CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
HYDERABAD

REGIONAL BENCH

Service Tax Appeal No. 26767 of 2013

(Arising out of order-in-Appeal No.9 to 11/2013(T)ST dated 06.03.2013 passed by Commissioner of Customs, Central Excise & Service Tax (Appeals) Guntur)

Sri Venkateshwara Bhakti Channel **...Appellant**
Alipiri Guest House,
Alipiri, Tirupathi

Verses

The Commissioner of Central Excise Customs & Service Tax Tirupathi, **...Respondent**
9/86-A, Behind West Church Compound,
Amaravathi Nagar,
M.R. Palli,
Andhra Pradesh

WITH

Service Tax Appeal No. 26768 of 2013

(Arising out of order-in-Appeal No.9 to 11/2013(T)ST dated 06.03.2013 passed by Commissioner of Customs, Central Excise & Service Tax (Appeals) Guntur)

Sri Venkateshwara Bhakti Channel **...Appellant**
Alipiri Guest House,
Alipiri, Tirupathi

Verses

The Commissioner of Central Excise Customs& Service Tax Tirupathi, **...Respondent**
9/86-A, Behind West Church Compound,
Amaravathi Nagar,
M.R. Palli,
Andhra Pradesh

AND

Service Tax Appeal No. 26796 of 2013

(Arising out of order-in-Appeal No.9 to 11/2013(T)ST dated 06.03.2013 passed by Commissioner of Customs, Central Excise & Service Tax (Appeals) Guntur)

Sri Venkateshwara Bhakti Channel **...Appellant**
Alipiri Guest House,
Alipiri, Tirupathi

Verses

The Commissioner of Central Excise Customs & Sevice Tax Tirupathi, ...Respondent
9/86-A, Behind West Church Compound,
Amaravathi Nagar,
M.R. Palli,
Andhra Pradesh

APPEARANCE:
Mr C. Sumanth Adv for the appellant
Mr A Rangadham, Authorized Representative for the Revenue

CORAM:
HON'BLE MR. P. V. SUBBA RAO MEMBER (TECHNICAL)
HON'BLE DR. RACHNA GUPTA MEMBER(JUDICIAL)

FINAL ORDER NO.30005-30007/2023

Date of Hearing: 09.01.2023
Date of Decision: 01.02.2023

PER P.V. SUBBA RAO

These three appeals are filed by M/s Sri Venkateswara Bhakti Channel (Appellant) to assail orders-in-appeal No. 9 to 11 of 2013 dated 06.03.2013 passed by Commissioner of Central Excise Customs and Service Tax (Appeals), Guntur whereby the Commissioner upheld the action taken by the department for recovery of irregular availment of CENVAT credit and recovery of the interest liability of the said credit and rejected the appeals filed by the appellant. The prayer in these three appeals is identical and is reproduced below:

a) "Strike down Rule 14 of the Cenvat Credit Rules 2004 in so far as it levies interest on Cenvat Credit of service tax taken, as it is *ultra vires* Section 94 of the Finance Act, 1994;
b) Set aside the impugned Order-in-Appeal dated 06.03.2013 passed by the Ld Commissioner (Appeals) and allow the appeal in full with consequential reliefs to the Appellants;
c) Allow the appellants to avail and utilize the Cenvat Credit amounting to Rs 2,91,17,695/- reversed vide entry Sl No. 9 dated 06.12.2011.
d) Set aside the demand of interest of Rs 81,21,004/- confirmed under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11AB of the Central Excise Act 1944 and recovered under Section 87(b)(i) of the Finance Act.

e) Grant a personal hearing; and
f) Pass such other order or orders as may be deemed fit and proper in the facts and circumstances of the case."

2. During hearing learned counsel for the appellant submits that he is pressing only for setting aside of the demand and interest of Rs 81,21,004/- under Rule 14 of the CENVAT Credit Rules 2004 (CCR) read with Section 11AB of the Central Excise Act 1944 (Act) and ordered to be recovered under Section 87(b)(i) of the Finance Act 1994 (Finance Act) and consequential relief. He has specifically said that he is not pressing the prayer to strike down Rules 14 of CCR as *ultravires* of Section 94 of the Finance Act. He was also not pressing the appellant's assertion to avail and utilize CENVAT credit amounting to Rs 2,91,17,695/- reversed by it on 06.12.2011. We therefore proceed to hear both sides on this demand and have perused the records.

3. On behalf of the appellant the following submissions have been made.

i) A show-cause notice has been issued for recovery of interest and the limitation period prescribed for recovery of tax equally applies to recovery of interest in the present case, the period is barred by limitation. The reliance in this case is placed on the following case laws:

1) Hindustan Insecticides Ltd Vs CCE & ST [2013(297)ELT 332(Del)

2) Paper Products Ltd Vs CCE Mumbai[205(327)ELT 326(Tri-Mum)]

3)Jaypee Greens Vs CCE,C & ST Noida[2020(33)GSTL 109 (Tri.All)]

4) Collector of Customs, Madras Vs TVS Whirlpool Ltd [1996(86)ELT 144(Tri)]

5)Commissioner V TVS Whirlpool Ltd [2000(119)ELT A177(SC)]

6) Kwality Ice Cream Company Vs UOI [2012(281)ELT 507(Del)]

7) CCE Vs VAE VKN Industries Pvt Ltd [2015(322)ELT 269(P&H)]

ii) The Interest liability does not arise and credit was reversed prior to utilization. It has been submitted by the learned counsel for the appellant that the appellant had availed CENVAT credit but had not utilized it and on being pointed out it had reversed the entire CENVAT credit without utilizing it. Therefore mere availment of the CENVAT credit and without utilizing it has not rendered it liable to pay interest. Reliance was placed on the following case laws

1) Commissioner of Central Excise Bangalore Vs Bill Forge Pvt Ltd (2012 (279 ELT 209 (KAR)

2) Aban Offshore Ltd Vs Commissioner of Service Tax Mumbai-IV [2022(6)TMI 1084-CESTAT Mumbai

3) Commissioner of Central Excise Vs Grasim Biwani Textile Ltd [2018(6) TMI(43)

4) M/s R.K. Transport Company Vs CCE Raipur [2020 (11)TMI 34-CESTAT New Delhi)

5) Commissioner of Central Excise Vs International Auto Ltd [2010 (250) ELT 3 (SC)]

iii) A Garnish Order for recovery of interest cannot be issued without issuance of Show-cause notice and passing of the order-in-original. Reliance is placed on the following :

1) S. Kumar's Associates Vs Addl Commr (Prev) of Cus., C.Ex & ST Bilaspur [2020(38)GSTL 29 (Chhattisgarh)]

2) Prashanthi Vs UOI [2016(41)STR 392 (Kar.)]

3) UOI Vs Prashanthi [2016(43)STR 350 (Kar)

4) ICICI Bank Ltd Vs UOI [2015(38)STR 907 (Bom)]

4. Learned A.R. for the Revenue supports the impugned order. He submits that the appellant was engaged in and was registered for payment of service tax on advertisement services. It availed CENVAT credit on several input services which were not input services for the advertisement services. On being pointed out by the audit, the appellant reversed the CENVAT credit on 06.12.2011. However, it had not paid the interest on the irregularly availed CENVAT credit. Therefore a letter dated 31.03.2012 was issued to the appellant by the Superintendent which states as follows:

"Please refer to the Service Tax Audit conducted by the Department on various dates in the months of October & November 2011, on the accounts of your Channel. The said Audit covered the period from April 2008 to March 2011. Copy of the Audit Report referred above is enclosed for your information.

2. Para 1 of the Audit Report deals with the excess availment of Cenvat Credit of input service tax to the tune of Rs 2,91,17,695/- which has been reversed by you vide Entry Sl No. 9 dated 06.12.2011 in your Cenvat Credit Register. The issues lies here is that an interest component of Rs 81,21,004/- is payable by you for such excess availment during relevant time. The calculation sheet for arriving said interest of Rs 81,21,004/- is enclosed for your information.

3. You are directed to pay the said interest **IMMEDIATELY** within 10 days from the date of receipt of this letter and submit the GAR-7 Challan to this Office. The interest may be credited to the Accounting Code 00440016 of Advertising Agency."

The appellant responded to that letter by letters dated 03.05.2012 and 01.06.2012 stating that it had availed CENVAT credit but had not utilized it and therefore no benefit had accrued to it and no interest liability should arise. The relevant portion of the letter dated 03.05.2012 is as follows:

"In our view interest liability should not arise if CENVAT credit taken is reversed before utilization on the following basis:

- Rule 14 of the Credit Rules and Rule 57-I of the erstwhile Rules are *pari materia* to the extent that both rules provide for recovery of credit wrongly taken. Accordingly, the High Court judgement should apply even in context of Rule 14 of the Credit Rules.
- Rule 14 of the Credit Rules applies only if Cenvat credit was 'wrongly' taken and it should not applicable if credit was taken by mistake or under *bonafide* belief.
- In various judicial pronouncements, it has been laid down that if credit entry has been reversed before utilization, it amounts to not taking credit.
- Interest is compensatory in nature and linked with default in payment of duty/tax.
- The Central government was kind enough to amend Rule 14 of the CENVAT Credit Rules, 2004 by notification 18/2012-CE(N.T), dated 17th March 2012 so as to substitute the word "OR" with "AND". In the result, from 17th March 2012, interest is not payable u/s 11AA of the CEA, 1944 on CENVAT credit wrongly taken unless the same is utilized."

5. He submits that the case of the appellant is that since it had availed CENVAT credit but not utilized it, no interest liability should be charged from it. There is no dispute that as per Rule 14 of CCR as applicable during the relevant period interest was payable when irregular CENVAT credit was either availed OR utilized. The Rule was changed later to make it necessary to pay interest only when CENVAT credit was both availed and utilized.

6. Learned authorized representative submits that the question which arises is where an assessee had during the relevant period availed CENVAT credit wrongly but had not utilized it whether interest is still payable? This question was answered by the Hon'ble Supreme Court in UOI & Others Vs Ind-Swift Laboratories Ltd [2011(2) TMI 6-SC]. Paragraph 17 & 20 are reproduced below:-

> **"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.
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> **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."

Learned A.R. submits that Hon'ble Supreme Court has decided with respect to Rule 14 of CCR as applicable during the relevant period that interest is payable whether CENVAT credit has been availed or utilized. The Hon'ble Supreme Court has over-ruled the decision of the Hon'ble High Court and held that 'OR' cannot be read as 'AND'. He relies on the following case laws:

1) CCE Pune Vs M/s GL & V India Pvt Ltd [2015(5)TMI 375-Bombay High Court
2) CCE &C Raipur Vs Vandana Vidyut Ltd [2016(5)TMI 381-Chattisgarh High Court)]
3) HPCL V The Commr of CGST & Central Excise [2019(5)TMI 509-Bombay High Court.
4) CCE Vs Mount Mettur Pharmaceuticals Ltd [2017(9)TMI 1375-Madras High Court]
5) CCE Vs Sundaram Fasteners Ltd [2014(2)TMI 551 Madras High Court
6) CCE Chennai Vs Delphi TVS Diesel Systems Ltd [2015(10)TMI 667-Madras High Court

7) Cipla Ltd Vs CCE Goa [2019(4)TMI 1686-Bombay High Court]

8) Granules India Ltd Vs CCE, C & ST Hyderabad[2019(9)TMI 833-CESTAT-Hyderabad

9) VPR Mining Infrastructure Pvt Ltd Vs CCE, C & ST Hyderabad[2017(9)TMI 508-CESTAT Hyderabad].

7. In so far as the judgement of the Hon'ble High Court of Karnataka and the case of the Bill Forge was concerned learned A.R. submits that the facts of that case were different inasmuch as the assessee had neither availed nor utilized the CENVAT credit but had only entered the details of the inputs in its accounts. Paragraph 6 of the order is reproduced below:

> "6. *Per contra*, the learned Counsel appearing for the assessee pointed out that Section 11AB expressly provides that the interest is payable from the day the duty is payable, in order to compensate the Revenue for the loss sustained on account of delayed payment of duty. Even in Rule 14 on which reliance is placed, the word used is "taken or utilized wrongly". It does not mean that when an entry is made in the account book showing that assessee is entitled to take credit of the duty paid on inputs or capital goods or input services the assessee is benefited to any extent. It is only, when that credit is taken or utilized to discharge the liability to pay duty he is benefited. If the said credit is taken wrongly, the liability to pay interest arises. In the instant case, though the entry was made in the account book showing availment of credit, on being pointed out, the said entry was reversed. Thus the assessee did not take or utilize the benefit of the said credit and therefore there is no liability to pay interest. Therefore he submitted that even in the judgment relied on by the learned Counsel for the Revenue, in the facts of this case, the interest was levied from the date the duty was payable and not from the date the entry of Cenvat credit made in the books of account. The Supreme Court was concerned about the interpretation placed by Punjab and Haryana High Court while interpreting "OR" as to be read as "AND" found in the Cenvat Rules. It has no application, to this case."

He therefore submits that on merits, the appellant has no case and is liable to pay interest.

8. On the question whether the demand of interest is time barred in the matter, learned A.R. submits that the amount of interest can be decided only when date of availment of CENVAT Credit and the date on which it has been reversed are available. The entire amount was reversed by the appellant on 06.12.2011. In less than four months, a letter dated 31.03.2012 is

issued to the appellant asking them to pay interest. Therefore, this letter is in the form of a notice issued to the appellant within four months and is therefore not barred by time. He further submits that the appellant utilized this opportunity and has responded to this notice by letters dated 03.05.2012 and 01.06.2012 asserting that no interest is liable to be paid by it for the reason that it had not utilized the CENVAT credit but had only availed. Since the appellant was liable to pay interest as per Rule 14 of CCR which was and still on the statute books and whose provisions have been interpreted by the Hon'ble Supreme Court in the case of Ind Swift and appellant was not paying interest, the same had to be recovered. Accordingly the action was initiated to recover the interest as per Section 87. This action under Section 87 is not a garnish order by the Court but simple mechanism for recovery of sums due from a assessee by the officer.

9. On the question of whether a separate show-cause notice should have been issued to the appellant for recovery of interest. Learned A.R. submits that the letter issued by the department to which the appellant has sent a response is in the nature of a show-cause notice. There is no specific section in the Finance Act 1994 under which a notice to recover interest due can or must be issued. Therefore, there is no infirmity in the procedure followed by the officers and have been correctly upheld by the Commissioner (Appeals) in the impugned order.

10. We have considered the submissions of both sides and perused the records. Of the several clauses of the prayer in the appeal, the only one pressed by the learned counsel is regarding the liability of interest. According to the learned counsel for the appellant in the first place, interest cannot be charged because it had availed CENVAT credit but not utilized it.

Learned counsel fairly submits that Rule 14 of CCR as applicable during the relevant period provided for interest to be recovered where CENVAT credit has been availed or utilized wrongly. However, according to him if CENVAT credit was not utilized and has been reversed, mere availment of CENVAT credit does not cause any prejudice to the Revenue and therefore the appellant should not be asked to pay interest. We cannot agree with learned counsel's submissions. As applicable during the relevant period, Rule 14 of CCR provided for interest where CENVAT credit was availed or it was utilized. The Hon'ble Supreme Court has interpreted this clause in the case of Indswift Laboratories in this manner and has clearly held that the High Court had attempted erroneously to read down the provisions by way of substituting the word 'OR' by "AND' so as to give relief to the assessee. This decision was followed in various other judicial decisions.

11. The case of Billforge Pvt Ltd was different inasmuch as it was an assertion of the learned counsel for the assesse in that case that it had neither availed not utillised CENVAT credit and therefore no interest was liable to be paid. It is in that factual matrix that Hon'ble High Court of Karnataka has held that no interest was liable to be paid and distinguished it from the judgement of IndSwift.

12. Next submission of the learned counsel for the appellant is that no show-cause notice was issued to the appellant for recovery of interest. On a specific query from the Bench as to the provisions in the Finance Act 1994 under which notice for recovery of interest can be issued, learned counsel fairly submits that there is no specific provision. However, according to him it can be issued under Section 75 read with Section 73 of the Act.

13. We have considered these submissions. If there is no specific provision under which a show-cause notice can be issued, any notice issued without the authority of law cannot be sustained. If we see the scheme Finance Act 1994 Section 75 provides for payment of interest automatically based on the amount of service tax due. Therefore there is no mechanism for separately deciding how much interest is due and adjudicating upon it. The only question is if interest is not paid and notice must be issued to the appellant, in some form asking it to pay the interest so that it can defend itself. For instance if the amount of interest calculated is say Rs 100/, the assessee may submit that actually only Rs 70/- is due as per the calculations. To this extent, letter issued by the department to the assessee appellant on 31.03.2012 along with a calculation sheet meets this requirement by issuing a notice. It is also pointed out that the appellant has fully availed the opportunity and put forth its defence as to why interest should not be paid through its letters dated 3.5.2012 and 1.6.2012. In defence, the appellant has stated that since it had not utilized the CENVAT credit and only availed it, a demand of interest is not fair. This issue has already been decided by the Hon'bl Supreme Court in the case of IndSwift Laboratories with respect to Rule 14 of CCR as it existed during the relevant period. Therefore, the officers proceeded to recover the interest due in terms of Section 87. The last leg of argument of the appellant is that the demand for recovery of interest must be issued within the same time limitations as recovery of dues and the matter is time barred. We find that the notice for demand of interest alone can be issued only after quantifying it. It is a different matter if the show-cause notice is issued for payment of service tax along with applicable interest. If a demand has to be issued only for amount of interest, it has to be quantified. And such quantification is

possible only after the date of availment of CENVAT credit and the date of reversal are known. Therefore until 6.12.2011 when the appellant has reversed the CENVAT credit, no notice could have been issued demanding any amount as interest. Because it has to be counted from this date. A letter seeking payment of interest was issued within four months. Before it cannot be said to be time barred.

14. For all these reasons, we find that the recovery of interest by the Revenue from the appellant is sustainable both on merits and on limitation and the impugned order upholding such proceedings are correct and proper and call for no interference. Impugned order is upheld and the appeals are rejected.

(Order pronounced in open Court on 01/02/2023)

(P.V.SUBBA RAO)
MEMBER (TECHNICAL)

(Dr. RACHNA GUPTA)
MEMBER(JUDICIAL)

Neela reddy