24.03.2015 passed in Excise Appeal No.234/09 as also in Excise Appeal No.208/2008.

3. Ld. DR for the revenue justified the impugned order.

4. Heard both sides and perused the appeal records.

5. We find from the adjudication order that the appellant had taken credit but 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 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. v. Asst. Commr. of C.Ex., Mysore [2016 (340) E.L.T. 393 (Tri.-LB)] held that wrong availment of Cenvat Credit, interest is not payable, if reversed before utilization. The Tribunal in the case of Garden Silk Mills Ltd. v. Commissioners of Central Excise, Customs & Service Tax-Surat-I [2015 SCC Online CESTAT 2361] on the identical issue 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 :

> *"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."*

6. Hence, the demand of interest on unutilised Cenvat Credit, cannot be sustained. In the present case penalty was imposed for contravention of the Rules and the same is warranted.

7. Regarding the issue of cenvat credit on GTA Services comprising in ISD Invoice No.1, we find that the issue is no more resintegra in view of the recent decision of the Hon'ble Supreme Court in the case of Commissioner of Central Excise, Belgaum vs. Vasavadatta Cements Ltd. [2018(11)GSTL 3(S.C.)]. Paragraph-7 of the above decision is reproduced below:

> "7.*As mentioned above, the expression used in the aforesaid Rule is "from the place of removal". It has to be from the place of removal upto a certain point. Therefore, tax paid on the transportation of the final product from the place of removal upto the first point, whether it is depot or the customer, has to be allowed."*

By respectfully following the ratio as laid down by the Hon'ble Supreme Court, the impugned order is set aside with regard to the cenvat credit of Rs.49,94,090/- on GTA Services comprising ISD Invoice No.1.

8. In view of the above discussion, the impugned order is modified to the extent, the demand of cenvat credit is set aside. The demand of interest is also set aside and the penalty imposed under Rule 15(3) of the Cenvat Credit Rules, 2004 is upheld. The appeal is disposed of in the above terms.

(Pronounced in the open court on 05.11.2018)

S/d.	S/d.
(BIJAY KUMAR)	**(P. K. CHOWDHARY)**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**

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