CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT No. I

Service Tax Appeal No. 42325 of 2014

(Arising out of Order-in-Original No. 15/2014 dated 05.08.2014 passed by Commissioner of Central Excise and Service Tax, No. 6/7, ATD Street, Race Course, Coimbatore – 641 018)

M/s. Bharat Sanchar Nigam Limited **...Appellant**
Office of the Principal General Manager,
323/1, Bharathi Park Cross II,
MTP Road,
Coimbatore – 641 043.

Versus

Commissioner of GST and Central Excise **...Respondent**
Coimbatore Commissionerate,
6/7, ATD Street,
Race Course,
Coimbatore – 641 018.

APPEARANCE:

For the Appellant : Shri S. Durairaj, Advocate
For the Respondent : Shri M. Ambe, Deputy Commissioner / A.R.

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER No. 40505/2024

DATE OF HEARING : 23.01.2024
DATE OF DECISION : 30.04.2024

Order : [Per Mr. VASA SESHAGIRI RAO]

Service Tax Appeal No. ST/42325/2014 has been filed by M/s. Bharat Sanchar Nigam Limited, aggrieved by the Order-in-Original No. 15/2014 dated 05.08.2014 passed by Commissioner of Central Excise & Service Tax, Coimbatore disallowing CENVAT Credit and ordering for recovery of wrongly availed CENVAT Credit amounting to Rs.97,69,082/-,

Rs.2,23,468/- and Rs.48,10,307/- respectively under Rule 14 of CENVAT Credit Rules, 2004 read with extended proviso to Section 73 of Finance Act, 1994 ('ACT') besides levy of applicable interest under Section 75 of Finance Act,1994 and imposition of penalty of Rs.1,48,02,857/- under Rule 15(3) of Rules ibid read with Section 78 of Act *ibid*.

2. The brief facts of the case are as detailed below:-

2.1 The ST-3 returns of the Appellant for the period November 2009-September 2010 were verified by the department and it appeared that the entire CENVAT credit of capital goods to the tune of Rs.1,95,38,163 was availed instead of 50%- Rs.97,96,082/- as stipulated under Rule 4(2)(a) of CCR,2004 which is reproduced below:-

> ***"(2)*** *(a) The CENVAT credit in respect of capital goods received in a factory or in the premises of the provider of output service at any point of time in a given financial year shall be taken only for an amount not exceeding fifty per cent. of the duty paid on such capital goods in the same financial year:"*

2.2 On verification of documents of Appellant for the period from November 2009-December 2010, it appeared that they have availed ineligible CENVAT Credit of Rs.2,23,468/- on Customs cess in respect of 11 Bills of Entry. On being pointed out the Appellant reversed the Credit in their CENVAT account on 11.01.2011.

2.3 On verification of CENVAT documents and ST-3 returns for August 2008 to October 2009, it appeared that the Appellant had availed credit of Rs.44,71,691/- based on invoices addressed to BSNL (Access Network

Project), Ganapathy, Coimbatore holding separate Service Tax registration. Further, it also appeared that the Appellant had availed CENVAT Credit of Rs.3,38,346/- based on invoices raised by the Input Service Distributor *Viz*. BSNL, Salem and invoices raised on BSNL (Access Network Project), Ganapathy, Coimbatore. The department was of the view that the CENVAT credit was availed on ineligible documents in contravention of Rule 9(2) of CENVAT Credit Rules, 2004.

2.4 Therefore the Department was of the view that the Appellant had contravened the provisions of CENVAT Credit Rules, 2004 and wrongly availed CENVAT credits which were liable to recovered along with interest under Rule 14 of CENVAT Credit Rules, 2004 read with Section 73 and 75 of Finance Act, 1994.

2.5 Consequently, a Show Cause Notice dated 30.09.2013 was issued to the Appellant proposing to recover the said wrongly availed CENVAT Credit under Rule 14 of CCR, 2004 read with Section 73 of Act, *ibid* along with applicable interest under Rule 14 of CCR, 2004 read with Section 75 of the Act *ibid*, besides proposing to impose penalty under Rule 15(3) of CCR, 2004 read with Section 78 of Act ibid and to appropriate the amount of Rs.2,23,468/- already paid by the Appellant.

2.6 After due process of law, the adjudicating authority *vide* Order-in-Original No. 15/2014 dated 05.08.2014 ordered for recovery of wrongly availed CENVAT Credit amounting to Rs.97,69,082/-, Rs.2,23,468/- and Rs.48,10,307/- under Rule 14 of CCR, 2004 read with extended proviso to

Section 73 of Finance Act,1994 along with interest of Rs.5,55,978/-, 2,23,468/- and Rs.22,551/- respectively under Rule 14 *ibid* read with Section 75 of the Act, besides appropriating an amount of Rs.2,23,468/- already paid by the Appellant and imposing a penalty of Rs.1,48,02,857/- under Rule 15(3) of Rules *ibid* read with Section 78 of Act *ibid*.

3. Aggrieved, present appeal by the Appellant before this forum.

4. As evident from the grounds of appeal, the submissions of the appellant are as follows:-

(i) Regarding CENVAT credit of Rs.97,96,082/- it was contended that although 100% credit was taken, only 50% was utilized during the year and the balance credit was not utilized till the date of its eligibility.

(ii) Regarding CENVAT credit availed on Customs Cess, it was pointed out that the same was reversed before utilization and hence interest was not liable to be paid relying on the decision of the Hon'ble High Court of Madras in the case of Commissioner of Central Excise Vs. Strategic Engg. Pvt. Ltd. [2014-TIOL-466–HC-Mad-CX], which has held that interest cannot be demanded if CENVAT Credit taken only but not actually utilized. It reads as follows:-

> ***"10.*** *In fact, this Court has perused the entire decision reported in 2012 (26) S.T.R. 204 (Karnataka) (Commissioner of Central Excise & S.T., Bangalore v. Bill Forge Private Limited) and ultimately found that mere taken of CENVAT credit facilities is not at all sufficient for claiming of interest as well as penalty.*
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> ***11.*** *It is an admitted fact that Rule 14 of the Cenvat Credit Rules as been subsequently amended, wherein it has been clearly stated as "taken and utilised". Therefore, it is quite clear that mere taking itself would not compel the assessee to pay interest as well as penalty. Further, as pointed out earlier, the subsequent 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 advanced 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."

(iii) Regarding availment of CENVAT Credit on ineligible documents, it was submitted that the credit could not be denied as the goods and services were consumed by the appellants for which relevant documents were submitted to the department and the Capital goods were available at the premises of the appellant.

(iv) It was contended that penalty was not imposable as the Appellant is a Public Sector Undertaking owned by Government of India; in the first case credit was not utilized before eligible date; in the second case credit was not used to earn undue financial accommodation and credit reversed before utilization; in the third case adequate evidences were adduced to prove that the goods and services were received and used by the Appellants.

5.1 The Ld. Advocate Shri S. Durairaj, argued for the Appellant and submitted as follows:-

(i) with regard to 100% CENVAT credit availed on capital goods it was submitted that interest is not applicable since the credit was not utilised.

(ii) Regarding Customs cess availed as credit during the period from March 2010 to April 2010, it was submitted that interest is not

applicable since the credit was not utilized and there is excess payment of service tax during the period.

(iii) Regarding credit of Rs.48,10,307/- taken during October 2008 to March 2009, it was submitted that it was only procedural infirmity for which substantial benefits could not be denied. Though invoices were addressed to other divisions of the Appellant, the equipments were installed in their jurisdiction and hence the Appellants were entitled for the credit as other divisions were only planning divisions.

(iv) Regarding invocation of extended period it was submitted being a public sector undertaking, the allegation of deliberate suppression of facts with an intent to evade is not sustainable.

It was pointed out that major portion of the credit was not utilized before the eligible dates and there were no undue benefits to the Appellants. It was further submitted that all the details were duly furnished in their ST-3 returns and the relevant invoices and bills of entries based on which credit was taken were also made available to the department and hence under the circumstances, it was averred the allegation of deliberate suppression with an intent to evade on a Public Sector Undertaking owned by the Government of India was not sustainable. It was also averred that the SCN was issued on 30.09.2013 well beyond the actual cut-off date for issue of SCN i.e 25.04.2011 / 25.10.2011, as the case may be and hence extended period could not be invoked.

5.2 The Ld. Advocate placed reliance on the ratio of the following decisions:-

(i) Commissioner of Central Excise, Chennai-I Vs. Chennai Petroleum Corporation Ltd. [2007 (211) ELT 193 (SC)]

(ii) Indian Oil Corporation Ltd. Vs. Commissioner of Central Excise, Ahmedabad [2013 (291) ELT 449 (Tri.-Ahmd.)]

(iii) Commissioner of Central Excise, Indore Vs. Nepa Ltd. [2013 (298) ELT 225 (Tri.-Del.)]

(iv) Commissioner of Central Excise, Allahabad Vs. Bharat Yantra Nigam Ltd. [2014 (36) STR 554 (Tri.-Del.)]

(v) Rajasthan Renewable Energy Corporation Ltd. Vs. Commissioner of Central Excise, Jaipur-I [2017 (51) STR (269) (Tri.-Del.)]

(vi) A.P Trade Promotion Corporation Ltd. Vs. Commissioner of Central Excise, Hyderabad- II [2019 (24) GSTL 269 (Tri.-Hyd.)]

(vii) Commissioner of Custom, Excise and Service Tax, Dehradun Vs. Commandant , CISF Unit [2019 (24) GSTL 232 (Tri.-Del.)]

(viii) Tamilnadu State Transport Corporation (Coimbatore) Ltd. Vs. Commissioner of Customs, Central Excise & Service Tax, Coimbatore [2019 (28) GSTL 225 (Tri.-Chennai)]

(ix) U.P State Food & Essential Commodities Corpn. Ltd. Vs. Commissioner of Central Excise, Lucknow [2019 (31) GSTL 97 (Tri.-All.)]

(x) Commissioner of Central Excise, Bolpur Vs. Indian Iron & Steel Co. Ltd. [2023 (4) CENTAX 41 (Cal.)]

6.1 The Ld. Authorized Representative Shri M. Ambe affirmed the findings of the lower Adjudicating Authority and submitted that as per Rule 14 of CCR, 2004 "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, &11AB of Central Excise Act or Section 72 and 75 of Finance Act shall apply mutatis mutandis for effecting such recoveries."

6.2 He has contended that the appellants were not entitled to avail CENVAT credit of Customs cess which they had availed and the said credit was liable for appropriation along with interest and penalty.

6.3 He has further submitted that the appellants had not provided all the documents required to prove that the goods or services covered under the documents in dispute, had been received and accounted for in the books of accounts of the receiver and the documents on which CENVAT credit was availed have not fulfilled the requirements under Rule 9 of CCR, 2004.

6.4 It was pointed out that the appellants had not acted as per the provisions of the CCR, 2004 with respect to the wrong availment of CENVAT credit and in declaring the wrong details in the ST 3 returns which was a deliberate suppression of facts and contravention of the provisions of Finance Act, 1994 and the rules made thereunder with an intent to evade payment of Service Tax and therefore extended proviso to Section 73 of Finance Act, 1994 has been rightly invoked. Hence Appellants were liable to pay interest and penalty.

6.5 He has placed reliance on the ratio of the judgment of the Hon'ble Supreme Court in the case of *M/s. Ind Swift Laboratories Ltd. [2011 (265) ELT 3-Supreme Court]* wherein it was held that:-

> ***"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:-*
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> "**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. ------

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."

7. Heard both sides and carefully considered the submissions and evidences on record.

8. The following issues arise for decision in this appeal:-

i. Whether interest is demandable on irregular CENVAT Credit merely taken in the books but have not been utilized?
ii. Whether the availment of CENVAT Credit by the appellant on the basis of various invoices / documents is in order or not in terms of Rule 9 of CENVAT Credit Rules, 2004?
iii. Whether invocation of extended period of time and imposition of penalty are justified considering the facts of this appeal?

9. On the issue of 100% availment of CENVAT Credit on capital goods in the first year itself and the availment of credit on Customs Cess, it is to be noted that the appellant though has taken the credit in their books has not utilized the credit taken towards payment of any duty / tax. Whether interest is demandable or not on irregular CENVAT Credit availed but not utilized, the issue is no more *res integra* as it has been held by various higher judicial fora that when CENVAT Credit was merely taken in the books but not utilized would not involve any payment of interest or penalty.

10. The facts indicate that the appellant had availed 100% CENVAT Credit on the capital goods in the very first year of receipt of such goods instead of 50% of duty as stipulated under Rule 4(2)(a) of CENVAT Credit Rules, 2004, resulting in 50% excess availment of CENVAT Credit. The appellant has submitted that though they have taken 100% CENVAT Credit on the capital

goods in the first year when the goods were received but they utilized only 50% of credit in the first year as per their eligibility. It was also informed regarding CENVAT Credit taken on Customs Cess that it was reversed before utilization. The appellant has relied on the decision of the Hon'ble High Court of Madras in the case of Strategic Engg. Pvt. Ltd. (*supra)* wherein it was held that interest cannot be demanded if CENVAT Credit taken only but not actually utilized. We find that demandability of interest for merely taking CENVAT Credit but not actually utilizing the same was considered and decided in favor of the appellant in many case laws.

11.1 The issue of unutilized CENVAT Credit was a subject matter before the Hon'ble Supreme Court in the case of *Ind-Swift Laboratories Ltd. (supra)* and the decision was considered by the Hon'ble High Courts and co-ordinate Benches of the Tribunal in the following decisions among others:-

i. *Commissioner of Central Excise and Service Tax, LTU, Bangalore Vs. Bill Forge Pvt. Ltd. [2012 (279) ELT 209 (Kar.)]*

ii. *M/s. SAIL Vs. Commissioner of GST and Central Excise, Bolpur [E/78557 of 2018 dated 20.09.2019]*

11.2 The relevant portion of the judgment of the Hon'ble High Court of Karnataka in the case of *Bill Forge Pvt. Ltd. (supra)* is extracted below:-

> ***"7.*** *In the light of the aforesaid material on record and rival contentions, the substantial question of law that arises for consideration in this appeal is as under :*
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> > *"The words "Cenvat Credit has been taken", does it mean making an entry in the account books showing the entitlement of the said credit? or does it mean the said credit found in the account books actually taken while clearing the finished products.?"*
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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.*

23. *Under these circumstances, we do not see any error committed by the Tribunal in passing the impugned order. Accordingly, the substantial question of law framed is answered against the Revenue and in favour of the assessee."*

11.3 The Hon'ble Madras High Court in the case of *Commissioner of Central Excise Vs. M/s. Strategic Engineering (P) Ltd. [2014-TIOL-466-HC-MAD-CX]*, has held:-

> ***"11.*** *It is an admitted fact that Rule 14 of the Cenvat Credit Rules as been subsequently amended, wherein it has been clearly stated as "taken and utilised". Therefore, it is quite clear that mere taking itself would not compel the assessee to pay interest as well as penalty. Further, as pointed out earlier, the subsequent 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 advanced 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."*

11.4 In the case of *J.K. Tyre and Industries Ltd. Vs. Assistant Commissioner of Central Excise, Mysore [2016 (340) ELT 193 (Tri.–LB)]*, Tribunal Large Bench has come to the conclusion that interest liability would not arise when the assessee had merely availed credit and had reversed the same before utilizing the availed credit for remittance of duty.

11.5 The same view was taken by the Tribunal in the following cases:-

i. Commissioner of Central Excise Vs. Sharda Energy & Minerals Ltd. [2013 (291) ELT 404 (Tri.-Del.)]
ii. Gary Pharmaceuticals (P) Ltd. Vs. Commissioner of Central Excise, [2013 (297) ELT 391 (Tri.-Del.)]
iii. Commissioner of Central Excise Vs. Balrampur Chini Mills Ltd., [2013-TIOL-1142- CESTAT-Del]
iv. M/s. Gurmehar Construction Vs. Commissioner of Central Excise [2014-TIOL-1205- CESTAT-Del]

11.6 Appreciating the ratio of above decisions, we find that the recovery of interest is not legally justified and not maintainable.

12. On the second issue of the appellant taking CENVAT Credit on ineligible documents, contravening the provisions of Rule 9 of the CENVAT Credit Rules, 2004, the appellant has submitted that such CENVAT Credit was

availed based on the invoices raised by the Input Service Distributor *viz.,* DGM (Transmission Planning), BSNL Salem which were addressed to BSNL, (Access Network Project), Ganapathy, Coimbatore-6; It was submitted that, BSNL (Access Network Project), Ganapathy, Coimbatore was a unit functioning under DGM (Transmission Planning), BSNL, Salem, and carries out the work for BSNL, Coimbatore for which excisable goods were received by Access Network Project, Ganapathy and carries out work like creating infrastructure for rendering effective telecommunication service by BSNL, Coimbatore; hence, the CENVAT Credit on the invoices issued in the name of Access Network Project, Ganapathy, CBT, for the goods received as well as work carried out for BSNL, Coimbatore SSA taken credit, based on the ISD Invoices issued by the Parent Office, *viz*., BSNL, Salem (ISD) to GM, BSNL, Coimbatore and enclosed the Copies of all the ISD invoices; hence, there was no contravention of Rule 9 of CENVAT Credit Rules, 2004; It was also alleged that the CENVAT credit was availed based on the invoices issued in the name of M/s. BSNL, Karnataka Circle; in that context, it was submitted that Broad Band equipments supplied by M/s. UTSTARCOM were received and commissioned at Coimbatore SSA based on the purchase order placed by the Central Telecom Stores Depot, Bangalore, Karnataka Circle; for the said Purchase Order, the consignee was Coimbatore SSA but the Invoices were raised on CTSD, Bangalore, Karnataka Circle since, the paying authority was Karnataka Circle; copies of the Delivery Challans and Claim bills were enclosed; the charges incurred by Karnataka Circle towards installation & commissioning of the Broad Band equipment on behalf of Coimbatore SSA had been distributed to Coimbatore SSA through an Advice of Transfer Debit; CTSD, Bangalore, Karnataka Circle was a registered Input

Service Distributor since March 2006; hence, there was no contravention of Rule 9 of CENVAT Credit Rules, 2004.

13. We find that the appellant is a Government owned company and it has got different circles, operational areas and divisions, as such discrediting these documents for the purpose of availment of CENVAT Credit is not legal and proper. Unless there is an allegation that the capital goods are diverted or not installed in the appellant's premises, it has to be held that the appellant is eligible for the CENVAT Credit availed.

14. On the issue of invoking the extended period, the Ld. Advocate Shri S. Durairaj has argued that major portion of the CENVAT Credit taken in their books was not utilized before the eligible dates and the appellant has not got any benefit of taking such credit into their books. He has further submitted that all the details were duly furnished to the Department in their ST-3 Returns and the relevant invoices and other documents based on which credit was taken were also made available to the Department and as such the allegation of deliberate suppression with an intent to evade payment of Service Tax in respect of Public Sector Undertaking is not sustainable. It is informed that the Show Cause Notice was issued on 30.09.2013 which is well beyond the actual cutoff date for the issue of the Show Cause Notice i.e., 25.04.2011 / 25.10.2011, as the case may be and contended that extended period could not be invokable.

15. Further, the Ld. Advocate has relied upon the decision rendered in the case of *Indian Oil Corporation Ltd. Vs. Commissioner of Central Excise, Ahmedabad [2013 (291) ELT 449 (Tri.-Ahmd.)]* wherein it was held that Public Sector Undertaking, cannot have *mala fide* for non-discharge of duty

and there cannot be an allegation of intention to evade duty. The relevant portion of the above judgment as applicable to the facts of this case is extracted below for ready reference:-

> ***"24.*** *…….. Be that it may be, I find strong force in the contention of the ld. Counsel that the appellant being a Public Sector Undertaking, there cannot be mala fide for non-discharge of excise duty, if any and there cannot be allegation of intention to evade duty. I find fortified in my view, by decision of this Tribunal in the case of Markfed Refined Oil & Allied Indus, (supra), wherein the Tribunal held that "We are of the view that in the absence of any material showing any positive intention on the part of the appellant, which is a Government undertaking, to evade duty or fraud, collusion, etc., imposition of penalty was not justified." I find that the Revenue took up the matter in the case of Markfed Refined Oil & Allied Indus. in appeal to Hon'ble High Court of Punjab & Haryana and their Lordships, while dismissing the appeal, passed the following order :*
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> > *"The revenue has filed the instant appeal under Section 35G of the Central Excise Act, 1944 challenging order dated 28-3-2008 passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi (for brevity 'the Tribunal'). The Tribunal has recorded a categorical finding that there is no material brought on record which may lead to an inference that there was any intention to evade duty by playing fraud or collusion. The dealer-respondent is a government undertaking namely Markfed. After recording the aforesaid finding, the order of penalty has been set aside by the Tribunal.*
> >
> > *Having heard learned counsel, we find that no exception is provided to interfere in the impugned order in which pure findings of fact have been recorded. Once the dealer-respondent is a Government organisation like Markfed it is not easy to infer any evasion of duty much less its intention to do so. There is thus no merit in the appeal as no question of law warranting its admission would arise. Dismissed".*

16. Further, in the case of *Commissioner of Central Excise, Indore Vs. Nepa Ltd. [2013 (298) ELT 225 (Tri.-Del.)]* it has been held as follows:-

> "***8.*** *In any case it is seen that the show cause notice has been issued after expiry of normal limitation period of one year from the relevant date and same would not survive unless the Department proves that the respondents had deliberately suppressed the relevant facts from the Department with intent to evade the duty. In this regard we find that the respondent is a Public Sector Undertaking wholly owned by the Government of India and in our view it would be absurd to accuse a wholly Government owned company of non-payment of excise duty with intent to evade the tax. In the circumstances of the case, in our view, it would not be correct to allege that the respondent have suppressed the relevant facts from the Department with intent to evade the payment of duty and as such longer limitation period under proviso of Section 11A(1)*

and the penalty under Section 11AC would not be applicable. Thus the duty demand is not sustainable on limitation, also."

17. Appreciating the ratio of the above decisions, we have to hold that the demand notice issued is time barred and there is no justification for invoking the extended period of limitation in the facts of this case. Thus, the appellant succeeds on limitation also.

18. In view of the above findings, the impugned Order-in-Original No. 15/2014 dated 05.08.2014 passed by Commissioner of Central Excise and Service Tax cannot sustain and so, ordered to be set aside. The appeal is allowed with consequential reliefs, if any, as per the law.

(Order pronounced in the open court on 30.04.2024)

Sd/-
(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

Sd/-
(P. DINESHA)
MEMBER (JUDICIAL)

MK