**(2015) 04 BOM CK 0043**

**In the Bombay High Court**

**Case No :** Central Excise Appeal (Lodg.) No. 15 of 2011

The Commissioner of Central Excise — APPELLANT

Vs

GL and V. India Pvt. Ltd. — RESPONDENT

**Date of Decision :** 27-04-2015

**Acts Referred:**

Central Excises and Salt Act, 1944 — Section 11, 11A, 11B
Finance Act, 1994 — Section 73, 75

**Citation :** (2015) 321 ELT 611

**Hon'ble Judges :** B.R. Gavai, J;A.S. Gadkari, J

**Bench :** Division Bench

**Advocate :** Suchitra Kamble, for the Appellant; V. Sridharan, Senior Advocate and Prakash Shah instructed by PDS Legal, Advocates for the Respondent

## Judgement

B.R. Gavai, J.—The Appeal is taken up for admission. The Appeal is admitted on the following substantial question of law:

"a) Whether in the facts and circumstances of the case and in law the Hon''ble CESTAT, is correct in allowing the appeal filed by the assessee that the assessee is not liable to pay interest on the Cenvat Credit taken wrongly but not utilized which is beyond the purview of the provisions of the C. Excise Law and the Rules made thereunder?"

2. By consent heard finally. The Respondent - assessee was holding central excise registration. The assessee is engaged in the manufacture of excisable goods viz. the machinery for making paper pulp, paper board etc. falling under Chapter Heading No. 8439. The assessee is also registered under Chapter V of the Finance Act of 1994 in respect of certain services rendered by it. The assessee has availed Cenvat credit of the specified duties paid on inputs, capital goods and input services as per the provisions of Central Credit Rules, 2004 (hereinafter referred to as ''2004 Rules'').

3. During the scrutiny of the record, it was noticed by the Revenue that the

assessee has taken suo moto credit of Rs. 5,35,500/- vide credit entry Nos. 20 and 21 dated 15th January, 2008. It was subsequently debited on 31st December, 2008 vide debit entry Nos. 43 and 44. It is the case of the Revenue that the assessee had suo moto availed the credit which was not permissible in accordance with law Since the assessee failed to pay interest of Rs. 66,945/-, a show cause notice was issued to the assessee calling upon them to show cause as to why:

"(i) the inadmissible suo-moto credit amounting to Rs. 5,35,500/- availed by them should not be disallowed and recovered from them under the provisions of Rule 14 of the Cenvat Credit Rules, 2004 read with Sec. 11A of the Central Excise Act, 1944;

(ii) the amount of Rs. 5,35,500/- debited by them on 31.12.2008 vide Debit Entry No. 43 and 44 should not be appropriated against the demand;

(iii) interest amounting to Rs. 66,945/- should not be charged and recovered under the provisions of Rule 14 of the Cenvat Credit Rules, 2004. Hereto annexed and marked Exhibit "A" is the copy of the Show Cause Notice dated 03.02.2009."

4. The show cause notice was adjudicated by the Additional Commissioner, Central Excise, Pune by order dated 21st August, 2009 by which the Additional Commissioner confirmed the demand and held that the suo motu credit of Rs. 5,35,500/- was wrongly availed by the assessee. By the said order the amount which was debited by the assessee on 31st December, 2008 was appropriated towards the demand made. The Additional Commissioner also directed the recovery of interest amounting to Rs. 66,945/-. Being aggrieved thereby an appeal was preferred before the Commissioner (Appeals), Central Excise, Pune who by order dated 31st December, 2009 dismissed the appeal and confirmed the order passed by the original authority. Being further aggrieved thereby, an appeal was preferred before the learned CESTAT. The learned CESTAT vide order dated 21st July, 2010 relying on the judgment of the Punjab and Haryana High Court in the case of Ind-Swift Laboratories Ltd. v. Union of India reported in 2009(240) ELT 328 (P and H) held that merely by the reason that the Cenvat credit has been wrongly taken by itself does not create any liability of payment of excise duty and as such, set aside the impugned orders and allowed the appeals. Being aggrieved thereby, the present Appeal.

5. Ms. Suchitra Kamble, learned counsel appearing on behalf of the Revenue submits that the judgment of the Punjab and Haryana High Court on which the learned CESTAT has relied has been reversed by the Apex Court in the case of Union of India (UOI) and Others Vs. Ind-Swift Laboratories Ltd., (2011) 184 ECR 299 : (2011) 265 ELT 3 : (2011) 2 JT 352 : (2011) 2 RCR(Civil) 680 : (2011) 2 SCALE 589 : (2011) 2 SCR 1087 : (2012) 25 STR 184 : (2011) 2 UJ 1152 : (2011) 40 VST 1 and as such, the order passed by the CESTAT is liable to be set aside and the order passed by the original authority needs to be confirmed.

 

6. Mr. Sridharan, learned senior counsel appearing on behalf of the Appellant on the contrary submits that the Apex Court has applied the principle of strict and liberal interpretation. In as much as the statute which has been considered by the Apex Court is a fiscal statute thereby imposing liability on an assessee. The learned senior counsel submits that if a strict and liberal interpretation is to be applied then, the words "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" cannot be ignored. The learned senior counsel submits that as such, while a recovery under Rule 14 is to be made, it can only be made by reading the provisions of Section 11 and Section 11B to be a part of the said provision. The learned senior counsel submits that by applying the principle of incorporation by reference, the provisions of Section 11A and Section 11B of the Central Excise Act will have to be read into Rule 14. The learned senior counsel submits that if Sections 11A and 11B are taken into consideration, the position that would emerge is that a recovery can be made only if the amount to be paid by an assessee is determined by the authority. The learned senior counsel submits that since in the present case there is no such determination and direction to make the payment, there would be no compliance with Section 11A. The learned senior counsel further submits that even the perusal of Section 11AB would reveal that the provision of making payment of interest would arise only in the event there is determination under sub section (2) of Section 11A to make the payment. The learned senior counsel submits that in the present case, there is no question of payment. The case is only of disallowing the Cenvat credit and appropriating the debit made by the assessee.

7. Mr. Sridharan, learned senior counsel appearing for the Respondent made an attempt to distinguish the judgment of the Apex Court in the case of Union of India (UOI) and Others Vs. Ind-Swift Laboratories Ltd., (2011) 184 ECR 299 : (2011) 265 ELT 3 : (2011) 2 JT 352 : (2011) 2 RCR(Civil) 680 : (2011) 2 SCALE 589 : (2011) 2 SCR 1087 : (2012) 25 STR 184 : (2011) 2 UJ 1152 : (2011) 40 VST 1 The learned senior counsel submits that in the said case the case was of an illegal taking of the credit, whereas in the present case, there is no issue as to whether the assessee has illegally taken the credit or not. The learned senior counsel submits that though the credit has been legally taken and also utilized in a legal manner, the authorities on an erroneous reading of the rules have held that the credit was erroneously utilized. The learned senior counsel also relies on a Division Bench judgment of the Karnataka High Court in the case of The Commissioner of Central Excise and Service Tax Vs. Bill Forge Pvt. Ltd., (2012) 279 ELT 209 : (2012) 26 STR 204 and the Madras High Court in the case of Commissioner of C. Ex. Vs. Strategic Engineering (P) Ltd., (2014) 310 ELT 509 .

8. Though Mr. Sridharan, learned senior counsel has addressed us on considerable length with regard to the provisions of Section 11A and 11AB, we find that it will not be permissible for us to go into such a larger issue.

9. Firstly, it is to be noted that the provisions of Rule 14 of the 2004 Rules have

 

been elaborately considered and interpreted by the Apex Court. The Rule which falls for consideration before us is the same rule which has been considered and interpreted by the Apex Court. In that view of the matter, we do not find it necessary to go into that issue.

10. The only issue that falls for consideration before us is as to whether the learned CESTAT was justified in setting aside the order passed by the original authority directing the assessee to pay the interest or not.

11. In the case before the Punjab and Haryana High Court which has been reversed by the Apex Court the issue was as to whether merely by taking the Cenvat credit erroneously and not utilizing it, the provisions of Rule 14 could be invoked or not. While interpreting the said provisions, the Lordships of the Apex Court observed thus in paragraphs 15, 16 and 17:

"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:

"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 and 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."

12. It could thus clearly be seen that while interpreting Rule 14 the Apex Court has clearly held that if the interpretation as placed by the Punjab and Haryana High Court was to be accepted, the same would amount to permitting the word "or" between "taken" and "utilized" to be substituted by "and". The Lordships therefore found that applying the principle of strict and liberal interpretation the same was not permissible.

13. In view of the clear pronouncement of law by the Apex Court, we find that the view taken by the learned Tribunal may be though correctly taken at that point of time, on the basis of the judgment of the Punjab and Haryana High Court, would no longer be correct in view of the subsequent judgment of the Apex Court in the case of Union of India (UOI) and Others Vs. Ind-Swift Laboratories Ltd., (2011) 184 ECR 299 : (2011) 265 ELT 3 : (2011) 2 JT 352 : (2011) 2 RCR(Civil) 680 : (2011) 2 SCALE 589 : (2011) 2 SCR 1087 : (2012) 25 STR 184 : (2011) 2 UJ 1152 : (2011) 40 VST 1 .

14. In so far as the issue raised by Mr. Sridharan, learned senior counsel with regard to the error committed by the authority in not construing Rule 3 of the 2004 Rules correctly is concerned, there is no finding by the learned Tribunal to that effect in the impugned order and therefore, it would not be appropriate for us to go into that question. In any case, that question pertains to decision on the factual position as obtained in the matter and therefore, it will be beyond our jurisdiction to decide a matter which is basically based on factual situation. We, therefore, find that it will be appropriate if the said issue is decided by the learned Tribunal.

15. In so far as the judgment of the Karnataka High Court is concerned, it appears that the said judgment is delivered by the Karnataka High Court on the facts of the said case. It would be relevant from the facts as stated in the said judgment that upon the mistake being brought to the notice of the assessee regarding the erroneous availment of the Cenvat credit, the assessee accepted the mistake and immediately reversed the entry. In the present case, the reversal of the entry is after a period of ten months. In that view of the matter, we find that even on facts, the said judgment is distinguishable.

16. In so far as the judgment passed by the Madras High Court is concerned, the Madras High Court has taken a view that mere taking of Cenvat credit facility is not at all sufficient for compelling the assessee to pay interest as well as penalty. With great respect to the Hon''ble Judges of the Madras High Court, we may say

that this is not what has been held by their Lordships of the Apex Court. The Apex Court has in clear terms held that the interpretation as paced by the Punjab and Haryana Court for invoking the provisions of Rule 14, there has to be taking as well as utilizing is not correct in law. The Apex Court has held that such an interpretation is totally impermissible. In that view of the matter, the said judgment would be of no assistance to the case of the assessee.

17. In the result, we hold that the view taken by the learned Tribunal is not sustainable in law.

18. The question on which we admitted the Appeal is required to be answered in view of the judgment of the Apex Court in the case of Union of India (UOI) and Others Vs. Ind-Swift Laboratories Ltd., (2011) 184 ECR 299 : (2011) 265 ELT 3 : (2011) 2 JT 352 : (2011) 2 RCR(Civil) 680 : (2011) 2 SCALE 589 : (2011) 2 SCR 1087 : (2012) 25 STR 184 : (2011) 2 UJ 1152 : (2011) 40 VST 1 that the learned Tribunal was not justified in upsetting the order passed by the original authority as upheld by the appellate authority in levying the interest.

19. However, it appears that since the learned Tribunal was of the view that in view of the judgment of the Punjab and Haryana High Court the Appeal deserves to be allowed on the short ground and as such, has not gone into other aspects of the matter. We find that it will be appropriate if the matter is reconsidered by the learned Tribunal.

20. The Appeal is therefore partly allowed. The impugned order is quashed and set aside. The matter is remitted back to the learned Tribunal for consideration on merits.

 