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

Appeal Nos. E/676/2009

Arising out of Order-in-Original No. 31/Commissioner/CE/Haldia/Adjn/2009 dated 07.10.2009 passed by the Commissioner of Central Excise, Haldia.

M/s Electrosteel Castings Ltd.

…Appellant (s)

Vs.

Commissioner of Central Excise, Haldia.

…Respondent (s)

Appearance:
Mr. Arvind Baheti, C. A. for the Appellant (s)
Shri H. S. Abedin, A.C. (AR) for the Respondent(s)

CORAM:
HON'BLE SHRI P. K. CHOUDHARY, MEMBER (JUDICIAL
HON'BLE SHRI BIJAY KUMAR, MEMBER (TECHNICAL)

Date of Hearing/Decision: - 11.07.2018

ORDER No…FO/A/77210/2018

Per Bench:

The assessee is in Appeal against Order-in-Original No. 31/Commissioner/CE/Haldia/Adjn/2009 dated 07.10.2009 on the limited point of confirmation of interest liability amounting to Rs.10,17,752/- under Rule 14 read with Section 11AB of the Central Excise Act.

2. The brief facts of the case are that the Appellant had inadvertently taken 100% credit of excise duty and education cess on capital goods received during the period July 2005 to March 2006, aggregating Rs.5,31,51,459/- as against 50% permitted in the year of

receipt in terms of Rule 4(5) (a) of the Cenvat Credit Rules. The inadvertent excess credit of Rs.2,65,75,730/- was suo motu detected and reversed by the Appellant even prior to utilization in April 2006 under an intimation to the Jurisdictional Excise Office. Thereafter, the Appellant was served with the Show Cause Notice dated 12 May 2009 proposing recovery of interest amounting to Rs.10,17,752/- which stood confirmed by the Learned Commissioner vide the impugned order-in-Original dated 07 October 2009.

3. The Ld. Consultant appearing on behalf of the Appellant has assailed the confirmation for demand of interest on the ground that the inadvertent credit was never utilized and stood reversed by the Appellant suo motu even prior to issuance of the Notice. The Learned Consultant has relied upon the following decisions in support of his contention that no interest is applicable when the unutilized irregular credit is reversed suo motu.

Commissioner of Central Excise, Vs. Strategic Engineering- 2014 (310)ELT 509 (Mad.)

Commissioner of Central Excise, Vs. Bill Forge Pvt. Ltd.- 2012 (279) ELT 209 (Kar.)

JK Tyre & Industries Ltd.- 2016 (340) ELT 399 (Tri.-LB)

Judgement of this Hon'ble Tribunal passed in the case of M/s Philips Carbon Black Ltd. Vs. CC, Bolpur bearing Final order No. 76030/2017

Rashtriya Ispat Nigam Ltd. Vs. CCE, CU & ST, Vishakapatnam (2018-TIOL-2014- CESTAT-HYD).

4. The Ld. D. R. has invited our attention to the decision of the Hon'ble Supreme Court in the case of Union of India Vs. Ind-Swift Laboratories reported in 2012 (25) STR 184 (S.C. to contend that

interest is applicable as soon as the irregular credit is taken even if the same is not utilized before reversal.

5. Heard both sides and perused the appeal records.

6. We find that the reversal of credit suo motto prior to utilization is undisputed in the present case as forthcoming from para 2.6 and para 2.7 of the impugned Order-in-Original dated 07.10.2009.

7. We find that the Larger Bench of the Tribunal in the case of J.K. Tyre & Industries Ltd. Vs. Assistant Commissioner of Central Excise, 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. Similar view has been taken by the Tribunal in the case of Garden Silk Mills Ltd. Vs. Commissioner of Central Excsie, Customs & Service Tax, Surat [2016 (332) E.L.T. 820 (Tri.-Ahmd).]. 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 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 Honøble High Courts and different Benches of the Honøble Tribunal. It is seen that the Honøble High Court of Gujarat has observed in Para 7 in the case of *Dynaflex Pvt. Ltd.* (supra), as under :

ñ7. 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.ò

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 Honøble Jurisdictional High Court, relying upon the decision of the Honøble 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.ò

8. The above decisions have been passed taking into consideration the decision of the Hon'ble Supreme Court in the case of Ind-Swift laboratories 2012 (25) STR 184. Therefore, these are not per incuriam but on the contrary decided on the sound principle laid down by the Hon'ble Supreme Court in the case of Sri Kumar Agencies reported in 2008 (232) ELT 577, that the decisions of the Hon'ble Court are not Euclid's theorem to be read out of context as one additional fact or circumstantial flexibility can make a whole lot of difference to the outcome of the case. Therefore, by respectfully following the ratio as laid down by the Hon'ble Supreme Court and the decisions cited supra, we are inclined to hold that the demand of interest on unutilized CENVAT Credit cannot be sustained.

9. In view of the above discussions, the impugned order is modified to the extent that the demand of interest is set aside and the appeal filed by the appellant is allowed with consequential relief to the appellants.

(Dictated and pronounced in the open court.)

(Bijay Kumar)
Member (Technical)

(P. K. Choudhary)
Member (Technical)

Tushar Kr.