IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.2

Excise Appeal No.78557 of 2018

(Arising out of Order-in-Appeal No.170/DGP-CEX/2018-19 dated 12.07.2018 passed by Commr. of Central Excise (Appeals), Siliguri Commissionerate)

M/s SAIL
Surya Sen Sarani, Dist.-Burdwan,
Durgapur-713208

Applicant (s)

VERSUS

CGST & Excise, Bolpur
Bolpur Commissionerate,
N.C.Das Road, Sian,
P.O.-Bolpur, Dist.-Birbhum, West Bengal

Respondent (s)

APPERANCE :

Shri Pratik Shah, C.A. & Shri Deepro Sen, Advocate for the Appellant
Shri K.Chowdhury, A.R. for the Respondent

CORAM:
HON'BLE MR. P.K.CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO.76224/2019

DATE OF HEARING : 20.09.2019
DATE OF DECISION : 20.09.2019

PER P.K.CHOUDHARY :

Briefly stated, the facts of the case are that the Appellant Company is engaged in the manufacture of alloy steel and products thereof, classifiable under Chapter 72,73 of the Central Excise Tariff Act, 1985. Show-cause notice dated 23rd September, 2009, was issued alleging wrong availment of cenvat credit to the tune of Rs.1,67,112/- Light Diesel Oil in the month of August, 2007. On an objection being raised by CERA, the appellant assessee reversed the amount in the month of July, 2009 to their credit account. Show cause notice sought, (i) to appropriate the amount already reversed ; (ii) to charge interest and (iii) to impose penalty under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944. The Adjudicating Authority disallowed the cenvat credit of Rs.1,67,112/- and confirmed the demand of duty and appropriated the amount of Rs.1,67,112/- already reversed by the appellant assessee in July, 2009. He also confirmed the demand of interest and imposed penalty under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944. On appeal, the Ld.Commissioner (Appeals) upheld the order of the Adjudicating Authority and rejected the appeal. Hence, the present appeal before the Tribunal.

2. The Ld.Counsels appearing on behalf of the Appellant Company, submitted a synopsis and a written submission along with a compilation of statutory provisions and relied upon decisions.

3. The Ld.D.R. appearing on behalf of the Revenue, submitted that the assessee is liable to pay interest on the cenvat credit taken on irregular basis, even though the same was not utilized by them in terms of Rule 14 of Cenvat Credit Rules, 2004. In support of his contention, he relied upon the following decisions :

(i) CCEx. & Customs, Raipur Vs. Vandana Vidyut Ltd. : 2016 (331) ELT 231 (Chhattisgarh) ;

(ii) CCEx., Pune Vs. GL & V India Pvt. Ltd. : 2015 (321) ELT 611 (Bom.) ;

(iii) CCEx., Chennai Vs. Delphi TVS Diesel Systems Ltd. : 2015 (322) ELT 279 (Mad.).

4. Heard both sides and perused the appeal records.

5. I find that the issue of interest on unutilized reversed credit entry was the subject matter of Hon'ble Supreme Court decision in the case of *Union of India vs. Ind-Swift Laboratories Ltd. [2011 (265) ELT 3 (SC)* = ***2011-TIOL-21-SC-CX*** . The decision was considered by Hon'ble High Courts and Co-ordinate Benches of Tribunal in the following decisions among others.

(i) In case of *CCE & ST vs. Bill Forge Pvt. Ltd. [2012 (26) STR 204 (Kar.)* = ***2011-TIOL-799-HC-KAR-CX*** the respondent assessee availed Cenvat Credit of duty paid on the capital goods but not utilized.

During the scrutiny of the ER-I return for the month of June 2007, it was observed that they had taken excess credit of Rs. 98,77,446.00 on capital goods. The fact having been pointed out, they reversed the same in September, 2007 and informed the Revenue. A show cause notice was issued calling upon them to show cause as to why they should not be levied interest and penalty for wrongful availment of Cenvat Credit which were also confirmed in Adjudication Order. On appeal, Hon'ble Tribunal set aside the levy of interest by holding that as the assessee had only made an entry in the records and actually not taken or utilized such credit, the question of payment of any interest would not arise. Against the said Order of the Hon'ble CESTAT, when Revenue preferred appeal, the substantial question of law was answered against the Revenue and in favour of the assessee by the Hon'ble Karnataka High Court, by placing reliance on various judgments of Hon'ble Apex Court rendered in the context of the Modvat Scheme. After discussing the judgment of Hon'ble Apex Court in case of Ind-Swift Laboratories Ltd. (Supra) the Hon'ble Karnataka High Court observed inter alia, as follows.

"19 Rule 14 of the CENVAT Credit Rules, 2004 reads as under:-

Rule 14. Recovery of CENVAT credit wrongly taken or erroneously refunded. When the CENVAT credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest shall be recovered from the manufacture or the provider of the output service and the provisions of sections 11A and 11AB of the Excise Act or Sections 73 and 75 of the Finance Act, Shall apply mutatis mutandis for effecting such recoveries.

A reading of the aforesaid provisions makes it very clear that the said provision is attracted where the Cenvat Credit has been taken or utilized wrongly or has been erroneously refunded. <u>In view of the aforesaid judgment of the Apex Court, the question of reading the word and in place of or would not arise. It is also to be noticed that in the aforesaid Rule, the word avail is not used. The words used are taken or</u>

<u>utilized wrongly. Further the said provision makes it clear that the interest shall be recovered in terms of Section 11A and 11B of the Act</u> .

20. <u>From the aforesaid discussion what emerges is that the credit of excise duty in the register maintained for the said purpose is only a book entry . It might be utilized later for payment of excise duty on the excisable product</u>. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. It matures when the excisable product is received from the factory and the stage for payment of excise duty is reached. Actually, the credit is taken, at the time of the removal of the excisable product. <u>It is in the nature of a set off or an adjustment. The assessee use the credit to make payment of excise duty on excisable product. Instead of paying excise duty, the cenvat credit is utilized, thereby it is adjusted or set off against the duty payable and a debit entry is made in the register. Therefore, this is a procedure whereby the manufacturers can utilize the credit to make payment of duty to discharge his liability. Before utilization of such credit, the entry has been reversed, it amounts to not taking credit. Reversal of cenvat credit amounts to non-taking of credit on the inputs</u> .

21. Interest is compensatory in character, and is imposed on an assessee, who has withheld payment of any tax, as and when it is due and payable. The levy of interest is on the actual amount which is withheld and the extent of delay in paying tax on the due date. If there is no liability to pay tax, there is no liability to pay interest. Section 11AB of the Act is attracted only on delayed payment of duty i.e., where only duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, the person liable to pay duty, shall in addition to the duty is liable to pay interest. <u>Section do not stipulate interest is payable from the date of book entry, showing entitlement of Cenvat credit interest connot be claimed from the date of wrong availment of CENVAT credit and that the interest would be payable from the date CENVAT credit is taken or utilized wrongly</u>.

<u>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</u>, a sum of Rs. 154-00 was the interest payable from the sate 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 pt to any loss at all. When once the wrong entry was pointed out, being convinced, the assessee has promptly reversed the entry. <u>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 ad 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 has taken the credit, in other words y 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 if 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.</u>"

(Emphasis supplied).

It can be seen that the decision in case of UOI Vs. Ind-Swift Laboratories Ltd. (supra) has been elaborately dealt with by Hon'ble High Court in the decision.

Following the decision in case of Bill Forge Pvt. Ltd. (Supra) Hon'ble Karnataka High Court in case of *CCE Vs. Gokaldas Images (P) Ltd. [2012 (28) S.T.R. 214 (SAR.)]* and *CCE, Bangalore vs. Pearl Insulation Ltd. [2012 (28) ELT 192 (Kar.)]* dismissed the appeal filed by the Revenue.

(ii) In case of *CCE Vs. Ashoka Metal Dicor (P) Ltd. [2011 (21) S.T.R. 469 (All.)]* the Revenue raised the following question among other, before the Hon'ble Allahabad High Court:-

> *" (A) Whether, the Tribunal has committed a manifest error of law to direct the Original authority "to verify as to whether credit was utilized and if not utilized the credit during the material period, no interest will be demanded ", whereas the liability to pay interest under Section 11AB of Central Excise Act, 1944 is automatic till the period the amount is not paid and it does not depend on non-utilization of amount kept/credit taken by manufacturer?*

The Hon'ble Allahabad High Court dismissed the appeal summarily by observing interalia. As follows: (Para 9):-

> *"9. It is undisputed fact that the Assessee was entitled for the Cenvat Credit under the Cenvat Credit Rules. It is also not disputed that during the period 28-2-2004 to 18-3-2004 the Assessee had paid Central Excise Duty in excess of Rs. 9,31,360/-. The purchasers have reversed the Cenvat Credit in their Cenvat account of Rs. 9,31,360/-, therefore, the Assessee was entitled for the refund of excess amount paid in accordance to the provisions of the Act. Instead of claiming refund separately, the Assessee has taken Cenvat Credit of the said amount in the Cenvat account. Such amount credited in the Cenvat account was available for the payment of duty but the same was not utilized for payment of duty and subsequently, the Assessee has reversed*

the Cenvat Credit entry in the Cenvat account. The Apex Court in the case of Commissioner of Central Excise, Mumbai-I v. Bombay Dyeing & Manufacturing Company Limited, reported in 2007 (215) E.L.T. 3 (S.C.) = ***2007-TIOL-141-SC-CX*** *has held that where before the utilization of the credit amount if the entry is reversed it amounts to not taking credit. Once the credit is reversed before its utilization in the Cenvat account it does not amount to taking of credit. Thus, the provisions of Rule 14 of Cenvat Credit Rules and Section 11AB of the Act are not attracted and neither the penalty nor the interest is chargeable. The Division Bench of Punjab & Haryana High Court in the case of Commissioner of Central Excise, Delhi-III v. MarutiUdyog Limited, reported in 2007 (214) E.L.T. 173 (P & H) =* ***2006-TIOL-308-HC-P&H-CX*** *has held that the Assessee is not liable to pay interest as the credit was only taken as an entry in the Modvat record and was not in fact utilized. Against the above decision of the Punjab & Haryana High Court, Special Leave to Appeal (Civil) No. CC3915/2007 filed by Commissioner of Central Excise, Delhi-III has been rejected by the Apex Court on 14-5-2007 [2007 (214) E.L.T. A50 (S.C.)]."*

(Emphasis added)

(iii) In case of CC & CE Vs. Rana Sugar Ltd. [2010 (253) E.L.T. 366 (All.)] Hon'ble Allahabad High Court had the occasion to consider the following question raised by the Revenue:

"Whether the interest in not recoverable under Rule 14 of the CENVAT Credit Rules, 2004 and penalty not imposable under Rule 15(I) of the CENVAT Credit Rules, 2004, if the inadmissible credit has been reversed before utilization?"
The appeal was dismissed as devoid of merit by the Hon'ble High Court by holding that

"Once before the issue of any Show Cause Notice, the CENVAT Credit has been reversed and the same has not been utilized for the payment of excise duty, we are of the opinion that there is no question of demanding any interest and levying any penalty."

(iv) Similarly, the same view was taken by the Tribunal in the following cases:

> *(a) CCE Vs. Sharda Energy & Minerals Ltd., 2013 (291) ELT 404 (Tri.-Del),*
>
> *(b) Gary Pharmaceuticals (P) Ltd. Vs. CCE, 2013 (297) ELT 391 (Tri.-Del.) =* ***2013-TIOL-2441-CESTAT-DEL***
>
> *(c) CE Vs. BalrampurChini Mills Ltd., -* ***2013-TIOL-1142-CESTAT-Del***
>
> *(d) M/s Gurmehar Construction Vs CCE -* ***2014-TIOL-1205-CESTAT-Del***

(v) The Hon'ble Gujarat High Court in case of CCE & C Vs Dynaflex Pvt. Ltd. [2011 (266) E.L.T. 41 (Guj.)] dismissed the Revenue Appeal by observing that -

> *"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."*

(vi) The above decision was also followed by Hon'ble High Courts in following judgment:

> *(a) Steelco Gujarat Ltd. Vs UOI [2012 (285) E.L.T. 161 (Bom.)] =* ***2012-TIOL-572-HC-MUM-CUS*** *,*
>
> *(b) CCE & C Vs. Sweet Industries 2011 (264) E.L.T. 349 Guj.)*

(c) CCE Vs. Ashoka Metal Dicor (P) Ltd. [2011 (21) S. T. R. 469 (All.)]

(vii) Hon'ble Punjab & Haryana High Court in the case of CCE Vs. MarutiUdyog Ltd., [reported in 2007 (214) E.L.T. 173 (P & H) = **2006-TIOL-308-HC-P&H-CX** has held that the Assessee is not liable to pay interest as the credit was only taken as an entry in the Modvat record and was not in fact utilized. Against the decision, the Special leave to Appeal (Civil) No. CC3915/2007 filed by Revenue, was rejected by the Hon'ble Apex Court [2007 (214) E. L. T. A50 (S.C.)] .

(viii) The Hon'ble Madras High Court in case of CCE Vs. M/s Strategic Engineering (P) Ltd. - **2014-TIOL-466-HC-MAD-CX** and Para 11 of the decision is worth quoting, which is extract below:

"11. It is an admitted fact that Rule 14 of the Cenvat Credit Rules has been subsequently amended wherein it has been clearly stated as "taken and utilized". Therefore it is quite clear the mere taking itself would not compel the assessee to pay interest as well as penalty. Further, as pointed out earlier, the subsequent amendment has given befitting answer to all doubts existed earlier. Since the subsequent amendment has cleared all doubts existed earlier in respect of Rule 14 of the said Rules, it is needless to say that the argument advanced by the learned counsel appearing for the appellant/Department is erroneous, whereas the argument advanced on the side of the respondent is really having merit and the substantial questions of law settled in the present Civil Miscellaneous Appeal are not having substance and altogether the present Civil Miscellaneous Appeal deserves to be dismissed. (Emphasized)

The following substantial question of law was framed for consideration:-

"1. Whether interest is recoverable or not from the manufacturer in terms of Rule 12 of erstwhile CCR, 2002, and Rule 14 of CCR, 2004 when the CENVAT Credit has been taken wrongly by the manufacturer but kept unutilized, when the said Rules specifically state that where the CENVAT credit has been taken or utilized

> *wrongly or has been erroneously refunded, the same along with interest shall be recovered from the manufacturer?*

Hon'ble High Court considered that the short point involved in the present Civil Miscellaneous Appeal is as to whether a mere taken of CENVAT credit facilities without actually using it, would carry interest as well a penalty? It was further considered that the Appellate Tribunal had come to a definite conclusion to the effect that in the instant case the assessee had merely taken CENVAT credit facilities and before utilizing the same, the Department had reversed it and therefore, the assessee was not liable to pay interest and penalty.

The entire argument put forth from the side of the Revenue was based upon the decision in the case of Ind-Swift Laboratories Ltd. (supra).

6. I find that the erstwhile Rule 14 of the Cenvat Credit Rules read as “taken or utilised”, which had been amended and substituted by the words “taken and utilised”. I find that such an amendment conveys the intent of the legislature and hence, substantive benefit cannot be denied to the appellant. Further, I find that if credit has been taken but not utilised and is subsequently reversed, it leads to no consequence and results in a revenue neutral situation.

7. In view of the above discussion and taking into consideration the facts and circumstances of the case, I find that recovery of interest is untenable. Accordingly, the impugned order is set aside and the appeal filed by the appellant is allowed with consequential relief to the appellant.

(Dictated and pronounced in the open court.)

Sd/

(P. K. Choudhary)
Member (Judicial)

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