CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Excise Appeal No. 86967 of 2014

(Arising out of Order-in-Original No. 04/COMMR(WLH)/LTU-M/CX/2014 dated 02.05.2014 passed by the Commissioner of Central Excise & Service Tax (LTU), Mumbai)

M/s. Bajaj Auto Ltd. **Appellant**
Akurdi, Pune 411 035.

Vs.

Commissioner of Cen. Ex. & ST (LTU), Mumbai Respondent
29th floor, Centre-I, World Trade Centre,
Cuffe Parade, Mumbai 400 005.

WITH

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Commissioner of Cen. Ex. & ST (LTU), Mumbai Respondent
29th floor, Centre-I, World Trade Centre,
Cuffe Parade, Mumbai 400 005.

Appearance:

Shri A. Hidayatullah, Sr. Advocate, with Shri M.P. Joshi, Advocate, for the Appellant
Shri R.K. Dwivedy, Additional Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/**86728-86729/2021**

Date of Hearing: 05.08.2021
Date of Decision: 05.08.2021

PER: SANJIV SRIVASTAVA

These appeals are directed against order in original No 04/COMMR (WLH)/LTU-M/CX/2014 dated 02.05.2014 of the

Commissioner of Central Excise and Service Tax LTU, Mumbai. By the impugned order, the Commissioner has held as follows:

"ORDER

(i) The CENVAT credit of Rs 14,98,32,257/- (Rupees Fourteen Crore Ninety Eight Lakhs Thirty Two Thousand Two Hundred and Fifty Seven only) is disallowed and same is ordered for recovery under Rule 14 of CENVAT Credit Rules, 2004 read with proviso to Section 11A of the Central; Excise Act, 1944.

(ii) Interest at appropriate rate is payable under Rule 14 of CENVAT Credit Rules, 2004 read with Section 11AB (section 11AA wef 08.04.2011) of the Central; Excise Act, 1944 against the demand amount confirmed at (i) above.

(iii) Penalty of Rs 7,50,49,796/- (Rupees Seven Crore Fifty Lakhs Forty Nine Thousand Seven Hundred and Ninety Six only) is imposed is imposed on the Noticee under Rule 15(3)/ 15(2) of CENVAT Credit Rules, 2004 read with Section 11AC of the Central; Excise Act, 1944."

2.1 Appellants have manufacturing units/factories registered with Central Excise at (i) Akurdi, Pune, Maharashtra, (ii) Chakan, Pune, Maharashtra, (iii) Waluj, Aurangabad, Maharashtra, and (iv) Pantnagar, Uttarakhand. Their office at Akurdi, Pune is registered as "Input Service Distributor".

2.1 Except for their unit at Pantnagar, which enjoys exemption under Notification No. 50/2003 dated 10th June 2003 (area based exemption notification for Uttarakhand), all other units are clearing the goods manufactured by them on payment of applicable Central Excise Duty and also avail the CENVAT credit as permissible on the inputs and input services received by them.

2.2 From their office registered as Input Service Tax Distributor, they were distributing the credit of service tax received in office, to their units at Akurdi, Chakan and Waluz. Since unit at Pantnagar was exempt from payment of duty, no credit was distributed to the said unit.

2.3 Revenue entertained the view that the input service tax credit received by them at their office should have been proportionately distributed to all the four units of Appellant. As the no credit was distributed to unit at Pantnagar a Show Cause Notice dated 12.06.2012 was issued to them asking them to show cause as to why,-

"(i) The input service credit of Rs 14,98,32,257/- (Rupees Fourteen Crore Ninety Eight Lakhs Thirty Two Thousand Two Hundred and Fifty Seven only) should not be recovered under Rule 14 of CENVAT Credit Rules, 2004 read with proviso to Section 11A (1) of the Central; Excise Act, 1944 upto 07.04.2011 and thereafter 11A(4) of the Central Excise Act, 1944..

(ii) Interest at appropriate rate should not be charged and recovered from them on the wrongly availed Service tax credit under Rule 14 of CENVAT Credit Rules, 2004 read with Section 11AB of the Central; Excise Act, 1944 upto 07.04.2011 and thereafter 11AA of the Central Excise Act, 1944.

(iii) Penalty should not be imposed on them under Rule 15 of CENVAT Credit Rules, 2004 read with Section 11AC of the Central; Excise Act, 1944."

2.4 This show cause notice was adjudicated by the Commissioner as per the impugned order referred in para 1, supra. Aggrieved Appellants have preferred this appeal.

3.1 We have heard Shri A Hidayatullah, Senior Advocate, along with Shri M P Joshi, Advocate, for the Appellant and Shri R K Dwivedy, Additional Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the appellant, learned counsel submits that,

- Undisputedly the entire demand is confirmed by the impugned order pertains to period 2007-08 to 2011-12.
- As per Rule 7 of the CENVAT Credit Rules, 2004, as it existed during the entire period of demand there was no requirement for proportionate distribution of the input

service tax credit received by their office as input service tax credit distributor. Bar on distribution of CENVAT Credit under Rule 7(b) of the CENVAT Rules is applicable to credit of Service Tax attributable to services used in a unit exclusively engaged in manufacture of exempted goods. This view is supported by the following decisions,-.

- (CCE, Bangalore V. ECOF Industries Pvt. Ltd. (2012 (277) ELT 317 (KAR)))
- CCE V. Orlikon Balzers Coating India Pvt. Ltd. (2019 (366) ELT 624 (Bom))
- CCE V. Dashion Ltd. (2016 (41) STR 884 (Guj))
- Board Circular No. 1063/2/2018-CX, dated 16-2-2018
- CCE V. National Engineering Industries Ltd. (2016 (42) STT 945 (Raj))
- Godrej Consumer Products Ltd. V. CGST & Ex (2019 (369) ELT 841))
- Praj Industries Ltd. V. CCE (2014 (36) STR 1273)

➢ Rule 7 (b) was amended with effect from 01.04.2012 to provide for proportionate distribution of the input service tax credit received by the office registered as input service distributor. Hon'ble Gujarat High Court has in case of Doshion, referred above, clearly held that the amendment, made in Rule 7 (b) was prospective.

➢ Even during the period of dispute Pantnagar unit was paying Basic Excise Duty (BED) along with other Duties of Excise such as Automobile Cess, E. Cess, SHE Cess, etc, on the goods manufactured and cleared by them on which exemption under Notification 50/2003-CE was not admissible. Hence it is not correct to say that the said unit was engaged in manufacture and clearance of exempted goods exclusively as have been held in the case of Henkel India Pvt. Ltd. [(2020 (1) TMI 369]

➢ Hon'ble Bombay High Court in Mahindra and Mahindra Ltd. V. CCE (2019-TIOL-2769-HC-CX) has also decided the issue in their favour.

- Extended period of limitation cannot be invoked in the present case for denying the credit and making the demand in view of the fact that,-
    - All the facts were within the knowledge of the Department from October 2007 as is evident from Department's letter dated 27th September 2007 and Appellants' letter dated 22nd October 2007;
    - Appellants have filed periodical returns every month, disclosing all the facts of payment of duty and distribution of CENVAT Credit.
    - In any event Appellants entertained a bonafide belief that the Pantnagar Unit is not exclusively engaged in manufacture of exempted goods as it has been paying excise duty.
- For the same reason the penalty imposed under Rule 15 read with Section 11AC cannot be sustained.
- Appeals need to be allowed setting aside the impugned order.

3.3 Arguing for the revenue learned authorized representative reiterates the findings recorded in the impugned order.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 We find that Hon'ble Gujarat High Court has in case of Doshion [2016 (41) STR 884 (Guj)] interpreted the provisions of Rule 7 of CENVAT Credit Rules, 2004 both pre and post amendments made with effect from 01.04.2012 and has held as follows:

"4. It is undisputed that the Rules of 2004 provide for a scheme for distribution of credit by input service distributor. Term "input service distributor" has been defined in Rule 2(m) of the Rules of 2004 as to mean an office of the manufacturer or producer of final products or provider of output service, which receives invoices issued under rule 4A of the Service Tax Rules, 1994 towards purchases of input services and issues invoice, bill or, as the case may be, challan for the purposes of distributing the credit of service tax paid on the said services to such manufacturer or producer or provider, as the case may be.

5. Rule-7 pertains to manner of distribution of credit by input service distributor. At the relevant time, this Rule-7 permitted input service distributor to distribute Cenvat credit in respect of service tax paid on the input service to its manufacturing units or units providing output service, subject to the two conditions, viz.:-

"(a) the credit distributed against a document referred to in rule 9 does not exceed the amount of service tax paid thereon;
(b) credit of service tax attributable to service [used by one or more units] exclusively engaged in manufacture of exempted goods or providing of exempted service shall not be distributed;"
5.1 It was only later on that additional condition by way of Clause-(d) to Rule 7 was added, which reads as under:-

"credit of service tax attributable to service used by more than one unit shall be distributed pro rata on the basis of the turnover of such units during the relevant period to the total turnover of all its units, which are operational in the current year, during the said relevant period."

6. The first objection of the Department therefore that the credit from one unit was utilized for the purpose of duty liability of other unit without pro rata distribution by the input service distributor therefore would not survive in view of no previous restriction of this nature flowing from Rule 7 of the Rules of 2004. In fact, the Tribunal has seen entire situation as a Revenue neutral, since as pointed out by the assessee, it had availed only 20% of the credit for payment of service tax and the balance was paid in cash."

4.3 In case of Oerlikon Balzers Coating India Pvt Ltd [2019 (366) ELT 624 (Bom)], Bombay High Court has held as follows:

"8. It would be appropriate that we reproduce Rule 7 as existing prior to 2012 and post 2012 which is as under:-

Rule 7 as Existing Prior to 2012:-

RULE 7. Manner of distribution of credit by input service distributor - *The input service distributor may distribute the CENVAT credit in respect of the service tax paid on the input* *service to its manufacturing units or units providing output service, subject to the following condition, namely :-*

(a) The credit distributed against a document referred to in rule 9 does not exceed the amount of service tax paid thereon; or

(b) credit of service tax attributable to service use in a unit exclusively engaged in manufacture of exempted goods or providing of exempted services shall not be distributed.

Rule 7 Post 2012- amendment

RULE 7. Manner of distribution of credit by input service distributor *- The input service distributor may distribute the CENVAT credit in respect of the service tax paid on the input service to its manufacturing units or units providing output service, subject to the following condition, namely :-*

(a) The credit distributed against a document referred to in rule 9 does not exceed the amount of service tax paid thereon; or

(b) credit of service tax attributable to service use in a unit exclusively engaged in manufacture of exempted goods or providing of exempted services shall not be distributed;

(c) credit of service tax attributable to service used wholly in a unit shall be distributed to the unit; and

(d) credit of service tax attributable to service used in more than one unit shall be distributed pro rate on the basis of the turnover during the relevant period of the concerned unit to the sum total of the turnover of all the units to which the service relates during the same period.

9. From reading of the above Rules both pre and post amendment, it would be noticed that both provisions give an option to the assessee concerned whether to distribute input services tax available to it amongst its other manufacturing units which are providing output services. This is evident from the use of word "may distribute the CENVAT credit" is found in Rule 7 both prior and also post 2012. Thus, from the reading of the Rules, the option was available to the assessee whether to distribute the CENVAT credit or not. In fact, our attention is *invited to Rule 7 of the CENVAT credit Rules, 2004 as substituted w.e.f. 1.4.2016 which has made it mandatory for distribution of input services to the various units providing output services. This is evidence by the use of words "shall distribute the Cenvat Credit" in the substituted Rule 7 as Cenvat Credit Rules 2004 w.e.f. 1.4.2016. Therefore, on plain reading of Rule 7 as existing both pre and post amendment 2012 covering the period involved in these proceedings, the respondent - assessee was entitled to utilize the CENVAT credit available at its Pune unit."*

4.4 Since the issue is squarely covered by the decisions of Hon'ble High Court of Mumbai and Hon'ble High Court of Gujarat, we do not find any merits in the impugned order.

4.5 It is evident from the letter dated 9th June 2014, that Appellant have filed two appeals against the single adjudication order, as a matter of abundant caution. The text of the letter is reproduced below:

"To,

The Assistant Registrar,
CESTAT, WZB, Mumbai,
3rd Floor, Jai Centre,
Masjid Bandar (E),
P. D'Mello Road,
Poona Street,
Mumbai.

Sub: Submission of Appeal and Stay Application, reg.

Ref.: Bajaj Auto Ltd.

Dear Sir,

Please find enclosed herewith Appeal and Stay Application, by our clients, Bajaj Auto Ltd. in quadruplicate, against Order In Original No.04/COMMR(WLH)/LTU M/CX/2014 dated 2ND May 2014 passed by the Commissioner of Central Excise, LTU, Mumbai.

Please note that our clients are filing TWO Appeals against the aforementioned Order dated 2nd May 2014, first in their capacity as manufacturer with reference to their Chakan Unit and Second in their capacity as ISD at Akurdi location.

Two Appeals are being filed as and by way of abundant caution because the impugned Show Cause Notice was issued to both these Units but the impugned Order dated 2nd May 2014 does *not specifically reflect as to against which Unit the demands, interest and penalty has been confirmed.*

The instant Appeal is relating to their ISD Registration at Akurdi Location

You are therefore requested to tag both the Appeal and list them together for all

purposes.

Also find enclosed herewith a Vakalatnama authorising us in the matter.

Also find enclosed herewith demand draft bearing number 003133 for Rs. 10,000/- and number 003137 for Rs. 500/- both dated 6th June 2014.

Kindly acknowledge the receipt of the same."

Since we do not find any order made separately against the ISD Registration at Akurdi Location, we are of the view that the appeal filed by them as an ISD is infructuous and needs to be disposed accordingly.

5.1 The Appeal filed by the Appellant, Chakkan plant is allowed and the impugned order set aside.

5.2 The Appeal filed by the Appellant, as ISD Registrant at Akurdi, is disposed of as infructuous.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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