**(2014) 06 CESTAT CK 0005**

**In the Customs, Excise And Service Tax Appellate Tribunal**

**Case No :** Service Tax Appeal No. 601 Of 2008

?M/s. Gurmehar Construction APPELLANT

Vs

CCE, Raipur RESPONDENT

**Date of Decision :** 05-06-2014

**Acts Referred:**

Finance Act, 1994 — Section 73, 75, 78
Cenvat Credit Rules, 2004 — Rule 14, 15
Central Excise Act, 1944 — Section 11AC

**Citation :** (2014) 06 CESTAT CK 0005

**Hon'ble Judges :** G. Raghuram, J;R. K. Singh, Technical Member

**Bench :** Division Bench

**Advocate :** Ayush Mehrotra, Govind Dixit

**Final Decision :** Allowed

## Judgement

1. This appeal is filed by M/s. Gurmehar Construction Village Amaghat, Distt. Raigarh (hereinafter referred to as the Appellants) against the Order-

in-Original No. Commissioner/RPR/50/2008, dated 11-6-2008. In terms of the said Order-in-Original the Commissioner had :-

(i) confirmed a demand of Rs.78,17,056/- (including Education Cess) along with interest towards the value of diesel supplied from the

service recipient (which was not included in the assessable value) under the provision of Section 73 read with Section 75 of Finance Act,

1994.

(ii) disallowed Cenvat credit of Rs. 14,68,800/- (including Education Cess) taken in respect of dumpers under Rule 14 of Cenvat Credit

Rules, 2004.

(iii) Confirmed demand of Rs.2,328/- towards Service Tax credit taken in respect of telephone service as telephones were not registered in

the name of the Appellants.

(iv) Imposed penalty of Rs.92,88,184/- under Section 78 ibid read with Rule 15 of Cenvat Credit Rules, 2004 and Section 11AC of the

Central Excise Act, 1944.

It may be pertinent to mention here that the Appellantsâ?? appeal is only in respect of points (i) and (ii) above and (by implication) the consequential

penalty relating thereto.

2. The main contentions of the assessee made in their written submissions and during personal hearing are summarized below :-

(i) Material supplied free by the service receiver is not includible in the gross amount charged by the service provider and therefore demand at 1(i)

above is unsustainable.

(ii) They had reversed the credit amounting to Rs.14,68,800/- wrongly taken on dumpers before utilization and so no interest is chargeable thereon.

(iii) There was no suppression or wilful misstatement as the Appellants were under a bona fide belief that they were doing the right thing.

(iv) The issue of free supplies of material by services recipient is settled in their favour by the Larger Bench of CESTAT in case of Bhayana Builders

Pvt. Ltd. v. CST, Delhi â?" 2013 (32) STR 49 (Tri.-LB).

(v) Interest is not chargeable on Cenvat credit reversed before utilization as has been held by the Honâ??ble Karnataka High Court in case of

Commissioner of Central Excise & ST, LTU Bangalore v. Bill Forge Pvt. Ltd. â?" (2012 (279) ELT 209 (kar.).

3. The learned DR hesitatingly conceded that the issue of free supplies is decided in the Appellantsâ?? favour by the CESTAT Larger Bench in the

case of Bhayana Builders referred to earlier. He however stated that interest on the Cenvat credit wrongly taken is chargeable from the date on

which it was taken even if it was not utilized before reversal and referred to the Apex Court judgment in case of U.O.I. v. Indo Swift Laboratories

2011 (265) ELT 3 (S.C.) He further added that the Karnataka High Court judgment is distinguishable as has been done in the case of Balmer Lawrie

& Co. Ltd. v. Commissioner of Central Excise 2014 (301) ELT 573 (Tri.-Mum.) and that the said judgment has also been held per incuriam by

CESTAT in the case of M/s. Dr. Reddyâ??s Laboratories Ltd. v. Commissioner of Central Excise, Hyderabad - 2013-TIOL-934-CESTAT-Bang.

4. We have considered the submissions made by both the parties.

5. As regards the demand of Service Tax on the value of the free supplies of diesel is concerned, the Larger Bench of this Tribunal in the case of

M/s. Bhayana Builders Pvt. Ltd. v. Commissioner, Service Tax, Delhi 2013 (32) STR 49 (Tri.-LB) has held that the value of free supplies is not

includible in the gross consideration received by the Service provider for rendition of taxable service. Consequently the demand of Rs. 78,17,056/-

relating to free supplies of diesel is not sustainable.

6. Regarding the Cenvat credit of Rs.14,68,800/- wrongly taken on dumpers, the fact that it was reversed before utilization is not in dispute. Only issue

to be decided is whether interest is chargeable from the date when it was taken upto the date of its reversal. The learned DR, referring to the

Honâ??ble Supreme Court decision in the case of M/s. Indo Swift Laboratories referred to earlier contended that the interest is chargeable from the

date on which the credit was taken and added that the decision of Honâ??ble Karnataka High Court in case of M/s. Bill Forge Pvt. Ltd. (supra) is

distinguishable as has been done by the CESTAT in case of Balmer Lawrie & Co. Ltd. (supra). He also referred to the judgment of CESTAT Single

Member Bench in case of Dr. Reddyâ??s Laboratories Ltd. v. Commissioner of Central Excise & Service Tax, Hyderabad 2013-TIOL-934

(CESTAT Bangalore) in which it is held that the Karnataka High Court judgment is per incuriam.

7. It is seen that the Honâ??ble Karnataka High Court in the case of M/s. Bill Forge Pvt. Ltd. has discussed and considered the judgment of

Honâ??ble Supreme Court in the case of M/s. Indo-Swift Laboratories (supra) in quite some detail in Paras 16 to 20 and then goes on to enumerate

the principle of charging interest in Para 21 which is quoted below :-

â??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.â??

Thus, the averment by the Honâ??ble Single Member of CESTAT in case of Dr. Reddyâ??s Laboratories Ltd. (supra) that the Honâ??ble

Karnataka High Court has been rather careless while considering and analyzing the judgment of the Honâ??ble Supreme Court in case of M/s. Indo-

Swift Laboratories Ltd. mainly on the basis of two small sentences viz. â?? Actually the credit is taken at the time of removal of the excisable

product. It is in the nature of set off or an adjustmentâ? is totally untenable particularly because, these sentences are in no way crucial for the

conclusion arrived at by the Honâ??ble Karnataka High Court. Indeed, even if these sentences did not exist, the findings would not be affected either

way as is evident from the holistic reading of Paras 16 to 20 of the said judgment. Further Honâ??ble Karnataka High Court judgment would not

become incuriam merely because it has not discussed, analyzed or distinguished the judgment of the Honâ??ble Supreme Court in case of M/s. Indo-

Swift Laboratories in a manner or to the extent some other Court would have chosen to do. Thus, we find that the said judgment of the Honâ??ble

Karnataka High Court cannot be held to be per incuriam even from a liberal stand point.

8. Coming to the judgment of the CESTAT, Mumbai in case of M/s. Balmer Lawrie (supra), it is seen that the distinction is sought to be made on the

ground that the facts are different. The Honâ??ble CESTAT is Para 5.2 inter alia states as under :

â??The reliance placed by the appellant on the decision of the Honâ??ble Karnataka High Court in the case of Bill Forge Pvt. Ltd. (supra) and the

other decisions will not apply to the facts of the present case. In the case of Bill Forge Pvt. Ltd. (supra) appellant therein took the credit and also

reversed the credit within the same month i.e. before any liability to pay any duty arose.â??

 

Thus what is contended is that the Karnataka High Court judgment (supra) would be applicable only when the credit is reversed within the same

months i.e. before any liability to pay duty arose. It is difficult to accept that this distinction in the facts is of any consequence because (i) â??within

the same monthâ? is not necessarily equivalent to â??before any liability to pay any duty aroseâ? because in a case where no clearances took place

for several months, no liability to pay any duty would arise for several months, and (ii) in Rule 14 of Cenvat Credit Rules, 2004 there was no provision

(implicit or express) which makes any distinction between reversal before utilization of wrongly taken Cenvat credit within the same month (or before

the liability to pay any duty arose) or otherwise. Thus, reversal before utilization of wrongly taken Cenvat credit within the same month or before any

liability to pay duty arose in no way affects or impacts the reasoning or principle contained in the judgment of Honâ??ble Karnataka High Court is

the case of Bill Forge Pvt. Ltd. It needs to be stated that when a judgment is sought to be distinguished on the grounds of different facts, it has to be

brought out that the difference in the facts is such as would have material effect on the findings (and basis of those findings) contained in the judgment

sought to be distinguished. The differences in facts pointed out by the Honâ??ble CESTAT Mumbai in case of M/s. Balmer Lawrie (supra) do not

have any such implication.

9. The Honâ??ble Karnataka High Court in the case of M/s. Bill Forge Pvt. Ltd. (supra) after taking due note of the judgment of Honâ??ble

Supreme Court in the case of Indo-Swift Laboratories Ltd. (supra) concluded in Para 21 as under :-

â??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.â??

8. Indeed, it is not merely out of courtesy that we should abide by the judgment of Honâ??ble Karnataka High Court in the case of M/s. Bill Forge

Pvt. Ltd. (supra); the judicial discipline so demands and we are legally bound by it in the absence of any judgment to the contrary of any other Court

equivalent or superior to the Honâ??ble Karnataka High Court.

8. Accordingly, we hold that the interest is not chargeable on the impugned wrongly taken Cenvat credit which was reversed before utilization.

9. In view of the foregoing the Appellantsâ?? appeal is allowed.

 