

(2011) 04 KAR CK 0108
In the Karnataka High Court
Case No : CEA No. 96 of 2010

The Commissioner of Central Excise and Service Tax

APPELLANT

Vs

Bill Forge Pvt. Ltd.

RESPONDENT

Date of Decision : 05-04-2011

Acts Referred:

Central Excise Act, 1944 — Section 11 A, 11 AB

Citation : (2012) 279 ELT 209 : (2012) 26 STR 204

Hon'ble Judges : Ravi Malimath, J;N. Kumar, J

Bench : Division Bench

Advocate : N.R. Bhaskar, for the Appellant; M.A. Narayana, for the Respondent

Judgement

N. Kumar, J.—This appeal is by the revenue challenging the order passed by the Tribunal, setting aside the order passed by the lower authorities holding that the Assessee is liable to pay interest and penalty for taking the Cenvat credit wrongly.

2. The facts are not in dispute.

3. The Assessee is engaged in the manufacture of accessories of motor vehicles falling under Chapter Sub Heading 87081090 of Central Excise Tariff. They are registered under the Central Excise Act, 1944. They avail Cenvat Credit of duty paid on the inputs, capital goods and the taxable services used in the manufacture of final product. During the scrutiny of the ER 1 Return for the month of June 2007, it was observed that the Assessee had taken excess credit of Rs. 98,77,446-00 on capital goods. The said fact was pointed out to the Assessee. The Assessee by their letter dated 12.09.2007 admitted the wrong committed by them and informed the Revenue that they have reversed the same in September, 2007. They have over drawn only an amount of Rs. 11,691-00 in payment of Education Cess for the month of July 2007 and the interest liability calculated thereon at Rs. 184-00 has since been debited in their PLA account on 27.09.2007. A show cause notice was issued to the assessee calling upon them to show cause as to why they should not be levied interest and penalty for wrongful

availment of Cenvat Credit. In reply thereto, they submitted that the mistake of taking excess credit has occurred only in the capital goods credit account and not in the other account, namely input credit and service tax credit. The availment of excess credit has not resulted in any over drawal in the credit account. Therefore no interest is payable on such wrongly availed credit. In view of the reversal of the credit and interest paid for the overdrawn amount, they requested for dropping of further proceedings. However the Assessing Authority held that the mistake is an intentional one, made with an intention of avoiding payment of duty and therefore they are liable to pay penalty. It also held that the interest is payable from the date of availment of the credit and accordingly issued a demand.

4. Aggrieved by the said order of the Commissioner, the Assessee preferred an appeal to the Tribunal. The Tribunal on reappraisal of the entire material on record held that when the Assessee had wrongly taken the credit to the extent of Rs. 98,77,446-00 in their CENVAT account without receipt of capital goods in June 2007 and the same was reversed in September 2007, there is no dispute that the Assessee had not utilized the said credit except to the extent of Rs. 11,691-00 towards education cess. The material on record does not give rise to a conclusion that the Assessee had taken irregular credit with an intention to avoid payment of duty. Therefore they held that imposition of penalty is unsustainable and accordingly set aside the said portion of the order. In so far as payment of interest is concerned, they relied on the judgment of the Punjab and Haryana High Court in the case of CCE Delhi v. Maruthi Udyog Ltd., (2007 (214) ELT A 50)) and held that as the Assessee had only made an entry in the records and actually not taken or utilized such credit, the question of payment of any interest would not arise. Therefore, the levy of interest was also set aside. Aggrieved by the said order, the Revenue is in appeal.

5. The learned Counsel appearing for the Revenue, assailing the impugned order contended that in view of the judgment of the Apex Court in the case of Union of India v. M/s Ind-Swift Laboratories Ltd., reported in 2011 TIOL-21-SC-CX, interest is payable once the credit is taken as the Assessee would be at liberty to utilize the same immediately thereafter subject to the Credit Rules and therefore the Tribunal committed a serious error in setting aside the levy of interest from the date of taking credit. He also contended that it is a clear case of taking the credit wrongly with an intention of avoiding payment of excise duty which attracts penalty and therefore the Tribunal committed a serious error in setting aside the penalty imposed by the Commissioner.

6. Per contra, the learned Counsel appearing for the Assessee pointed out that Section 11-AB 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.

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:

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.?

8. The payment of interest on delayed payment of duty is provided u/s 11AB, which was inserted by Act 33 of 1976 which came into effect from 28.09.1996, which reads as under:

Interest on delayed payment of duty.

[(1) Where any duty of excise has not been levied or paid or has been short-levied or short paid or erroneously refunded the person who is liable to pay the duty as determined under Sub-section (2), or has paid the duty under Sub-section (2B), of Section 11A shall, in addition to the duty, be liable to pay interest at such rate not below [ten per cent] and not exceeding thirty six per cent per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette, from the first date of the month succeeding the month in which the duty ought to have been paid under this Act, or from the date of such erroneous refund, as the case may be, but for the provisions contained in Sub-Section 02, or Sub-Section 11A till the date of payment of such duty:

PROVIDED that in such cases where the duty becomes payable consequent to issue of an order, instruction or direction by the Board u/s 37B, and such amount of duty payable is voluntarily paid in full, without reserving any right to appeal against such payment at any subsequent stage, within forty-five days from the date of issue of such order, instruction or direction, as the case may be, no interest shall be payable and in other cases the interest shall be payable on the whole of the amount, including the amount already paid.]

[(2) The provisions of Sub-section (1) shall be payable is reduced by the become payable or ought to have been paid before the date on which the Finance Bill, 2001 receives the assent of the President.

Explanation 1: Where the duty determined to be payable is reduced by the Commissioner (Appeals), the Appellate Tribunal (National Tax Tribunal] or, as the case may be, the court, the interest shall be payable on such reduced amount of duty.

Explanation 2: Where the duty determined to be payable is increased or further increased by the Commissioner (Appeals), the Appellate Tribunal [National Tax Tribunal] or, as the case may be, the court, the interest shall be payable on such increased or further increased amount of duty.]

9. It deals with payment of interest on any duty of excise which has not been levied or paid or has been short levied or short paid or erroneously refunded. A person who is liable to pay duty in any one of those cases is liable to pay interest at such rate not below 10% and not exceeding 35% p.a. from the first date of the month succeeding the month in which the duty ought to have been paid under this Act or from the date of such erroneous refund, as the case may be. However, the proviso to said Section makes an exception in cases where no interest shall be payable.

10. The Apex Court in the case of Prathiba Processors v. Union of India reported in 1996 (88) ELT 12 (SC), explaining the term tax, interest and penalty in Fiscal Statute held as under:

13. In fiscal Statues, the import of the words - "tax", "interest", "penalty", etc. are well known. They are different concepts. Tax is the amount payable as a result of the charging provision. It is compulsory exaction of money by a public authority for public purposes, the payment of which is enforce by law. Penalty is ordinarily levied on an Assessee for some contumacious conduct or for a deliberate violation of the provisions of the particular statute. Interest is compensatory in character and is imposed on an Assessee who as withheld payment of any tax as and when it is due and payable. The levy of interest is geared to actual amount of tax withheld and the extent of the delay in paying the tax on the due date. Essentially, it is compensatory and different from penalty - which is penal in character.

11. Therefore it is clear that the liability to pay interest u/s 11-AB arises when the Assessee is liable to pay duty on the date which is prescribed under Sub-section (1), fails to pay the same. Then the liability to pay interest arises from the date the duty is payable till the date it is paid. By such late payment or delayed payment, the Revenue is deprived of the duty. The said amount would be in possession of the Assessee who would have the benefit of the said amount. It is to compensate the loss sustained by the Revenue, the interest is imposed, i.e., interest is payable for the period during which the Revenue is deprived of the duty, which it was legitimately entitled to and as the Assessee had the

benefit of the duty by not paying the duty payable on the due date. In other words it is compensatory in character, and is imposed on the Assessee who has withheld payment of any tax as and when it is due and payable.

12. It is in this context we have to see the judgments of the Apex Court dealing with the MODVAT Scheme, where an Assessee is liable to pay the duty when he wants to have the benefit of the said scheme. The Apex Court in the case of Collector of Central Excise, Pune v. Daichi Karkaria Ltd., reported in 1999 (112) ELT 353 (SC) held as under:

14. Before we look at the Rules relating to the MODVAT scheme we must set out the submissions of the learned Attorney General in this regard. He submitted that the raw material suffered excise duty legally and factually. If there had been no MODVAT scheme excise duty on the raw material would be included in the cost of production of the excisable product. The MODVAT scheme did not alter this fundamental position. By virtue of it the cost of the raw material was not reduced. The MODVAT scheme resulted in reducing the excise duty on the excisable product. It was a separate and special facility that had the effect of reducing the excise duty incidence on the excisable product and had no bearing in determining the cost of its production. The credit of excise duty on the raw material in the register maintained for MODVAT purposes was only a book entry which might be utilised later for payment of excise duty on the excisable product. In other words, it matured when the excisable product was removed from the factory and the stage for payment of excise duty thereon was reached. Actually, credit was taken, that is, availed of or utilised, at the time of the removal of the excisable product. Consequently, the cost of production of the excisable product was not reduced by the amount of the MODVAT credit on the raw material. The credit was a contingent credit. It might be disallowed under certain circumstances. It could not be withdrawn like a credit amount in a bank account. The manufacturer did not have any indefeasible right or title to it. The rules pertaining to the MODVAT scheme made it clear that MODVAT credit was in the nature of a set off or an adjustment.

After considering the said submissions and taking into consideration the submissions made on the other side they held as under:

17. It is clear from these Rules, as we read them that a manufacturer obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgment thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. There is no provision in the Rules which provides for a reversal of the credit by the excise authorities except where it has been illegally or irregularly taken, in which event it stands cancelled or, if utilised, has to be paid for. We are here really concerned with credit that has been validly taken, and its benefit is available to the manufacturer without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw material in its excisable

product. The credit is, therefore, indefeasible. It should also be noted that there is no co-relation of the raw material and the final product: that is to say, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be taken against the excise duty on a final product manufactured on the very day that it becomes available.

They also took note of the guidance note on accounting treatment for MODVAT which is set out in the aforesaid judgment at para-22 as under:

22. Learned Counsel for the Respondents made reference to the "Guidance Note on accounting treatment for MODVAT" as on 16th March, 1995 issued by the Institute of Chartered Accountants of India. The Guidance Note deals (in paragraph 6) with "Accounting treatment in case of inputs used in for relation to manufacture of final product". It states:

In the light of the above, it may be stated that MODVAT is a procedure whereby the manufacturer can utilise credit for specified duty on inputs against duty payable on final products. Duty credit taken on inputs is of the nature of set-off available against the payment of excise duty on the final products. There are two alternative methods of treatment of MODVAT credit in accounts:

(a) Specified duty paid on inputs may be debited to a separate account, e.g., MODVAT credit Receivable (Inputs) Account. As and when MODVAT credit is actually utilised against payment of excise duty on final products, appropriate accounting entries will be required to adjust the excise duty paid out of MODVAT credit Receivable (Inputs) Account to the account maintained for payment/provision for excise duty on final product. In this case, the purchase cost of the inputs would be net of the specified duty on inputs. Therefore, the inputs consumed and the inventory of inputs would be valued on the basis of purchase cost net of the specified duty on inputs. The debit balance in MODVAT credit Receivable (Inputs) Account should be shown on the assets side under the head "advances".

(b) In the second alternative, the cost of inputs may be recorded at the total amount paid to the supplier inclusive of the specified duty on inputs. To the extent the MODVAT credit is utilised for payment of excise duty on final products, the amount could be credited to a separate account, e.g., MODVAT credit Availed Account. Out of the MODVAT credit Availed Account, the amount of MODVAT credit availed in respect of consumption of inputs would be reduced from the total cost of inputs consumed. The balance amount standing to the credit of MODVAT credit Availed Account representing MODVAT credit in respect of input not consumed but lying in stock could be shown in the balance sheet as deduction from the value of inventory.

13. The Apex Court in the case of Chandrapur Magnet Wires (P) Ltd v. CCE, reported in 1996 (8) ELT (SC) dealing with MODVAT credit held as under:

7. In view of the aforesaid clarification by the Department, we see no reason why the Assessee cannot make a debit entry in the credit account before removal of the exempted final product. If this debit entry is permissible to be made, credit entry for the duties paid on the inputs utilised in manufacture of the final exempted product will stand deleted in the accounts of the Assessee. In such a situation, it cannot be said that the Assessee has taken credit for the duty paid on the inputs utilised in the manufacture of the final exempted product under Rule 57A. In other words, the claim for exemption of duty on the disputed goods cannot be denied on the plea that the Assessee has taken credit of the duty paid on the inputs used in manufacture of these goods.

14. The Apex Court in the case of *Commissioner of Central Excise v. Bombay Dyeing & MFG. Co. Ltd.* reported in 2007 (215) ELT 3 (SC) held as under:

8. Under the notification, mode of payment has not been prescribed. Further, exemption is given to the final product, namely, grey fabric under the Central Excise Act, 1944, levy is on manufacture but payment is at the time of clearance. Under the Act, payment of duty on yarn had to be at the spindle stage. However, when we come to the Exemption Notification No. 14/2002-C.E., the requirement was that exemption on grey fabrics was admissible subject to the Assessee paying duty on yarn before claiming exemption and subject to the Assessee not claiming CENVAT credit before claiming exemption. The question of exemption from payment of duty on grey fabrics arose on satisfaction of the said two conditions. In this case, payment of duty on yarn on deferred basis took place before clearance of grey fabrics on which exemption was claimed. Therefore, payment was made before the stage of exemption. Similarly, on payment of duty on the input (yarn) the Assessee got the credit which was never utilized. That before utilization, the entry has been reversed which amounts to not taking credit. Hence, in this case, both the conditions are satisfied. Hence item No. 1 of the table to Notification No. 14/2002-C.E. would apply and accordingly the grey fabrics would attract nil rate of duty.

15. The Gujarat High Court in the case of *Commissioner of Central Excise v. Ashima Dyecot Ltd.*, reported in 2008 (232) ELT 580 (Guj) after referring to the *Chandrapur Magnet Wires (P) Ltd.*, held as under:

6. Once appropriate entries have been made in the register, there is no rule under which the process could be reversed. It is true that the Assessee has not maintained separate accounts or segregated the inputs utilised for manufacture of dutiable goods and duty free goods, as should have been done. But the Court's attention was drawn to the departmental circular according to which in a case where the manufacturer produces dutiable final products and also final goods which are exempt from duty and it is not reasonably possible to segregate inputs utilised in manufacture of the dutiable final products from the final products which are exempt from duty. Based on this, the Court held that the manufacturer may take credit of duty paid on all the inputs used in the manufacture of final products on which duty will have to be paid and in view of

this clarification by the Department, the Court saw no reason that why the Assessee should not make a debit entry in the credit account before removal of the exempted final product and hence, it cannot be said that the Assessee has taken credit for the duty paid on the inputs utilised in the manufacture of the final exempted product under Rule 57A. The Court, therefore, took the view that the claim for exemption of duty on the disputed goods cannot be denied on the plea that the Assessee has taken the credit of the duty paid in the inputs used in the manufacture of these goods."

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This issue had come up for consideration before the Allahabad High Court in the case of Hello Minerals Water (P) Ltd., v. Union of India, reported in 2004 (174) 422 (All), wherein it is held that the reversal of MODVAT credit amounts to non-taking of credit on the inputs. Hence, the benefit has to be given of the notification granting exemption rate of duty on the final products since the reversal of credit on the input was done at the Tribunals stage. While arriving at this conclusion, the Allahabad High Court has referred to various Judgments under which such reversal was made subsequently and still the benefit was given to the Assessee.

16. The Apex Court in the case of Union of India v. M/s Ind-Swift Laboratories Ltd., in Civil Appeal No. 1976/2011 interpreting Rule-14 of CENVAT Credit Rules, 2004 held as under:

2. 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.

3. 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 avilment 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 avilment of CENVAT credit and that the interest would be payable from the date CENVAT credit is wrongfully 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.

4. 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.

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2. Therefore, the attempt of the High Court to read down the provision by way 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.

17. As is clear from the aforesaid judgments, the Apex Court in the case of Union of India v. M/s Ind-Swift Laboratories Ltd., was essentially concerned with the interpretation placed by the Punjab and Harayana High Court where it had held that Rule 14 of the Cenvat Credit Rules, 2004 had to be read down to mean that where Cenvat credit has been taken or utilized wrongly interest should be payable on the Cenvat credit from the date the said credit had been utilized wrongly and that interest cannot be claimed simply for the reason that Cenvat credit has been wrongly taken, as such availment by itself does not create any liability of payment of excise duty. Further they held that the word "OR" appearing in Rule 14 twice could be read as "AND" by way of reading it down. Disagreeing with the said reasoning, the Apex Court held that Rule 14 specifically provides that where Cenvat 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. If the aforesaid provision is read as a whole, we find no reason to read the word "OR" in between the expression "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. Therefore the High Court erroneously held that interest cannot be claimed from the date of wrong availment of Cenvat credit, that they should be payable from the date when the Cenvat credit is wrongly utilized. Therefore the attempt on 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.

18. In view of the aforesaid authoritative pronouncement of the Apex Court, the word "OR" found in Rule 14 cannot be read as "AND". Further, once the credit is taken or utilized wrongly or has been erroneously refunded, such credit becomes recoverable along with interest. In fact, in the case before the Apex Court, the Assessee received inputs and capital goods from various manufacturers/dealers and availed Cenvat credit on the duty paid on such materials. The investigations conducted indicated that the Assessee had taken Cenvat credit on fake invoices. When proceedings were initiated, the Assessee filed applications for settlement of proceedings and the entire matter was placed before the Settlement Commission. The Settlement Commission held that a sum of Rs. 5,71,47,148-00 is the duty payable and simple interest at 10% on Cenvat credit wrongly availed from the date the duty became payable as per Section 11-AB of the Act till the date of payment. The Revenue calculated the said interest up to the date of the appropriation of the deposited amount and not up to the date of payment. Therefore it was contended that interest has to be calculated from the date of actual utilization and not from the date of availment. Therefore, an application was filed for clarification by the Assessee. The said application was rejected upholding the earlier order, i.e., interest is payable from the date of duty becoming payable as per Section 11-AB. Therefore the Apex Court interfered with the judgment of the Punjab and Haryana High Court and rightly rejected by the Settlement Commission as outside the scope and they found fault with the interpretation placed on Rule 14.

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 canvat 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 canvat 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 11 AB of the Act is attracted only on delayed payment of duty i.e., where only duty of exercise 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 Canvat 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 u/s 11-AB, 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.

Parties to bear their own costs.