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

APPEAL NO.ST/88565/2014

(Arising out of Order-in-Original No.50/ST/RN/Idea/MII/13-14 dated 30.04.2014 passed by the Commissioner of Central Excise Mumbai II)

Idea Cellular Limited : **Appellant**

VS

CCE MUMBAI - II : **Respondent**

Appearance

Shri S.S. Gupta, C.A. with Shri Manoj Chauhan, C.A. for Appellant

Shri Suresh, Dy.Commissioner (A.R) for respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Shri P Anjani Kumar, Member (Technical)

Date of hearing : 20/12/2018
Date of decision : 20/12/2018

ORDER NO. A/88337/2018

Per : **Shri P Anjani Kumar, Member (Technical)**

1. This appeal is directed against the order in original No 50/ST/RN/Idea/M-II dated 30-4-2004 passed by Commissioner of Central Excise, Mumbai-II. Briefly stated the facts of the case are that the Appellants is engaged in providing telecommunication services and have availed 100% of CENVAT credit, of Rs.35,85,71,911, on duty paid on various capital goods, during the period April 2007 to January 2008 CENVAT in the first year itself instead of 50%. The said CENVAT credit

was reversed by the Appellant on 15.02.2008. A Show Cause Notice was issued seeking confirmation of Cenvat reversed; payment of interest of Rs.2,37,64,632 and penalty. The SCN was confirmed. The appeal is challenging demand of interest and imposition of penalty.

2. Learned Counsel for the appellants submitted that the Learned Commissioner has not provided any reasoning whatsoever for confirming the demand; ha not discussed various submissions made by them and the cases law cited. The order was based solely relied on a case law and a circular. Appellant had inadvertently availed the inadmissible Cenvat credit but did not utilize the same for discharging its output liability. This is evident from the records that there was always a surplus balance over and above the inadmissible Cenvat credit. It is established that though the credit was wrongly taken by the Appellant, the same was never utilized during the period in dispute for the payment of any output liability, till the reversal of the said credit in the month of February 2008. Therefore it is submitted that the by availing the ineligible CENVAT credit the Appellant did not default in the payment of the service tax liability.

2.1. The Learned Counsel submitted that in one of the landmark judgments, Hon'ble Supreme Court, in the case of Pratibha Processors Vs UOI 1996 (88) ELT 12 (SC) has explained the reason for charging of interest and observed as follows:

13. In fiscal Statutes, the import of the words – "tax", "interest", "penalty", etc are well known. They are different concepts. Tax is the amount payable as a result of the charging provision. It is a compulsory exaction of money by a public authority for public purposes, the payment of which is enforce by law. Penalty is ordinarily levied on an assessee for some contumacious conduct or for a deliberate violation of the provisions of the particular statute. 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 geared to actual amount of tax withheld and the extent of the delay in paying the tax on the due date. Essentially, it is compensatory and different from penalty --- which is penal in character.

2.2. Rule 14 of Cenvat Credit Rules, 2004 during the period in question reads as below.

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 for effecting such recoveries.*

However, due to ambiguity in the text in this Rule, there were many rounds of ligations in various courts and subsequently the matters reached Hon'ble Supreme Court, who in the case of Ind-Swift Labs (2011 (265) E.L.T. 3(S.C.) held that '' the provisions to be declared as ultra vires has held that 'OR' should not be read as AND'.

2.3. Learned Counsel further submitted that Legislature amended Rule 14, of the Credit Rules with effect from 17.3.2012, vide Notification No.18.2012-CE (NT) dated 17.3.2012, by substituting the word "or" for the word "and". It was clarified by CBEC, vide Circular No. DOF. No.334/ 3/2012-TRU dated 16.3.2012, that *"Rule 14 is being amended to substitute the word "or" with "and" so that interest is not payable on credit wrongly taken unless the same is utilized''.* Therefore, it is clear that the intention of the Legislature was to charge

interest only when the credit availed was utilized. The same position would apply for the period prior to the amendment of Rule 14 of the Rules also in view of the ratio of the decision of the Hon'ble Supreme Court in the case of **Johnson and Johnson Ltd. Vs. Commissioner (1997 (92) ELT 23 (SC))** wherein it has been held that in interpreting an earlier notification, when the question is whether a narrow or broader view would be more appropriate, intention of the authorities could be gathered from the subsequent notification. The same view was taken by the Hon'ble Tribunal in the case of Fertilizers & Chemicals Travancore Ltd. Vs CC, Cochin (2001 (133), E.L.T. 175 (Tri. – Bang.)). Considering the intention of the legislature in an identical issue, in a recent judgment, Hon'ble High Court of Madras in the case of **CCE, Madurai V/s. M/s. Strategic Engineering (P) Ltd as reported in 2014-TIOL-466-HC-MAD-CX** has held that mere taking of credit itself would not compel the assessee to pay interest as well as penalty. Hon'ble High Courts observations at Para 11 are as follows.

> *"It is an admitted fact the 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 subsequently 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 advance 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."

2.4. The appellants further relied upon the following.

(i). J. K. Tyre & industries Ltd. (2016 (340) E.L.T. 193 (Tri-LB)

(ii). Atul Limited (2017 (4) TMI 217 – CESTATE AHMEDABAD)

(iii). Nagpur Nagrik Sahakari Bank Ltd (2018 (11) TMI 1524 – CESTAT MUMBAI)

2.5. They submitted that reversal of credit without utilizing is not barred, extended period cannot be invoked in view of the following and extended period cannot be invoked if Penalty under Section 78 is dropped.

(i). Amby Valley Ltd. (2018 (5) TMI 610-CESTAT MUMBAI)

(ii). Flextronics Technologies (India) Pvt LTD. (2015 (323) E.L.T. 273 (Kar.)

(iii). Charak Pharma P. Ltd. (2012 (278) E.L.T. 319 (Guj.)

(iv). Continental Foundation Jt. Venture (2007 (216) E.L.T. 177 (S.C.)

(v). Kahems Engineering Pvt. Ltd. (2016 (41) S.T.R. 307 (Tri – Del)

(vi). Addis Marketing (2017 (50) S.T.R. 56 (Tri) – Mumbai)2.7.

(vii). Royal Travels (2011 (21) S.T.R. 31 (Tri-Ahmd)

(viii). Agarwal Trading Co. (2016 (44) S.T.R. 479 (Tri. Del).

2.6. Further, the Counsel submitted that limitation also applies to Interest in view of the following.

(i). Sutham Nylocots (2014 (309) E.L.T. 255 (Mad – HC)

(ii). Neer Metal Products Ltd. (2014 (306) E.L.T. 367 (P & H – HC).

(iii). Hindustan Insecticides Ltd (2013 (297) E.L.T. 332 (Del – HC)

(iv). Kwality Ice Cream Company 2012 (27) S.T.R. 8 (Del)

(v). T.V.S. Whirlpool Ltd. (1996 (86) E.L.T. 144 (Tribunal)

(vi). T.V.S. Whirlpool Ltd. (2000 (119) E.L.T. A177 (S.C.)

2.7. He further submitted that it is a settled principle of law that if a dispute is arising out of interpretation of the provisions of statute or exemption notification, no penalty can be levied. He relied on following.

(a) Bharat Wagon & Engg. Co. Ltd. v CCE, Patna, (146) ELT 118 (Tri. – Kol)

(b) Goenka Woollen Mills Ltd Vs CCE, Shillong 2001 (135) ELT 873(Tri-Kol)

(c) Bhilware Spinners Ltd v CCE, Jaipur, 2001 (129) ELT 458 (Tri. – Del).

(d) Sonar Wires Pvt. Ltd Vs. CCEx. 1996 (87) ELT 439 (T).

(e) Synthetics & Chemicals Ltd. 1997 (89) ELT 793 (T).

(f) Man Industries Corporation 1996 (88) ELT 178 (T)

(g) Sports & Leisure Apparel Ltd. CCE, Noida 2005 (180) ELT 490

(h) Aqua mall Water Solutions Ltd. 2003 (153) ELT 428.

(i) Blue Cross Laboratories Ltd. vide order No.A/1529/C-IV/SMB/2007.

2.8. The Learned Authorised Representative reiterated the findings of the OIO and relied upon the following cases:

(i). CCE Thane II Vs Standard Greases 2017(350) ELT123 (Tri-Mum)

(ii). CCE Bangalore II Vs Alsthom Instrument Transformers 2015 (322) ELT 297 (Kar)

(iii). CCE Chennai III Vs Supreme Industries Ltd. 2014 (303) ELT 513 (Mad.)

(iv). Commissioner of Trade Tax Lucknow Vs Kanhai Ram Thekedar2005 (185) ELT 3 (SC)

(v). CCE Pune Vs SKR India Ltd 2009 (239) ELT 385 (SC)

(vi). CCE Pune I Vs SKF India Ltd 2015 (321) ELT 611 (SC).

(vii). CCE Pune – I Vs GL & V India Pvt. Ltd. 2015 (321) ELT 611 (Bom)

(viii). CCE & Cus Raipur Vs Vandana Vidyut Ltd 2016(331) ELT 231 (Chhattisgarh)

(ix). J.K. Tyre & Industries Ltd. VS AC of C.EX Mysore 2016 (340) ELT 193 (Tri-LB)

(x). Clariant Chemicals (I) Ltd. Vs CCE, Raigad 2015-TIOL-2510-CESTAT-Mum)

(xi). F.L. Smidth Pvt. Ltd. Vs CCE, Trichy 2014-TIOL-1439-CESTAT-MAD

(xii). F.L. Smidth Pvt. Ltd. Vs CCE, Trichy 2014-TIOL-2186-HC-Mad-XC

(xiii). Gunnebo India Pvt. Ltd. Vs Commissioner of Service Tax Mumbai – VII 2018-TIOL-3785-CESTATAT-MUM.

3. Heard both sides and perused the records of the case. The brief issue that needs to be decided in this case is whether the appellants are liable to pay interest on the credit of capital goods wrongly taken by them even when they have not utilized the same and have reversed

the same on being pointed out. The adjudicating authority has relied upon the decision of Apex Court in the case of M/s In-Swift Laboratories Ltd-2012(25) STR 184(SC) where in it was held that

> *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 (Para 17)*

4.1 We find that the Appellants have contested the impugned order both on the grounds of merit as well as limitation. We take up the issue of limitation to begin with :

The appellants submitted that the SCN is barred by limitation. The matter pertains to April 2007-January 2008. The Show Cause Notice accepts the fact that the reversal was made by the appellants on 15-2-2008, as soon as the error was pointed out. The Show Cause Notice doesn't not bring out any allegation, of specific omission or commission on the part of the appellants, so as to establish intent to evade payment of duty. The Show Cause Notice merely states that the facts were brought to the Notice of department only during the course of Audit. It is not denied that the appellants were regularly filing the ST-3 returns. The Show Cause Notice doesn't

specify when audit has taken place. It only states reversal was on 15-2-2008. Show Cause Notice was issued 08/10/2012. Therefore, we find that the department has not made any case for invoking extended period of time. We find that the Notice is barred by Limitation. We find that the Show Cause Notice should have been issued under Section 73 (1) of Finance Act, 1994. Since the extended period was not available the notice is barred by limitation. It was held in in case of TVS Whirlpool Limited 1996 (86) ELT 144 (Tri.) and in the case of Gujarat Narmada Fertilizers Company Limited 2012 (285) ELT 336(Guj) that limitation also applies to interest liability. Therefore we find that demand of interest is hit by limitation. We find that a similar view was taken by the Tribunal in the case of M/s Amby Valley Ltd Vs CCE,Pune 2018(5) TMI 610 (Cestat-Mumbai).

We find that the Appellants have a strong case of limitation and the Appeal succeeds on that grounds itself. Therefore we find that that there is no reason to go into merits of the issue.

5. In view of the above the appeal is allowed on limitation.

(Pronounced and dictated in court)

(P Anjani Kumar)
Member (Technical)

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

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