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

Appeal No. E/944/2008

(Arising out of Order-in-Original No. 20/Commr/MII/2008 dt. 11.08.2008 passed by the Commissioner of Central Excise, Mumbai II))

Hindustan Petroleum Corporation : **Appellant**

VS

Commissioner of Central Excise, Mumbai-II : **Respondent**

Appearance

Ms. Padmavati Patil, Advocate for Appellant

Shri Ajay Kumar, Addl. Commr. (A.R) for respondent

CORAM:

Hon'ble Shri Ramesh Nair, Member (Judicial)
Hon'ble Shri Raju, Member (Technical)

Date of hearing : 03/04/2018
Date of pronouncement : 17/05/2018

ORDER NO. A/86420/2018

Per : Ramesh Nair

The facts of the case are that the appellant have wrongly availed cenvat credit twice on the same invoice in the month of April 2007. This discripency was noticed by the EA-2000 Audit Officers. The appellant agreeing to the Audit objection paid the said wrong Cenvat Credit amounting to Rs. 1,08,86,809/-, however the interest liability was not discharged. The issue in the present appeal is limited to charging of interest under Section 11AB of the Central Excise Act, 1944 and penalty under Rule 15(3) of Cenvat Credit Rules, 2004 read with Rule 25 of Central Excise Rules, 2002. The adjudicating authority confirmed the interest of Rs.9,34,476/- and imposed penalty of Rs.2,00,000/- under Rule 15(3) of Central Excise Rules,2004 read with Rule 25 of the Central Excise Rules, 2002.

2. Ms. Padmavati Patil, Ld. Counsel appearing on behalf of the appellant submits that the appellant have been maintaining the credit balance much more than the wrongly availed credit. In this regard she submitted statement showing the non-utilization of credit, therefore merely taking credit and lying in the balance in cenvat account, no interest is chargeable on the same ground penalty should not have been imposed. She further submits that during the relevant period under Rule 15(3) the maximum penalty was Rs.2,000/- therefore the penalty of Rs. 2,00000/- is not legal and correct. She placed reliance on the following judgments:

(i) *Commissioner of C. Ex., Mumbai-I Vs. Bombay Dyeing & Mfg. Co. Ltd.2007 (215) E.L.T. 3 (S.C.)*

(ii) *Steelco Gujarat Ltd. Vs. Union of India 2012 (285) E.L.T. 161 (Bom.)*

(iii) *Commissioner of C. Ex. & Customs Vs. Genus Electrotech Ltd. 2013 (296) E.L.T. 175 (Guj,)*

(iv) *Commissioner of Central Excise, Mumbai-I Vs. Hindustan Petroleum Corporation Ltd. 2017-TIOL-1257-HC-MUM-CX*

(v) *Commissioner of C.Ex. & S.T., LTU Vs. Bill Forge Pvt. Ltd. 2012 (279) E.L.T.209 (Kar.)*

(vi) *Commissioner of C.Ex., Bangalore-II Vs. Gokaldas Images (P) Ltd. 2012 (278) E.L.T. 590 (Kar.)*

(v) *Commissioner of C. Ex., Chennai-II Vs. Hindustan Motors Ltd. 2012 (284) E.L.T. 168 (Mad.)*

(vi) Commissioner of Central Excise, Madurai Vs. M/s. Strategic Engineering (P) Ltd.2014-TIOL-466-HC-MAD-CX

(vii) Commissioner of C. Ex., Ghaziabad Vs. Ashoka Metal Décor (P) Ltd. 2010 (256) E.L.T. 524 (All.)

3. On the other hand, Shri Ajay Kumar Ld. Additional Commissioner (A.R.) appearing on behalf of the Revenue reiterates the findings of the impugned order. He submits that there is no dispute that the appellant have wrongly availed the credit twice on the same invoice. It is only on pointed out by the EA-2000 Audit, the appellant reversed the credit. He further submits that the Hon'ble Supreme Court in the case of Union of India Vs. Ind-Swift Laboratories Ltd. 2012 (25) STR 184 (S.C.) held that even if the credit is not utilized, only on taking credit the interest is chargeable by interpreting Rule 14 of Cenvat Credit Rules, 2004. Therefore interest is legally chargeable. Since the appellant have wrongly availed credit, the penalty imposed is maintainable. He placed reliance on the following judgments:

(i) Union of India Vs. Ind-Seift Laboratories Ltd. 2012 (25) S.T.R. 184 (S.C.)

(ii) Chemspec Chemicals Pvt. Ltd. Vs. Commissioner of C.Ex., Belapur 2008 (222) E.L.T. 374 (Tri.-Mumbai)

(iii) Kinetic Engineering Ltd. Vs. Commissioner of C. Ex., Aurangabad 2008 (223) E.L.T.73 (Tri.-Mumbai)

(iii) Commissioner of C. Ex., Pune-II Vs. Yashashri Polyextrusion Ltd. 2008 (221) E.L.T. 523 (Tri.-Mumbai)

(iv) Indian Oil Corpn. Ltd. Vs. Commissioner of C. Ex., Vadodara 2007 (220) E.L.T. 260 (Tri.-Ahmd.)

(v) CCE & C. Augangabad Vs. Padmashri V. V. Patil S.S.K. Ltd. 2007 (215) ELT 23 (Bom.)

(vi) Commissioner of C. Ex., Jaipur-II Vs. Agarwal Cotton Mills 2007 (220) ELT 274 (Tri.Del.)

(vii) Commissioner of C. Ex. & Cus., Aurangabad Vs. Greaves Cotton Ltd. 2008 (225) E.L.T. 198 (Bom.)

(viii) Commr. of C. Ex. Delhi-III, Guragaon Vs. Electrolus Kelvinator Ltd.,
2006 (206) E.L.T. 1137 (P & H)

(ix) Sony India Ltd. Vs. Commissioner of Central Excise, Delhi
2004 (167) E.L.T 385 (S.C.)

(x) Seiko Plast Vs. Commissioner of Central Excise, Mumbai-III
2003 (156) E.L.T. 1008 (Tri.-Mumbai)

(xi) Commissioner of C. Ex., Bangalore-III Vs. Chelpark Co.(P) Ltd.
2007 (216) E.LT 364 (Kar.)

4. On careful consideration of the submissions made by both the sides and perusal of records,. We find that there is no dispute of wrong availment of credit which the appellant have already paid on pointing out by the audit. The only issues remain to be decided is that whether the interest and penalty is payable by the appellant. In this regard, we find that during the period the interest provision in terms of Rule 14 reads as under:

> *"Rule 14. Recovery of CENVAT credit wrongly taken or erroneously refunded:- 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 or the provider of the output service and the provisions of Section 11A and 11AB of the Excise Act or Section 73 and 75 of the Finance Act, shall apply mutatis mutandis for effecting such recoveries".*

In view of the above Rule, the wordings are if the credit has wrongly been taken or utilize the interest is chargeable therefore even though the credit was not utilized only on cenvat taken, the interest is chargeable. The Hon'ble Supreme Court in the case of Ind-Swift Laboratories Ltd. (supra) interpreting Rule 14 held that interest is chargeable from the date of taking credit. The judgment relied upon by the Ld. Counsel are distinguishable, in view of the Hon'ble Supreme Court judgment in Ind-Swift Laboratories Ltd. (supra) therefore we hold that the appellant is liable to pay the interest on wrongly availed credit from the date of taking credit till the reversal thereof.

5. As regard penalty we find that since the appellant has no malafide intention. The wrong credit availment twice on the same invoice is due to inadvertence. This cannot be taken as intention to evade duty. More over the appellant is a Public Sector Undertaking and paying the huge revenue therefore it cannot be expected from the appellant that they had any malafide intention to avail wrong credit therefore we do not find the present case as fit for imposition of penalty. Accordingly the penalty imposed under Rule 15(3) of Cenvat Credit Rules, 2004 read with Rule 25 of Central Excise Rules, 2002 is set aside. The appeal is partly allowed in the above terms.

(Pronounced in court on 17/05/2018)

(Raju)
Member (Technical)

(Ramesh Nair)
Member (Judicial)

SM.