IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I

APPEAL Nos. ST/87203,87425/2014

(Arising out of Orders-in-Original No. 69/SK/M-I/2013-14 dated 12.3.2014 and No. 71/SK/M-I/2013-14 dated 18.3.2014 passed by Commissioner of Central Excise, Mumbai-I)

Jet Airways (India) Ltd. **Appellant**

Vs.

Commissioner of Central Excise, Mumbai-I **Respondent**

Appearance:

Shri Gajendra Jain, Advocate, with Shri Jay Chheda, C.A., for appellant
Shri Roopam Kapoor, Commissioner (AR), for respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of Hearing: 30.8.2018
Date of Decision: 30.8.2018

ORDER N. A/**88043-88044/2018**

Per: Sanjiv Srivastava

These appeals are directed against order in original No 69/SK/M-I/2013-14 dated 12/03/2014 & 71/SK/M-I/2013-14 dated 18/032014. By the said orders Commissioner has decided holding as follows:

a. Order in Original No 69/SK/M-I/2013-14 dated 12/03/2014

"9.1 I confirm and order recovery of Service tax amounting to Rs 1,01,00,000/- (rupees One Crore and One Lakh only) under Rule 14 of the CENVAT Credit Rules, 2004 read Section 73 of the Finance Act, 1994.

9.2 I order that interest should be recovered under Section 75 of the the Finance Act, 1994 read with Rule 14 of the CENVAT Credit Rules, 2004.

9.3 I impose penalty of Rs 1,01,00,000/- (Rupees One Crore and One Lakh only) *under Section 78 of the Finance Act, 1994 read with Rule 15 of the CENVAT Credit Rules, 2004.*

9.4 I do not impose penalty under Section 76 of the Finance Act, 1994 on the Assesseee.

9.5 I impose penalty of Rs 5000/- (Rupees Five Thousand Only) under Section 77 of the Finance Act, 1994."

b. Order in Original No 71/SK/M-I/2013-14 dated 18/032014

"15.1 I confirm demand of Cenvat Credit of Rs 21,31,20,807/- (Rupees Twenty One Crores Thirty One Lakhs Twenty Thousand Eight Hundred Seven Only) under Rule 14 of the CENVAT Credit Rules, 2004 read with proviso to Section 73(1) of the Finance Act, 1994.

15.2 I appropriate the amount of Rs 21,31,20,807/- (Rupees Twenty One Crores Thirty One Lakhs Twenty Thousand Eight Hundred Seven Only) paid by the Assessee against the demand confirmed at para 15.1.

15.3 I order for recovery of Interest of Rs 3,31,11,198/- under Rule 14 of the CENVAT Credit Rules, 2004 read Section 75 of the Finance Act, 1994.

15.4 I impose a penalty of Rs 200/- per day during which the failure continues or @2% of such tax per month, whichever is higher, not exceeding the amount of Service tax short paid under section 76 of the Finance Act, 1994.

15.5 I impose penalty of Rs 21,31,20,807/- under Section 78 of the Finance Act, 1994 read with Rule 15 of the CENVAT Credit Rules, 2004."

2.1 During the course of audit of the records of Appellant for the period 2007-08 to 2010-11, it was noticed that appellants have while working showing the ratio of taxable

CENVAT ratio for the year as 10% for reversing the Credit in respect of the exempted services provided by them during the year 2008-09, has actually included the cancellation of ticket charges as taxable revenue. If the taxable CENVAT ratio is calculated excluding the said revenues then said ratio will work out to 9.4%. By inflating the said ratio, appellants had under rule 6(3A) reversed lesser credit to the extent of Rs 1.01 crores. In response to the ueries made appellant responded saying that they in year 2009-10 reversed extra amount of credit and thus they are required to any further credit nad extra reversal made by them during the year 2009-10 should be adjusted against the short reversal made during the year 2008-09.

2.2 Since the explanation given by the appellant was not acceptable to the department, a show cause notice dated 23.04.2012 was issued to the appellants seeking to recover the said amounts short reversed along with interest and penalty. This Show Cause Notice has been adjudicated by the Commissioner as per the order at (i) in para 1 supra.

2.3 Further during the audit it was also noticed that appellants were availing the Cenvat Credit on Aviation Turbine Fuel (ATF) on inputs, and also in respect of other input services. On comparison of the CENVAT credit as per ST-3 return with 3CD statement prepared by the party following discrepancy is noticed.

Table 1		**Amount Rs'Crore**	
S No	**Description of Goods/ Services**	**Opening Balance at the start of 2008-09**	
		As per ST-3 return	**As per 3 CD Statement**
1	ATF	330.78	349.93
2	Input Services	121.42	102.27
	Total	**452.2**	**452.2**
3	**Closing Balance on 31.03.2010**	**329.26**	**308.75**

2.4 Appellants agreed to the above discrepancy and agreed for reversal of excess credit shown in their ST-3 return (Appellants letter dated 21.09.2013). They accordingly reversed the said excess credit as detailed in table 2 and also paid the service tax short paid during the said period.

Table 2		**Amount in Rupees**	
S No	**Document No**	**Date of Reversal**	**Amount Reversed**
1	2007013852	30.06.2010	11,17,63,581
2	2007054337	31.03.2011	1,13,40,918
3	2007013850	30.06.2010	3,00,59,294
Total Excess Credit taken and reversed			**15,31,63,793**
4	2007049649	01.03.2011	1,55,66,509
5	2007054894	31.03.2011	3,09,69,467
6	2007049651	01.03.2011	1,34,21,038
Service Tax short paid and paid subsequently			**1,63,32,785**
	Total		**21,31,20,807**

2.5 Though appellants have reversed the credit, they were not able to the explain the reasons for the said discrepancy. They also not paid interest as was required to be paid. Thus interest was computed on the basis of date of availment of excess credit as is indicated in table 3 below:

Table 3: Interest to be paid				
Date of		**Amount' Rs**	**No of Days**	**Interest @ 13% p.a.**
Excess Credit/ payment	**Reversed/Paid**			
21.07.2009	30.06.2010	11,17,63,581	344	1,36,93,335
21.07.2009	31.03.2011	1,13,40,918	618	24,96,245
06.05.2010	30.06.2010	3,00,59,294	55	5,88,833
Interest on Excess Credit taken/subsequently reversed				1,67,78,413
31.03.009	01.03.2011	1,55,66,509	700	38,80,965
05.10.2008	31.03.2011	3,09,69,467	907	1,00,04,411
05.10.2009	01.03.2011	1,34,21,038	512	24,47,409
Interest on Service Tax Short Paid				1,63,32,785
Total Interest to Be Paid				3,31,11,198

2.6 Since appellant have short paid the service tax without any justifiable reason and has suppressed the fact of such short payment and its subsequent adjustment, a show cause notice dated 23/04/2012 invoking extended period of limitation as provided under proviso Section 73(1) of Finance Act, 1994 was issued to the appellant.

2.7 The said show cause has been adjudicated by the Commissioner, as per the order as indicated at (ii) in para 1, supra.

2.8 Aggrieved by the orders of Commissioner, Appellant have filed these appeals.

3.1 In their appeal filed against the order at (i) in para 1, supra, appellants have assailed the order of Commissioner stating-

a. Revenue earned from cancellation charges during the period of dispute is insignificant. Quantity of inputs/

capital goods/ input services availed by the appellants would have remained the same irrespective of whether the appellants earn cancellation charges from customers or not. Hence, no part of the common input services can be said to be used to the extent they earn consideration in the form of cancellation charges.

b. They have already reversed the excess credit in the year 2009-10 and thus they are not required to reverse any further CENVAT credit. Such adjustments is permissible as per the provisions of Rule 6(3A) of the CENVAT Credit Rules, 2004.

c. The total shirt reversal if any due to non consideration of cancellation fees as exempted turnover is only 0.2% as oppsed to 0.6% alleged by the department.

d. The short reversal was only on account of rounding off adopted by the appellants and there was no intention to avail excess credit.

e. Demand is barred by limitation. {Continental Foundation [2007 (216) ELT 177 (SC)], Padmini Products [1989 (43) ELT 195 (SC)] and Tamil Nadu Housing Board [1994 (74) ELT 9 (SC)]}

f. No interest is payables since the excess credit was never utilized. {CCE vs Bombay Dyeing and Manufacturing Co Ltd [2007 (215) ELT 3 (SC)], Bill Forge Pvt Ltd [2011-TIOL-799-HC-Kar-CX]}

g. Penalty is not imposable {Hindustan Steel Ltd vs The State of Orissa [1969 (2) SCC 627]}

h. Since no credit is to be reversed or paid back, demand of interest is not sustainable.

3.2 In their appeal filed against the order at (ii) in para 1, supra, appellants have assailed the order of Commissioner stating-

a. They are not liable to pay interest amounting to Rs 1,67,78,413/- in respect of the credit which was only availed but not utilized by them {CCE vs Bombay Dyeing and Manufacturing Co Ltd [2007 (215) ELT 3 (SC)], Bill Forge Pvt Ltd [2011-TIOL-799-HC-Kar-CX], CCE vs Dynaflex Pvt Ltd. [2011 (266) ELT 41 (Guj)], CCE vs Strategic Engineering (P) Ltd [2014-TIOL-466-HC-Mad-CX], Sharda Energy and Minerals Limited [2013 (291) ELT 404 (t-Del)], Pearl Insulation Limited {2012 (281) ELT 192 (Kar)], Gokuldas Images (P) Ltd [2012 (278) ELT 590 (Kar)]}

b. They have not availed excess credit to the extent of Rs 3,00,59,294/- during the Financial Year 2009-10.

c. They are not liable to pay interest amounting to Rs 1,63,32,785/- for delay in making debit entries in the book of account for utilization of CENVAT Credit for payments of short paid out service tax.

d. They have not short paid the service tax amounting to Rs 1,34,21,038/-. They were liable to pay service tax amounting to Rs 1,34,21,038/- on account of PO

Mail documents & Cargo uplifted in domestic sector for the FY 2009-10. This liability was disclosed in the ST-3 returns from time to time and shown to be discharged from the CENVAT Credit account. However the journal entries for the same were not passed in the SAP system then, and were passed on only in 2010-11

e. Extended period of limitation is not invokable in this case {Continental Foundation [2007 (216) ELT 177 (SC)], Padmini Products [1989 (43) ELT 195 (SC)] and Tamil Nadu Housing Board [1994 (74) ELT 9 (SC)]}

f. Penalty is not imposable {Hindustan Steel Ltd vs The State of Orissa [1969 (2) SCC 627]}

g. Penalty both under Section 76 and Section 78 cannot be imposed simultaneously {The Financers vs CCE Jaipur [2007 (8) STR 7 (T-Del)], Silver Oak Gardens Resort [2008 (9) STR 481 (T-Del)]]

4.1 We have heard Shri Gajendra Jain, Advocate along with Shri Jay Chhada for the Appellants and Shri Roopam Kapoor, Commissioner, Authorized Representative, for the revenue.

4.2 Arguing for appellants learned counsel submitted relying on various decisions of High Courts and Tribunal, that –

i. since they had only taken the excess credit but have not utilized the same interest could not have been levied on them, in terms of Rule 14 of CENVAT Credit Rules. {CCE & ST Vs Bill Fortg Pvt Ltd. [2011-TIOL-799-HC-

KAR-CX], CCE vs Strategic Engineering (P) Ltd. [2014-TIOL-466-HC-Mad], Pearl Industries Ltd [2012 (281) ELT 192 (Kar)], Gokaldas Images (P) Ltd [2012 (278) ELT 590 (Kar)], Sharda Energy & Minerals Ltd [2013 (291) ELT 404 (T-Del)], Sweet Industries [2011 (264) ELT 349 (Guj)], Ashoka Metal Décor (P) Ltd [2011 (21) STR 469 (ALL)], Bombay Dyeing & Mfg Co Ltd [2007 (215) ELT 3 (SC)], Maruti Udyog Limited [2007 (214) ELT 173 (P&H)], Dynaflex Pvt Ltd. [2012 (25) STR 277 (GUJ)], HEG Ltd [2016 (341) ELT 366 (T-Del)], Savio India Ltd [2016 (340) ELT 735 (T-Chennai). He further submitted that all the times they have were having excess credit available with them always.

ii. Hence following the said decision, and Karnataka High Court in Bill Forge the demand for interest should be set aside.

iii. Since they had no intention to evade payment of tax section 78 should not be invoked in their case as necessary ingredients for invoking the said section are not available in this case.

iv. He stated that, in case at (i) the error was nothing but a rounding off error and should be not the reason for invoking section 78 or demanding interest.

v. He also relied on the decision in case of Mangal Textuile Pvt Ltd {2014 (311) ELT 707 (T-Ahd)], Essar Steel India Ltd [2017 (345) ELT 139 (T-Del)], Suzlon Energy Ltd {2016 (39) ELT 87 (T-Ahd)]

4.3 Arguing for the revenue learned Authorized representative submitted that it is an admitted that fact that the appellant had taken excess credit and also had short paid the service tax at relevant time. It is also an admitted fact that they were not filing the ST-3 return by the due date. In fact for the years 2008-09 and 2009-10 the ST-3 return was filed only in 2010-11. He relied upon the decision of the Apex Court in case of Ind-Swift Laboratories [2011 (265) ELT 3 (SC)} and Bombay High Court in case of GL & V India Pvt Ltd [2015 (321) ELT 611 (Bom)]. In case of J K tyre & Industries Ltd [2016 (340) ELT 193 (T-LB) larger bench has chosen to follow the decision of the Bill Forge only for the reason that the unit was in the jurisdiction of that High Court. He further submitted relying on the various decisions of tribunal that interest is to be levied in case where the appellants have taken the excess credit or short paid the service tax.

He further submitted that this is cases where appellant has deliberately suppressed the facts by not filing the ST-3 returns by due date with intention to evade the payment of tax. Hence necessary ingredients for invoking Section 78 are present in the case. Hence penalty under section 78 is justified. He relied on the decision of tribunal in case case of Hanuman Sahakari Dudh Vyvasaik Krushi Purak Seva Sansatha [2014 (309) ELT 273 (T-Mum)], to argue that bonafide belief is not blind belief and should be based on sound reasoning. Hence the plea of bonafide belief etc, cannot be reason in the present case.

5.0 We have heard the submissions made at the time of arguments and also considered those made in appeal memo.

6.0 Issue involved in the present case is vis a vis, the reversal of CENVAT Credit in terms of Rule 6(3A) of the CENVAT Credit Rules. Appellants are providing both taxable and exempted output services. They avail of the CENVAT Credit in respect of various inputs and input services, used by them for providing the output services. Since they are not maintaining the separate accounts in respect of the inputs/ input services consumed by them for providing taxable/ exempted output services they reverse the credit availed by them, as provided for by rule 6(3A) of the CENVAT Credit Rules, 2004. For ease of reference Rule 6 of the CENVAT Credit Rules, 2004 as it existed during the relevant period is reproduced below:

"Rule 6 Obligation of manufacturer of dutiable and exempted goods and provider of taxable and exempted services.-

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(3) Notwithstanding anything contained insub-rules (I) and (2), the manufacturer or the provider of output service, opting not to maintain separate accounts, shall follow either of the following options, as applicable to him, namely :-

(i) the manufacturer shall pay an amount equal to ten percent of the value of exempted goods and the provider of output services shall pay an amount equal to eight percent of the value of exempted services; or

(ii) the manufacturer of goods or the provider of output service shall pay an amount equivalent to the CENVAT credit attributable to inputs and input services used in, or in relation to, the manufacture of such exempted goods or for provision of exempted services subject to the conditions and procedures specified in sub-rule (3A).

Explanation-I. – If the manufacturer of goods or the provider of output service, avails any of the option under this sub-rule, he shall exercise such option for all exempted goods manufactured by him or, as the case may be, all exempted services provided by him and such option shall not be withdrawn during the remaining part of the financial year.

Explanation-II. – For removal of doubts, it is hereby clarified that the credit shall not be allowed on inputs and input services used exclusively for the manufacture of exempted goods or provision of exempted service.

(3A) For determination and payment of amount payable under clause (ii) of sub-rule (3), the manufacturer of goods or provider of output service shall follow the following procedure and conditions, namely:-

(a) while exercising this option, the manufacturer of goods or the provider of output service shall intimate in writing to the Superintendent of Central Excise giving the following particulars; namely :-

i. name, address and registration No. of the manufacturer of goods or provider of output service;

ii. date from which the option under this clause is exercised or proposed to be exercised;

iii. description of dutiable goods or taxable services;

iv. description of exempted goods or exempted services;

v. CENVAT credit of inputs and input services lying in balance as on the date of exercising the option under this condition;

(b) the manufacturer of goods or the provider of output service shall, determine and pay, provisionally, for every month, -

i. the amount equivalent to CENVAT credit attributable to inputs used in or in relation to manufacture of exempted goods, denoted as A;

ii. the amount of CENVAT credit attributable to inputs used for provision of exempted services (provisional) = (B/C) multiplied by D, where B denotes the total value of exempted services provided during the preceding financial year, C denotes the total value of dutiable goods manufactured and removed plus the total value of taxable services provided plus the total value of exempted services provided, during the preceding financial year and D denotes total CENVAT credit taken on inputs during the month minus A;

iii. the amount attributable to input services used in or in relation to manufacture of exempted goods or provision of exempted services (provisional) = (E/F) multiplied by G, where E denotes total value of exempted services provided plus the total value of exempted goods manufactured and removed during the preceding financial year, F denotes total value of dutiable and exempted services provided, and total value of dutiable and exempted goods manufactured and removed, during the preceding financial year, and G denotes total CENVAT credit taken on input services during the month;

(c) the manufacturer of goods or the provider of output service, shall determine finally the amount of CENVAT credit attributable to exempted goods and exempted

services for the whole financial year in the following manner, namely :-

i. *the amount of CENVAT credit attributable to inputs used in or in relation to manufacture of exempted goods, on the basis of total quantity of inputs used in or in relation to manufacture of said exempted goods, denoted as H;*

ii. *the amount of CENVAT credit attributable to inputs used for provision of exempted services = (J/K) multiplied by L, where J denotes the total value of exempted services provided during the financial year, K denotes the total value of dutiable goods manufactured and removed plus the total value of taxable services provided plus the total value of exempted services provided, during the financial year and L denotes total CENVAT credit taken on inputs during the financial year minus H;*

iii. *the amount attributable to input services used in or in relation to manufacture of exempted goods or provision of exempted services = (M/N) multiplied by P, where L denotes total value of exempted services provided plus the total value of exempted goods manufactured and removed during the financial year, N denotes total value of taxable and exempted services provided, and total value of dutiable and exempted goods manufactured and removed, during the financial year and P denotes total CENVAT credit taken on input services during the financial year.*

(d) *the manufacturer of goods or the provider of output services, shall pay an amount equal to the difference between aggregate amount determined as per condition (c) and the aggregate amount determined and paid as per condition (b), on or before the 30^Th^ June of the succeeding financial year, where the* *amount determined as per condition (c) is more than the amount paid;*

(e) the manufacturer of goods or the provider of output services, shall, in addition to the amount short paid, be liable to pay interest at the rate of twenty four percent per annum, from the due date, i.e., 30th Jun 2008 till the date of payment, where the amount short paid is not paid by the said due date;

(f) where the amount determined as per condition (c) is less than the amount determined and paid as pr condition (b), the said the manufacturer of goods or the provider of output services may adjust the excess amount on his own, by taking credit of such amount;

(g) the manufacturer of goods or the provider of output services shall intimate to the jurisdictional Superintendent of Central Excised, within a period of fifteen days from the date of payment or adjustment, as per condition (d) and (f) respectively, the following particulars, namely:-

i. details of CENVAT credit attributable to exempted goods and exempted services, month wise, for the whole financial year, determined provisionally as per condition (b),

ii. CENVAT credit attributable to exempted goods and exempted services for the whole financial year, determined as per condition (c);

iii. Amount short paid determined as per condition (d), along with the date of payment of the amount short paid;

iv. Interest payable and paid, if any, on the amount short-paid, determined as per condition (e), and

v. Credit taken on account of excess payment, if any, determined as per condition (f);

(h) xxxxxx

4. xxxxxx"

7.1 Since the appellants are providing output services which are taxable and exempted they as per Rule (6) reproduced above are required to reverse the credit attributable in respect of the exempted services provided by them. In terms of Rule 6(3A)(c) & (d) the appellants have to determine and finalize the reversals by the 30th June, the succeeding financial year. Also an intimation with reference to such finalization has to be submitted to the jurisdictional Superintendent within fifteen days of such finalization.

7.2 During the Financial Year 2008-09 appellants had determined the taxable CENVAT ratio for determining the amount to reversed under Rule 6(3A)(c) as 10%. For determining so, they included the value of exempted taxable services (cancellation charges), category of taxable service. If the said ratio had been determined correctly by the appellant, the said ratio would have been 9.4%. Appellants do not dispute the error committed by them in calculating the taxable CENVAT ratio. As a result of this error, they have short reversed the amount to the tune of Rs 1.01 crore.

7.3 Appellants do not dispute such short reversal, but have submitted that the this error has occurred for the reason of rounding of the percentage/ ratio of reversal As per the practice followed by them they were rounding off to the nearest whole number the percentage/ ratio of reversal. Thus during the Financial Year 2008-09 the percentage/ ratio determined by them was 90.4%, they rounded off the same to 90% and reversed the credit accordingly. To buttress their argument, they stated that in the year 2009-10, the said ratio was calculated as 86.5%, but rounded off by them to 87%. Thus during the year 2008-09 they after reversal availed credit of 10% of the credit taken and during the year 2009-10, 13% of the credit taken. The said contention of the appellants has been considered by the Commissioner in para 8.5 of his order as follows:

"I observe that the Assessee had claimed that the short reversal was due to the system of rounding adopted by them and there was no intention of evading Service Tax on their part. In this regard I see that the Assessee had adopted the system of rounding off the ratios to nearest whole number for their convenience. They were also aware that the said system resulted in variation of correct amount of CENVAT Credit available to them and the amount calculated by the system. The Assessee cannot claim that they were not aware of the same. The assessee was not prevented to calculate the correct amount of CENVAT Credit actually available to them, which could have been more or less, and on their own paid proper service tax. Despite above they continued using such faulty system. Neither they intimated the said fact to the department nor they corrected the amount of CENVAT Credit utilized by them on their own. This points out the clear intention towards evasion of Service Tax on part of the Assessee and I do not agree to the claim of Assessee that the short payment was unintentional. The case laws relied upon by the assessee state that mere omission to give information is not suppression of the fact and therefore extended period is not invokable. However, from the discussion above it is een that therein is clear intention to evade Service Tax on the part of the assessee and therefore the case laws relied upon do not apply in this case.

Extended period under Section 73 of Finance Act, 1994 is therefore clearly invokable in this case."

7.4 From plain reading of Rule 6(3A)(c) it is quite evident that said clause provide for the manner of determination of the CENVAT credit attributable to exempted goods/ services. The said clause do not provide for determination of any taxable/ CENVAT ratio. A proper application of the formula as per the said clause will result in an amount that needs to b reversed. The said formula is not determining any ratio as claimed by the Appellant or the percentage as determined by them. Thus the entire argument advanced by the appellants is based on certain procedure which they have devised/ adopted but which do not find support in law. The reply to the question "whether such a procedure adopted by the Appellants can be a proxy to the procedure prescribed by the Rule 6(3A) (c)?" can be nothing but a **"No".**

7.5 It is settled principle in law that when a statue prescribes a manner for doing a thing then it is the only correct manner and all other manners are barred. The principle has been time and again referred and explained by the Hon'ble Supreme Court. In case of Dipak Babaria Vs State of Gujarat [2014 (3) SCC 502], it was stated-

"53. It is well settled that where the statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. This proposition of law laid down in Taylor Vs. Taylor (1875) 1 Ch D 426,431 was first adopted by the Judicial Committee in Nazir Ahmed Vs. King Emperor reported in AIR 1936 PC 253 and then followed by a

bench of three Judges of this Court in Rao Shiv Bahadur Singh Vs. State of Vindhya Pradesh reported in AIR 1954 SC 322. This proposition was further explained in paragraph 8 of State of U.P. Vs. Singhara Singh by a bench of three Judges reported in AIR 1964 SC 358 in the following words:-

"8. The rule adopted in Taylor v. Taylor is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted…." This proposition has been later on reiterated in Chandra Kishore Jha Vs. Mahavir Prasad reported in 1999 (8) SCC 266, Dhananjaya Reddy Vs. State of Karnataka reported in 2001 (4) SCC 9 and Gujarat Urja Vikas Nigam Limited vs. Essar Power Limited reported in 2008 (4) SCC 755."

7.5 It is also a settled principle in law that "No person should be allowed the benefit of his own wrongs." In our considered view when the provisions as laid down by the Rule 6(3A)(c) of the CENVAT Credit Rules,2004, clearly and unambiguously lay down the manner for determination of amount of credit attributable to exempted goods/ services, then Appellants should have followed the same. Any other practice adopted by them cannot be justification for the wrong committed. Hon'ble Supreme Court has in case of Devendra Kumar vs State of Uttaranchal [2013 (9) SCC 363} held as follows:

"23. More so, if the initial action is not in consonance with law, the subsequent conduct of a party cannot sanctify the same. "Subla Fundamento cedit opus"- a foundation being removed, the superstructure falls. A person having done wrong cannot take advantage of his own wrong and plead bar of any law to frustrate the lawful trial by a competent Court. In such a case the legal maxim Nullus Commodum Capere Potest De Injuria Sua Propria applies. The persons violating the law cannot be permitted to urge that their offence cannot be subjected to inquiry, trial or investigation. (Vide: Union of India v. Maj. Gen. Madan Lal Yadav, AIR 1996 SC 1340; and Lily Thomas v. Union of India & Ors., AIR 2000 SC 1650).

Nor can a person claim any right arising out of his own wrong doing. (Juri Ex Injuria Non Oritur)."

7.6 In view of above discussions we are of the view that all the arguments advanced by the appellants are nothing but a justification to cover up the wrong committed by them. Accordingly they need to be rejected. Even otherwise if the argument of rounding off, was to be considered, then rounding off could have been done in respect of the amount determined and not on the percent calculated by them.

7.7 Since appellants have not determined the amounts to be reversed correctly and had never disclosed the manner adopted by them for determination of the amount to be reversed to the department, the appellants have suppressed and have contravened the provisions of Rule 6(3A) (c) of the CENVAT Credit Rules, 2004 with the intention to evade payment of Service Tax accordingly extended period of limitation as per the proviso t Section 73 of Finance Act, 1994 read with Rule 14 of CENVAT Credit Rules, 2004 has been rightly invoked.

7.8 The contention of the Appellants that short payment of the amount to be reversed during the year 2008-09 with excess payment made by them during the year 2009-10 to cannot be accepted, because the Rule 6(3A)(c) itself provides for determination of the amounts Financial Year wise.

8.1 From the para 1.10 of the Appeal memo, appellants have explained the availment of excess credit as follows:

Table		
Particulars	Financial Year	
	2008-09	2009-10
Monthly Reversal (Provisional) Ratio, 6(3A)(b)	91.25	84.0
Net Credit Availed during the Financial Year	12.51	26.01
Final Reversal/ Credit Ratio, 6(3A)(c) as on 30th June	83.86	87.0
Total Credit Availed during Financial Year	35.84	23.01
Subsequent Adjustment as	90.0	13.87
Adjusted Credit Availed during Financial Year	23.53	28.98
Excess Credit availed and subsequently reversed	12.31	3.00
Total Excess Credit taken		15.31

Thus the appellants also admit that they have taken excess credit at various times which has to be adjusted. From this table it is quite evident that the plea of appellant with regards to rounding off is totally erroneous as from the table above it is seen that appellant had been taking the credit by determining the said ratio/ percentage to second place of decimal.

8.2 Since Appellants themselves admit to taking the excess credit they at certain points of time and have subsequently adjusted the same, they are required to pay interest during the period they had taken the excess credit. To argue against the interest they have relied upon series of case law referred to in their submissions {CCE vs Bombay Dyeing and Manufacturing Co Ltd [2007 (215) ELT 3 (SC)], Bill Forge Pvt Ltd [2011-TIOL-799-HC-Kar-CX], CCE vs Dynaflex Pvt Ltd. [2011 (266) ELT 41 (Guj)], CCE vs Strategic Engineering (P) Ltd [2014-TIOL-466-HC-Mad-CX], Sharda Energy and Minerals Limited [2013 (291) ELT 404 (t-Del)], Pearl Insulation Limited {2012 (281) ELT 192 (Kar)], Gokuldas Images (P) Ltd [2012 (278) ELT 590 (Kar)]}. However Hon'ble Apex Court has in case Indo Swift [2011 (265) ELT 003 (SC)], held-

"15. *In order to appreciate the findings recorded by the High Court by way of reading down the provision of Rule 14, we deem it appropriate to extract the said Rule at this stage which is as follows :*

*"**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 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."*

16. *A bare reading of the said Rule would indicate that the manufacturer or the provider of the output service becomes liable to pay interest along with the duty where CENVAT credit* *has been taken or utilized wrongly or has been erroneously refunded and that in the case of the aforesaid nature the provision of Section 11AB would apply for effecting such recovery.*

17. *We have very carefully read the impugned judgment and order of the High Court. The High Court proceeded by reading it down to mean that where CENVAT credit has been taken and utilized wrongly, interest should be payable from the date the CENVAT credit has been utilized wrongly for according to the High Court interest cannot be claimed simply for the reason that the CENVAT credit has been wrongly taken as such availment by itself does not create any liability of payment of excise duty. Therefore, High Court on a conjoint reading of Section 11AB of the Act and Rules 3 & 4 of the Credit Rules proceeded to hold that interest cannot be claimed from the date of wrong availment of CENVAT credit and that the interest would be payable from the date CENVAT credit is wrongly utilized. In our considered opinion, the High Court misread and misinterpreted the aforesaid Rule 14 and wrongly read it down without properly appreciating the scope and limitation thereof. A statutory provision is generally read down in order to save the said provision from being declared unconstitutional or illegal. Rule 14 specifically provides that where CENVAT credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest would be recovered from the manufacturer or the provider of the output service. The issue is as to whether the aforesaid word "OR" appearing in Rule 14, twice, could be read as "AND" by way of reading it down as has been done by the High Court. If the aforesaid provision is read as a whole we find no reason to read the word "OR" in between the expressions 'taken' or 'utilized wrongly' or has been erroneously refunded' as the word "AND". On the happening of any of the three aforesaid circumstances such credit becomes recoverable along with interest.*

18. *We do not feel that any other harmonious construction is required to be given to the aforesaid expression/provision which is clear and unambiguous as it exists all by itself. So far as Section 11AB is concerned, the same becomes relevant and applicable for the purpose of making recovery of the amount due and payable. Therefore, the High Court erroneously held that interest cannot be claimed from the date of wrong availment of CENVAT credit and that it should only be payable from the date when CENVAT credit is wrongly utilized. Besides, the rule of reading down is in itself a rule of harmonious construction in a different name. It is generally utilized to straighten the crudities or ironing out the creases to make a statute workable. This Court has repeatedly laid down that in the garb of reading down a provision it is not open to read words and expressions not found in the provision/statute and thus venture into a kind of judicial legislation. It is also held by this Court that the Rule of reading down is to be used for the limited purpose of making a particular provision workable and to bring it in harmony with other provisions of the statute. In this connection we may appropriately refer to the decision of this Court in Calcutta Gujarati Education Society and Another v. Calcutta Municipal Corporation and Others reported in (2003) 10 SCC 533 in which reference was made at Para 35 to the following observations of this Court in the case of B.R. Enterprises v. State of U.P. and Others reported in (1999) 9 SCC 700 : -*

"81. ………. It is also well settled that first attempt should be made by the courts to uphold the charged provision and not to invalidate it merely because one of the possible interpretations leads to such a result, howsoever attractive it may be. Thus, where there are two possible interpretations, one invalidating the law and the other upholding, the latter should be adopted. For this, the courts have been endeavouring, sometimes to give restrictive or expansive meaning keeping in view the nature of legislation, maybe beneficial, penal or fiscal etc. Cumulatively it is to subserve the object of the legislation. Old golden rule is of

respecting the wisdom of legislature that they are aware of the law and would never have intended for an invalid legislation. This also keeps courts within their track and checks individual zeal of going wayward. Yet in spite of this, if the impugned legislation cannot be saved the courts shall not hesitate to strike it down. Similarly, for upholding any provision, if it could be saved by reading it down, it should be done, unless plain words are so clear to be in defiance of the Constitution. These interpretations spring out because of concern of the courts to salvage a legislation to achieve its objective and not to let it fall merely because of a possible ingenious interpretation. The words are not static but dynamic. This infuses fertility in the field of interpretation. This equally helps to save an Act but also the cause of attack on the Act. Here the courts have to play a cautious role of weeding out the wild from the crop, of course, without infringing the Constitution. For doing this, the courts have taken help from the preamble, Objects, the scheme of the Act, its historical background, the purpose for enacting such a provision, the mischief, if any which existed, which is sought to be eliminated……………………… ………………………………………………..This principle of reading down, however, will not be available where the plain and literal meaning from a bare reading of any impugned provisions clearly shows that it confers arbitrary, uncanalised or unbridled power." (emphasis supplied)"

19. *A taxing statute must be interpreted in the light of what is clearly expressed. It is not permissible to import provisions in a taxing statute so as to supply any assumed deficiency. In support of the same we may refer to the decision of this Court in Commissioner of Sales Tax, U.P. v. Modi Sugar Mills Ltd. reported in (1961) 2 SCR 189 wherein this Court at Para 10 has observed as follows : -*

"10. ……. In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The court

must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed : it cannot imply anything which is not expressed; it cannot import provisions in the statutes so as to supply any assumed deficiency."

20. *Therefore, the attempt of the High Court to read down the provision by way of substituting the word "OR" by an "AND" so as to give relief to the assessee is found to be erroneous. In that regard the submission of the counsel for the appellant is well-founded that once the said credit is taken the beneficiary is at liberty to utilize the same, immediately thereafter, subject to the Credit rules."*

Thus in a case where admittedly appellants were manipulating the CENVAT credit as per their will and in result have availed excess credit knowingly, there can be no case for nonpayment of interest in respect of the excess credit availed.

8.3 Apart from the issue of excess availment of CENVAT Credit, the issue of short payment of service tax and demand of interest in respect of such short payment is also involved. Appellants have in their appeal memo have admitted that they had short paid the service tax totally amounting tom Rs 5,99,57,014/- for the periods 2008-09 and 2009-10 as detailed in table below:

Table	**Service Tax Short paid**		
Journal Entry No	Financial Year	Amount in Rupees	Reasons
2007049649 dated 1.03.2011	2008-09	1,55,66,509	Service tax liability on PO Mail documents and cargo uplifted in domestic sector. The service tax liability disclosed in the ST-3
2007049651 dated 1.03.2011	2009-10	1,34,21,038	

			return but the debit entries were made only subsequently.
2007054894 dated 31.03.2011	2008-09	3,09,69,467	On account of wrong booking of the passenger revenue during 1.04.08 to 30.09.08. Subsequently corrected and paid ithe tax short paid in FY 2010-11
Total		5,99,57,014	

It is also a fact that appellants had not filed the service tax returns during the relevant period by the due date. The service tax returns for the year 2008-09 and 2009-10 were filed only in 2010-11 (Para 1.7 and 1.8 of the appeal memo). Thus when the appellants had short paid the service tax the interest on such short payment is also due. It is now settled law that interest in respect of the short payment of taxes is strict civil liability and has to be complied with.

8.4 During the course of argument in respect of the second appeal in respect of the order at (ii) of para 1, supra, Counsel for the appellants have submitted a rough sheet explaining the credits taken by them and reversed year wise. The said sheets are reproduced below in form as submitted as they are also admit the facts as stated above in the appeal memo.

r Adv 3/18

ST/87425/2014 Jet Airways (GJ)

Audit letter	SCN	OIO	Amts (Rs)
5.9.2011	20.4.2012	18.3.2014	Rs. 21,31,20,807

Final Audit Report
12.1.2012

+
(Int) ← Rs. 3,31,11,198
+
(Penalty) ← Rs. 21,31,20,807 (U/S 78)

(U/S 76)

Credit Inputs ATF

11.17 Cr.
1.13 Cr.
3 Cr. → 6(3A)

Int
1) 1.67 Cr. – I+II
2) 1.63 Cr. – III
3.31 Cr.

12.31
3.00 } 15.31
5.99
21.31

(I) 2008-09

A) availed provisional 8.75% of total = 12.51 Cr. — 6(3A)(b) preceding FY t/o

B) final (June 2009) ← availed when — 16.14% (+) = 23.33 Cr. → 16.14% less 8.75% = 7.39% — 6(3)(c)

35.84 Cr.

C) March 2011 | reassess final 10% (–) 23.53 Cr.

Final > Reassessed excess credit ← 12.31 Cr. ⇒ 16.14% less 10% = 6.14%

Paid
11.17 Cr. → 30.6.2010
1.13 Cr. → 31.3.2011
12.31 Cr.

(II) 2009-10

(A) availed provisional 16% 6(3)(c) = 26.01 Cr. — 6(3A)(b)
(B) Final 13% (–) = ~~23~~ 23 Cr.

Paid on 30.6.2010 ← ~~23.01~~ 3 Cr.
Complied with 6(3A)

(C) 2010-11 | reassess final 28.98 Cr.
Final < Reassessed
31.3.2011 when? availed credit ← 5.98 Cr.

Filed S.Tax returns 2008-09/2009-10 in FY 2010-11

(III) Short Payment

		Paid on	
2008-09	1,55,66,509	1.3.2011	all in March 2011
2008-09	3,09,69,467	31.3.2011	
2009-10	1,34,21,038	1.3.2011	

Form 3CD – Cr. Bal on on 31.3.2010 – 329.26 Cr.

ST-3 Return – " " " " = 308.76 Cr.

20.5 Cr.

filed on 27.11.2010

Pg 59/60 of appeal memo

300.07
8.68
308.76 Cr.

passenger cargo

2006 Business class Intl journey - taxable

2010 All journey

8.5 From the discussions above and the submissions made it is quite evident that appellants themselves are also not disputing the facts that they had availed excess credit at times and had also short paid the service tax due. The claim of the appellant that they have reflected the said service tax liability in their ST-3 return and had also paid the same by showing the debit entries in their return from the CENVAT Credit account is nothing but a hollow argument as they had not filed the ST-3 returns by the due date. These returns for the year 2008-09 and 2009-10 as per their own admission have been filed only in the year 2010-11. Since these returns have been filed not by the due date but after the delay of one to two years, appellant had deliberately being suppressing their tax liability and evading the payment of tax. Intention to evade payment of tax which very clear, from the manner they manipulated the ratio for reversal of credit. During the year 2008-09 on the basis ratio arrived from the data of 2007-08, they took credit of 8.75% of available credit, and then on the basis of data, determined ratio of 16.14% and took the credit suo motto of differential. This ratio was used for taking the credit in year 2009-10. Subsequently they revised 16.14% to 10% for 2008-09. This resulted in taking excess credit not only for the year 2008-09 but also for 2009-10. Hence extended period of limitation as provided in law is applicable in the facts and circumstances of the case.

8.6 Appellants have also admitted their liabilities and have made good the excess credit availed by them and also paid the service tax short paid by them.

9.1 From the appeal memo and during the course of arguments the appellants contested the demand for interest and the penalties imposed on them. In respect of interest relying on various case laws referred above in their submission, supra they submitted that since they were having sufficient credit balance available with them, and they had not utilized the excess credit taken by them, no interest should be levied in respect of the excess credit availed by them. They have heavily relied upon the decision of Karnataka High Court in case of Bill Forge wherein it has been stated-

"***19.*** *Rule 14 of the CENVAT Credit Rules, 2004 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 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. 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 '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.

20. *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 utilised later for payment of excise duty on the excisable product. 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. It is in the nature of a set off or an adjustment. The assessee uses 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 utilise 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.*

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. Section do not stipulate interest is payable from the date of book entry, showing entitlement of Cenvat credit. Interest cannot 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.*

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, a sum of Rs. 154-00 was the interest payable from the date 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 put to any loss at all. When once the wrong entry was pointed out, being convinced, the assessee has promptly reversed the entry. 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 as 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 had taken the credit, in other words by 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 it 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.*”

9.2 The said decision of the Karnataka High Court, is clearly distinguishable in the facts of present case. High Court was considering a simple case of certain inadmissible credits taken by the assessee and being reversed before the same was utilized. The present case is not the same. In this case appellants had taken the credit, and then were required to reverse the credit taken to extent it was attributable to the exempted services provided by them. The manner of computation of such credit to reversed is also laid down by the Rule 6(3A) of the CENVAT Credit reversals. Appellants have by not computing the amount of reversal, appropriately have short reversed the credit initially taken by them resulting in excess credit with them. Reversal by way of debit entry in the CENVAT credit account is utilization of the Cenvat Credit taken. Thus the credit short reversed was available as excess credit with the appellants, and demands are in respect of such reversals and interest is also demanded in respect of the same. Since the facts of demand are not identical to the facts of case of Bill Forge the said decisions is distinguishable.'

9.3 Even otherwise the Bombay High Court has in case of GL & V India Pvt Ltd [2015 (321) ELT 611 (Bom)] distinguished the said decision of Karnataka High Court and also similar decision of Madras High Court, stating as follows:

"15. *In so far as the judgment of the Karnataka High Court is concerned, it appears that the said judgment is delivered by the Karnataka High Court on the facts of the said case. It would be relevant from the facts as stated in the said judgment that upon the mistake being brought to the notice of the assessee regarding the erroneous availment of the Cenvat credit, the assessee accepted the mistake and immediately reversed the entry. In the present case, the reversal of the entry is after a period of ten months. In that view of the matter, we find that even on facts, the said judgment is distinguishable.*

16. *In so far as the judgment passed by the Madras High Court is concerned, the Madras High Court has taken a view that mere taking of Cenvat credit facility is not at all sufficient for compelling the assessee to pay interest as well as penalty. With great respect to the Hon'ble Judges of the Madras High Court, we may say that this is not what has been held by their Lordships of the Apex Court. The Apex Court has in clear terms held that the interpretation as paced by the Punjab and Haryana Court for invoking the provisions of Rule 14, there has to be taking as well as utilizing is not correct in law. The Apex Court has held that such an interpretation is totally impermissible. In that view of the matter, the said judgment would be of no assistance to the case of the assessee."*

9.4 In case of Vandana Vidyut Ltd [2016 (331) ELT 231 (Chattisgrah)], this Chattisgarh High Court has held-

*"**9.** The aforesaid consideration takes it beyond the ambit of any controversy that under Rule 14, even if the Cenvat credit was taken by making paper entries by one not entitled to the same, the liability for interest arises irrespective of its reversal before utilization. The conclusion of the Tribunal that the Cenvat credit having remained a paper entry only liability for interest would not arise in absence of utilization was thus clearly erroneous.*

***10.** The fact that the liability would arise from wrong taking of Cenvat credit by making entries and that utilisation was the second step thereafter which was not required to be necessarily fulfilled for the liability of interest becomes apparent from the following passage :-*

"20. Therefore, the attempt of the High Court to read down the provision by way of substituting the word "OR" by an "AND" so as to give relief to the assessee is found to be erroneous. In that regard the submission of the counsel for the appellant is wellfounded that once the said credit is taken the beneficiary is at liberty to utilize the same, immediately thereafter, subject to the Credit rules."

***11.** In other words, the taking of Cenvat credit precedes the utilisation. If Cenvat credit had been wrongly taken, that is an independent liability by itself irrespective of its utilisation which may have followed, as far as taxing statutes are concerned.*

***12.** Since Learned Counsel for the Respondent has heavily relied upon Bill Forge Pvt. Ltd. (supra), we consider it proper to discuss the same also even though it is not binding on us. We regret our inability to concur with the discussion in paragraph 22 of the same that the mere taking of Cenvat credit wrongly by making entries* *would not invite liability for interest unless it had been utilised also. In our respectful opinion, that would be against the discussion and the law laid down in Ind-Swift Laboratories Ltd. (supra) that the liability for interest arises on the wrong taking independent of utilisation."*

9.5 Thus we do not find any merits in the submission of the appellants in respect of the interest of excess credit availed by them.

10.1 In respect of the demand of Service Tax short paid also the claim of appellant against interest demanded is not sustainable. demand of interest is a natural consequence on account of delay in payment of the tax. Since appellants have short paid the Customs duty interest is demandable from them under Section 28AA of the Customs Act, 18962. Issue with regards to statutory levy of interest is no longer res integra. Bombay High Court has in case of Commissioner Of Central Excise vs Padmashri V.V. Patil Sahakari [2007 (215) ELT 23 Bom] has held as follows:

"10. So far as interest Under Section 11AB is concerned, on reference to text of Section 11AB, it is evident that there is no discretion regarding the rate of interest. Language of Section 11AB(1) is clear. The interest has to be at the rate not below 10% and not exceeding 36% p.a. The actual rate of interest applicable from time to time by fluctuations between 10% to 36% is as determined by the Central Government by notification in the official gazette

from time to time. There would be discretion, if at all the same is incorporated in such notification in the gazette by which rates of interest chargeable Under Section 11AB are declared.

The second aspect would be whether there is any discretion not to charge the interest Under Section 11AB at all and we are afraid, language of Section 11AB is unambiguous. The person, who is liable to pay duty short levied / short paid / non levied / unpaid etc., is liable to pay interest at the rate as may be determined by the Central Government from time to time. This is evident from the opening part of Sub-section (1) of Section 11, which runs thus:

Where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, the person, who is liable to pay duty as determined under Sub-section (2) or has paid the duty under Sub-section (2B) of Section 11A, shall in addition to the duty be liable to pay interest at such rate....

The terminal part in the quotation above, which is couched with the words "shall" and "be liable" clearly indicates that there is no option. As discussed earlier, this is a civil liability of the assessee, who has retained the amount of public exchequer with himself and which ought to have gone in the pockets of the Central Government much earlier. Upon reading Section 11AB together with Sections 11A and 11AA, we are of firm view that interest on the duty evaded is payable and the same is compulsory and even though the evasion of duty is not mala fide or intentional."

10.2 Thus the demand of interest on the service tax short paid is upheld.

11.1 In their appeals appellants have assailed the penalties imposed on them. By the order at (i) in para 1 supra Commissioner has imposed penalty on the appellant under Section 77 and 78 of the Finance Act, 1994 and by the order at (ii) he has imposed penalties under Section 76 and 78 of the Finance Act, 1994.

11.2 Appellants have relied upon various case laws specifically Hindustan Steel Ltd vs The State of Orissa [1969 (2) SCC 627], to assail the penalties imposed. Reliance has been placed on the para 8 of the said decision reproduced below:

“8 An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi- criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute"

11.3 The said para has been considered by the Apex Court subsequently number of times and Apex Court has after considering the said decision laid down as follows in the case of Bhartiya Steel Industries vs Commissioner Sales Tax U P []:

“16. Reliance has also been placed on Director of Enforcement v. M.C.T. M. Corporation Pvt. Ltd. & Others [(1996) 2 SCC 471]. This Court was dealing therein with Foreign Exchange Regulation Act, 1947. It was opined that Section 23(1(a) of the Act confers adjudicatory function on the conduct of the delinquent, stating :

"8. It is thus the breach of a "civil obligation" which attracts 'penalty' under Section 23(1)(a), FERA, 1947 and a finding that the delinquent has contravened the provisions of Section 10, FERA, 1947 that would immediately attract the levy of 'penalty' under Section 23, irrespective of the fact whether the contravention was made by the defaulter with any "guilty intention" or not. Therefore, unlike in a criminal case, where it is essential for the 'prosecution' to establish that the 'accused' had the necessary guilty intention or in other words the requisite "mens rea" to commit the alleged offence with which he is charged before recording his conviction, the obligation on the part of the Directorate of Enforcement, in cases of contravention of the provisions of Section 10 of FERA, would be discharged where it is shown that the "blameworthy conduct" of the delinquent had been established by wilful contravention by him of the provisions of Section 10, FERA, 1947. It is the delinquency of the defaulter itself which establishes his 'blameworthy' conduct, attracting the provisions of Section 23(1)(a) of FERA, 1947 without any further proof

of the existence of "mens rea". Even after an adjudication by the authorities and levy of penalty under Section 23(1)(a) of FERA, 1947, the defaulter can still be tried and punished for the commission of an offence under the penal law, where the act of the defaulter also amounts to an offence under the penal law and the bar under Article 20(2) of the Constitution of India in such a case would not be attracted. The failure to pay the penalty by itself attracts 'prosecution' under Section 23-F and on conviction by the 'court' for the said offence imprisonment may follow."

17. The attention of the Court, therein, however, was not drawn to the earlier binding precedent in Hindustan Steel (supra). Furthermore, the question as to whether mens rea is an essential ingredient or not will depend upon the nature of the right of the parties and the purpose for which penalty is sought to be imposed.

18. A distinction must also be borne in mind between a statute where no discretion is conferred upon the adjudicatory authority and where such a discretion is conferred. Whereas in the former case the principle of mens rea will be held to be imperative, in the latter, having regard to the purport and object thereof, it may not be held to be so.

In Dilip N Shroff v. Joint Commissioner of Income Tax, Mumbai & Anr. [(2007) 6 SCC 329], it was opined :

"86. It is of some significance that in the standard pro forma used by the assessing officer in issuing a notice despite the fact that the same postulates that inappropriate words and paragraphs were to be deleted, but the same had not been done. Thus, the assessing officer himself was not sure as to whether he had

proceeded on the basis that the assessee had concealed his income or he had furnished inaccurate particulars. Even before us, the learned Additional Solicitor General while placing the order of assessment laid emphasis that he had dealt with both the situations. The impugned order, therefore, suffers from non- application of mind. It was also bound to comply with the principles of natural justice. (See Malabar Industrial Co. Ltd. v. CIT)

87. We have, however, noticed hereinbefore that the Income Tax Officer had merely held that the assessee is guilty of furnishing of inaccurate particulars and not of concealment of income; which finding was arrived at also by the Commissioner of Income Tax and the Income Tax Appellate Tribunal."

In Chairman, SEBI v. Shriram Mutual Fund [(2006) 5 SCC 361], this Court held:

"35. In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulations is established and hence the intention of the parties committing such violation becomes wholly irrelevant. A breach of civil obligation which attracts penalty in the nature of fine under the provisions of the Act and the Regulations would immediately attract the levy of penalty irrespective of the fact whether contravention must be made by the defaulter with guilty intention or not. We also further held that unless the language of the statute indicates the need to establish the presence of mens rea , it is wholly unnecessary to ascertain whether such a violation was intentional or not. On a careful perusal of Section 15-D(b) and Section 15-E of the Act, there is nothing which requires that mens rea must be proved before penalty can be imposed under these provisions.

Hence once the contravention is established then the penalty is to follow."

19. It is, therefore, difficult to accede to the contention of Mr. Banerjee that under no circumstances absence of mens rea would not be a plea for levy of penalty. An assessing authority has been conferred with a discretionary jurisdiction to levy penalty. By necessary implication, the authority may not levy penalty. If it has the discretion not to levy penalty, existence of mens rea becomes a relevant factor. We may notice that in the show cause notice itself, the authorities stated: "You have sold away 239.966 tons of iron and steel without payment of any sales tax with the assistance of the Form No. 3(B), amounting to Rs. 10,73,850.89, whereas the receipt thereof was also issued under the provisions of Section 4-B on the basis of full exemption from the tax, with the assistance of the Form No. 3(B). In this way, the material purchased for the purposes of production under the provisions of Section 4-B, while utilizing the same for the same purposes, was sold away in the same condition, which is a violation of the provisions of Section 4-B, and is punishable under the aforesaid sub-section of the Act."

20. The assessing authority, therefore, understood the said provision to mean that the appellant was liable to be imposed with a punishment. The authority did not say that the duty which was otherwise due from the appellant would be realized."

11.4 In case of Vandana Art Prints Pvt Ltd. [2017 (50) STR 91 (SC)], Hon'ble Supreme Court has held as follows:

"4. *A neat submission that has been made by Mr. K. Radhakrishnan, learned senior counsel appearing for the appellant, is that in terms of Section 11AC of the Central Excise Act (hereinafter referred to as 'Act'), the penalty has to be equal to the duty so determined.*

5. *Section 11AC of the Act reads as under :-*

Penalty for "11AC. short-levy or non-levy of duty in certain cases. *- Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (2) of section 11A, shall also be liable to pay a penalty equal to the duty so determined :*

Provided that where the duty determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the Court, then, for the purposes of this section, the duty as reduced or increased, as the case may be, shall be taken into account."

6.*On the basis of the aforesaid language in the Section, the submission of Mr. Radhakrishnan is meritorious. Thus, while the penalty as demanded in respect of one Show Cause Notice had been quashed, the Tribunal could not reduce it for an amount lesser than the duty which has been upheld. The duty in respect of two demands comes to Rs. 40,44,720/-. Therefore, going by the provisions of Section 11AC of the Act, the penalty should also have been Rs. 40,44,720/- and not Rs. 20 lakhs."*

11.4 Since appellants have in fact suppressed the facts by not filing the ST-3 return with the intention to evade payment of Service Tax, all the ingredients for invocation of the Section 78 of the Finance Act, 1994 satisfied in the present case. It is now settled law by way of decision of the Apex Court in case of Dharmendra Textile Processors [2008 (231) ELT 3 (SC)]-

"***25.*** *The Explanations appended to Section 272(1)(c) of the IT Act entirely indicates the element of strict liability on the assessee for concealment or for giving inaccurate particulars while filing return. The judgment in Dilip N. Shroff's case (supra) has not considered the effect and relevance of Section 276C of the I.T. Act. Object behind enactment of Section 271(1)(e) read with Explanations indicate that the said section has been enacted to provide for a remedy for loss of revenue. The penalty under that provision is a civil liability. Wilful concealment is not an essential ingredient for attracting civil liability as is the case in the matter of prosecution under Section 276C of the I.T. Act.*

26. *In Union Budget of 1996-97, Section 11AC of the Act was introduced. It has made the position clear that there is no scope for any discretion. In para 136 of the Union Budget reference has been made to the provision stating that the levy of penalty is a mandatory penalty. In the Notes on Clauses also the similar indication has been given."*

11.5 In case of Rajasthan Spinning & Weaving Mills [2009 (238) ELT 3 (SC)], Apex Court further clarified its decision in case of Dharmendra Textile Processors stating as follows:

"23. *The decision in Dharamendra Textile must, therefore, be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of Section 11A. That is what Dharamendra Textile decides.*

24. *It must, however, be made clear that what is stated above in regard to the decision in Dharamendra Textile is only in so far as Section 11AC is concerned. We make no observations (as a matter of fact there is no occasion for it!) with regard to the several other statutory provisions that came up for consideration in that decision."*

11.6 Since in the present case we hold that all the ingredients for invoking extended period are available, Section 78 for imposing mandatory penalty is invokable.

11.7 Commissioner has imposed penalty under Section 76 in his order at (ii). No penalty under section 76 has been imposed under said provision, in order at (i). There are decisions of tribunal and High Court upholding simultaneous imposition of penalties under section 76 and 78. A proviso to Section 78, has been inserted with effect from 10.05.2008 stating- *"Provided further that if penalty is payable under this section the provisions of* *section 76 shall not apply."* Since the entire period involved in the present case is 2008-09 to 2009-10, in our view the imposition of penalty under section 76 cannot be justified and hence the penalty imposed under section 76 is set aside.

11.8 Commissioner has imposed penalty under section 77 in order at (i) above. Since the appellants were not filing the ST-3 returns by the due date, we do not find any reason to interfere with the said penalty.

12.1 Thus in result we uphold the order at (i) in para 1 above and dismiss the Appeal No ST/87203/14.

12.2 The order at (ii) in para 1 above is modified to the extent of setting aside the penalties imposed under Section 76. The appeal No ST/87425/2014 is allowed to this extent.

(Pronounced in court)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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