

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, WEST ZONAL BENCH AT MUMBAI**

Appeal No. ST/87611/2018

(Arising out of Order-in-Appeal No. CD/TR(Appeals)/ME/131/2017-18 dated 01.03.2018 passed by Commissioner of Central CGST & Central Excise (Appeals), Mumbai)

Kyal Trading Pvt. Ltd.

Appellant

Vs.

Respondent

**Commissioner of Service Tax,
Mumbai V**

Appearance:

Shri Bharat Raichandani, Advocate
Shri S.B. Mane, Asst. Commr (AR)

for appellant
for respondent

CORAM:

Hon'ble Mr. S.K. Mohanty, Member (Judicial)

Date of Hearing & Decision: 12.10.2018

FINAL ORDER NO. **A/88502 / 2018**

Per: S.K. Mohanty

Brief facts of the case are that the appellant is engaged in providing various taxable services and avails CENVAT Credit of service tax paid on the input services for payment of service tax on the output service. During the disputed period, the appellant had availed common input service for providing both taxable as well as for the purpose of trading activities. Taking of CENVAT Credit on such circumstances were objected by the Audit Wing

of the department and thereafter, the appellant had reversed the CENVAT Credit. After reversal of CENVAT Credit, the department initiated show cause proceedings against the appellant, seeking for confirmation of Cenvat demand along with interest and for imposition of penalty on the appellant. On appeal, the learned Commissioner (Appeals) has also upheld the adjudged demand confirmed against the appellant by the original authority. Hence the appellant has preferred this appeal before this Tribunal.

2. Learned Advocate appearing for the appellant submits that interest and penalty demand cannot be demanded on the appellant on the ground that the appellant had sufficient balance in its Cenvat account during the period between taking of CENVAT Credit and subsequent reversal thereof. He also contended that in absence of any malafide intention on the part of the appellant in defrauding the Government revenue, the provisions of Section 78 of the Act cannot be invoked for imposition of penalty. In this context, he has relied on the decision of this Tribunal in the case of Nova Petrochemicals Ltd. - 2015 (330) ELT 648 (Tri. Ahmd).

3. On the other hand, learned D.R. appearing for Revenue reiterates the findings recorded in the impugned order.

4. Heard both sides and perused the records.

5. The department has not specifically alleged that the appellant had not maintained sufficient balance in its Cenvat account between the period of taking irregular Cenvat credit and subsequent reversal thereof. Taking of credit in the CENVAT account under such circumstances would be considered as a mere book entry inasmuch as there is no loss of revenue to the Government exchequer. Hence, it is not the case of Revenue that they have suffered loss owing to delayed reversal of Cenvat credit, which should be compensated by way of payment of interest. The law with regard to levy of interest on delayed reversal of CENVAT Credit is no more *res integra* in view of the judgement of Hon'ble Karnataka High Court in the case of *Commissioner v. Bill Forge Pvt. Ltd. - 2012 (279) ELT 209 (Kar.)*. Relying upon the said judgement of the Hon'ble High Court, this Tribunal in the case of *Nova Petrochemicals Ltd. (supra)* have also set aside the interest and penalty demand confirmed by the department. Relevant paragraphs in the said order are extracted below:-

"8. In view of the findings of the adjudicating authority, the allegation in the show cause notice is that the appellant utilized the credit cannot be sustained. The adjudicating authority confirmed the demand of interest only on the ground that they have taken the credit and they are liable to pay interest. The Learned Authorised Representative heavily relied upon the decision of the

Hon'ble Supreme Court in the case of Ind-Swift Laboratories (supra). The said decision was against the decision of the Hon'ble Punjab and Haryana High Court in the case of Ind-Swift v. UOI [2009 (240) E.L.T. 328 (P & H)]. The facts of the case of Ind-Swift Laboratories (supra) are that the petitioner during 1-11-2011 to 31-3-2012 received invoices. On the basis of such invoices, the petitioner claimed Cenvat credit of Rs. 6,50,44,412/-. Out of the said amount, the petitioner utilized the credit of Rs. 5,71,47,138/- only. In this contest, it was held that the appellant/petitioner is liable to pay interest from the date of availing credit and not from the date of utilization. I find that the Hon'ble Madras High Court in the case of Strategic Engg. Pvt. Ltd. (supra) after considering the decision of the Hon'ble Supreme Court in the case of Ind-Swift Laboratories Ltd. (supra) held that mere taking credit itself would not compel the assessee to pay interest as well as penalty. It is also observed that subsequent amendment of Rule 14 of Cenvat Credit Rules would make it clear.

9. *The Counsel cited various decisions of Tribunals, High Courts and Supreme Court. I find that the appellant had noticed the irregularity and reversed the credit. Learned counsel contented that demand is not sustainable on limitation. On perusal of show cause notice, I find that the appellant shown credit in their ER1 return. The appellant vide its letter dated 26-3-2008 informed the jurisdictional Superintendent, Central Excise, that they reversed credit on 29-2-2008. This fact was not disputed by the Revenue. Hence, the demand of duty for the extended period of limitation cannot be sustained. In any event, the appellant is not disputing the demand which has already been paid by them. The learned counsel categorically stated that they are not contesting the demand of duty, even it is for extended period of limitation, as they have already paid. In my considered view, the payment of interest under Section 11AB to the Central Excise Act as they have not utilised such credit and the imposition of penalty under Section 11AC of the said Act, cannot be sustained."*

6. In view of above position of law, I do not find any merits in the impugned order, so far as it has upheld confirmation of adjudged demand of interest and penalty on the appellant. Accordingly, the impugned order to such extent is set aside and the appeal is allowed in favour of the appellant.

(Order dictated in Court)

(S.K. Mohanty)
Member (Judicial)

nsk