IN THE CUSTOMS, EXCISE AND SERVECE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH AT MUMBAI
COURT NO. IV

APPEAL NO. ST/394/12

(Arising out of Order-in-Original No. P-I/Commr/ST/16/2012 dated 15.03.2012 passed by the Commissioner of Central Excise, Pune-I.)

M/s Aamby Valley Ltd. Appellant

Vs.

CCE, Pune-I Respondent

Appearance:

Shri S.S. Gupta, Chartered Accountant for Appellant
Shri Rishi Goyal, Additional Commissioner (A.R.) for Respondent

CORAM:

HON'BLE SHRI RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE SHRI RAJU, MEMBER (TECHNICAL)

Date of Hearing: 11.04.2018
Date of Decision: 26.04.2018

ORDER NO. A/86226/2018

Per: Ramesh Nair:

The facts of the case are that the appellant have reversed the CENVAT credit on 30.09.2008 on their own in respect of some input services as per the advice of their Statutory Auditor. However they did not pay any interest on the inadmissible credit reversed by them and when asked to pay interest vide letter dated 28/12/2010, they did not agree to pay interest as informed vide their letter dated 15.03.2011. Therefore a show-cause notice was issued to the appellant for proposing demand of CENVAT credit amounting to Rs. 2,31,46,878/- under the provisions of Rule 14 of CENVAT Credit Rules, 2004 read with Section 73(1) of the Finance Act, 1994, interest under Rule 14 of CENVAT Credit Rules, 2004 read with Section 75 of the Finance Act, 1994 was proposed to be recovered from the appellant, penalty under Rule 15(3) of CENVAT Credit Rules, 2004 was also proposed to be imposed on the appellant for wrong availment of CENVAT credit. The Adjudicating Authority confirmed the demand which was proposed in the show-cause notice and the same was appropriated against the suo-moto reversed made by the appellant. It was also ordered for recovery of interest under Rule 14 and penalty of equal amount was also imposed under Rule 15(3) of the CENVAT Credit Rules, 2004 read with Section 78 of the Finance Act, 1994. Being aggrieved by the Order-in-Original the appellant filed the present appeal.

2. Shri S.S. Gupta, learned Counsel appearing on behalf of the appellant submits that they are not contesting the demand of Service Tax as the same was paid suo-moto before the issuance of show-cause notice and the same was declared in the ST-3 return. The appellant is contesting the demand of interest and penalty. As regard interest, he submits that the appellant had not utilised the CENVAT credit which was subsequently reversed on their own therefore the interest is not chargeable on the said CENVAT credit. He further submits that since the appellant had already paid the CENVAT amount on their own ascertainment and declared in their

monthly ST-3 return, there is no amount due for which the demand can be issued under Section 73. He submits that the demand under Section 73 can be raised only when any Service Tax has not been paid or levied, in the present case, the appellant paid suo-moto amount, there is no case of non-levy or non-payment of Service Tax, hence the provisions of Section 73(1) cannot be invoked. He submits that by filing ST-3 return the assessment was finalised which includes the payment of CENVAT credit availed by the appellant, after filing the ST-3 return no amount stand due for recovery. He further submits that Rule 14 of CENVAT Credit Rules, 2004 invoked by the Adjudicating Authority requires that the demand can be issued for the credit which is wrongly taken. This can be a triggering point for show-cause notice under Section 73. But show-cause notice should be issued for short levy or non-payment, which is not the case here. Therefore no show-cause notice was to be issued and question of interest and penalty does not arise. He submits that the judgment of Hon'ble Supreme Court in the case of *M/s Ind-Swift Laboratories Ltd. – 2012 (25) STR 184 (S.C.)* shall not apply in the facts of the present case inasmuch as in that case, the company had availed as well as utilised the ineligible credit. However in the present case, the appellant had not utilised the CENVAT credit. He further submits that it is held in various judgments that even for demand of interest, show-cause notice should be issued within the time limit as prescribed under Section 11A (Section 73 for Service Tax). In the present case, the show-cause notice demanding interest in respect of the credit availed during the period October, 2004 to March, 2008 and reversed the same in 2008, the show-cause notice was issued on 22.06.2011 therefore the show-cause notice is time bar, subsequently no demand of interest and imposition of penalty could have been confirmed. He placed reliance on the following judgments:-

(i) *Bill Forge Pvt. Ltd. – 2012 (26) STR 204 (Kar.)*

(ii) *Strategic Engineering (P) Ltd. – 2014 (310) ELT 509 (Mad.)*

(iii) *GL & V India Pvt. Ltd. 2015 (321) ELT 611 (Bom.)*

(iv) *J.K. Tyres & Industries Ltd. – 2016 (340) ELT 193 (Tri.-LB)*

(v) *Shyam Sunder U. Nichani – 1985 (22) ELT 751 (Karnataka)*

(vi) *Indian Tobacco Association - 2005 (187) ELT 162 (S.C.)*

(vii) *Multiservice Rolls Ltd. 2007 - (215) ELT 119 (Tri.-Kol.)*

(viii) *Reliance Industries Ltd. - 2006 (206) ELT 250 (Tri.-Mum)*

(ix) *Gupta Steel - 2006 (205) ELT 24 (Guj.)*

(x) *Cosmic Dye Chemical Vs. Collector of Central Excise, Bombay - 1995 (75) ELT 721 (S.C.)*

(x) *Tamil Nadu Housing Board - 1994 (74) ELT 9 (S.C.)*

(xi) *T.V.S. Whirlpool Ltd. - 1996 (86) ELT 144 (Tribunal)*

(xi) *Gujarat Narmada Fertilizers Co. Ltd. - 2012 (285) ELT 336 (Guj.)*

(xii) *Ceat Ltd. – 2012 (275) ELT 433 (Tri.-Mumbai)*

(xiii) *Ind Swift Laboratories Ltd. – 2009 (240) ELT 328 (P&H)*

(xiv) *Pahwa Chemicals Pvt. Ltd. Vs. Commissioner of Excise, Delhi – 2005 (189) ELT 257 (SC)*

3. On the other hand Shri Rishi Goyal, learned Additional Commissioner (A.R.) appearing on behalf of the Revenue reiterates the finding of the impugned order. He further submits that the appellant

have wrongly availed the CENVAT credit, therefore even though the same was suo-moto reversed the provisions of Rule 14 of CENVAT Credit Rules is applicable therefore the demand of interest cannot be avoided. He submits that the issue has been settled by the judgment of Hon'ble Supreme Court in the case of *M/s Ind-Swift Laboratories Ltd. (supra)* wherein the Hon'ble Supreme Court has interpreted the provisions of Rule 14 prevailing at the relevant time and it was ruled that at the material time the interest was chargeable for wrongly taken or utilised the CENVAT credit, therefore even though the appellant had not utilised the credit but even though taken wrong credit, the interest is chargeable.

4. He further submits that there is no dispute the appellant had wrongly availed the credit even though they reversed the credit but the character of wrongly availed does not change, therefore extended period is invokable for demanding interest. He submits that merely because the appellant have suo-moto reversed the credit the *malafide* intention is proved, hence the longer period of demand of interest was rightly invoked. He further submits that limitation shall not apply in the case for demand of interest for reason that even if the show-cause notice need not to be issued for the interest is payable on amount of availed credit. He placed reliance on the following judgments:-

(i) Commissioner of Central Excise, Bangalore-II Vs. Alsthom Instrument Transformers – 2015 (322) ELT 297 (Kar.)

(ii) Commissioner of Central Excise, Chennai-III Vs. Supreme Industries Ltd. – 2014 (303) ELT 513 (Mad.)

(iii) Commissioner of Central Excise & Customs, Raipur Vs. Vandana Vidyut Ltd. – 2016 (331) ELT 231 (Chhattisgarh)

(iv) Commissioner of Central Excise, Thane-II Vs. Standard Greases – 2017 (350) ELT 123 (Tri.-Mumbai)

5. We have carefully considered the submissions made by both sides. We find that though the appellant had availed the credit during the period 2004-08 but on advise by Statutory Auditor they reversed the same suo-moto in 2008, and declared the said reversal in their ST-3 return, therefore in our view in this fact no show-cause notice should have been issued under Section 73(1) for demand of CENVAT credit which was admittedly paid by the appellant. As regard the demand of interest, we find that since the extended period was not available for the revenue for the reason that there is no suppression of fact on the part of the appellant as per their conduct discussed above, the extended period should have not been invoked. In the case of *T.V.S. Whirlpool Ltd. (supra), Gujarat Narmada Fertilizers Co. Ltd. (supra)* and *Ceat Ltd. (supra),* it was held that the limitation also apply to interest liability. In the present case the CENVAT credit pertaining to the period 2004-08 was reversed by the appellant in 2008 and declared in the ST-3 return, there was no suppression of fact on part of the appellant, therefore even for interest the show-cause notice should have been issued within the normal period of one year from the date of reversal of CENVAT credit. Accordingly, we are of the considered view that the demand of interest is hit by limitation, therefore the same is not sustainable being time bar. As regard the

penalty, we find that though the appellant have availed the credit but they on their own reversed it and declared in their ST-3 return, in that case even the show-cause notice for demand under Section 73(1) should not have been issued, if that be so there is no question of invoking the penal provision. Accordingly, the penalty of the equal amount imposed by the lower authorities is not sustainable, hence the same is set aside. As per our above discussion the demand of interest and penalty are set aside, the amount of CENVAT credit reversed by the appellant stand maintained. The appeal is allowed in the above terms.

(Pronounced in Court on 26.04.2018)

(Raju)
Member (Technical)

(Ramesh Nair)
Member (Judicial)

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