

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA**

REGIONAL BENCH - COURT NO.1

Service Tax Appeal No.77300 of 2018

(Arising out of Order-in-Appeal No.132/S.Tax-II/KOL/2018 dated 22.03.2018 passed by Commissioner of Central Goods & Service Tax & Central Excise, Appeal-I Commissionerate, Kolkata.)

M/s. Vodafone Essar East Limited

(11, D.R. U.N. Brahmachari Street, Circus Avenue, Kolkata-700017.)

...Appellant

VERSUS

Commissioner of CGST & CX, Kolkata South Commissionerate

.....Respondent

(GST Bhawan, 180, Shantipally, Rajdanga Main Road, Kolkata.)

APPEARANCE

Ms.Payal Bharwani, Chartered Accountant & Shri Deepro Sen, Advocate for the Appellant (s)

Shri S.S.Chattopadhyay, Authorized Representative for the Revenue

CORAM: HON'BLE SHRI ASHOK JINDAL, MEMBER(JUDICIAL)

FINAL ORDER NO. 77189/2023

DATE OF HEARING : 4 October 2023

DATE OF DECISION : 4 October 2023

ASHOK JINDAL :

The appellant is in appeal against the impugned order wherein cenvat credit availed inadvertently by the appellant have been disallowed.

2. The facts of the case are that the appellant received certain services from M/s. Indus Towers Ltd. and at the time of payment of advance, they have taken cenvat credit on the advance payment. Later on, invoices were raised to the appellant and on whole of the amount of invoice, the appellant took cenvat credit. Thereafter, realizing that he appellant has taken excess cenvat credit on the advance paid by them,

they adjusted the advance availment of cenvat credit with availment of another cenvat credit available to the the appellant. The revenue is of the view that the appellant has taken cenvat credit twice and have not produced any proof or evidence that they have reversed the cenvat credit taken inadvertently, therefore, the impugned order has been passed. Aggrieved from the said order, the appellant is before me.

3. Heard the parties and perused the records.

4. On perusal of the records, I find that it is a fact on record that the appellant has taken cenvat credit on advance payment made by them and the cenvat credit was also taken on full amount raised by the service provider, but later on the appellant has availed less cenvat credit on the amount equivalent to the amount of cenvat credit pertaining to the advance paid by them. As this fact has not been disputed by either of the sides, therefore, it is concluded that the appellant has reversed the excess cenvat credit and are not liable to reverse the cenvat credit again.

5. Further, I found that there is ample cenvat credit lying in the cenvat credit account, therefore, no payment of interest is required to be made by the appellant in the light of the decision of the Hon'ble Karnataka High Court in the case of Commissioner of Central Excise & Service Tax, LTU, Bangalore v. Bill Forge Private Limited [2012 (279) E.L.T. 209 (Kar.)], wherein the Hon'ble High Court has held as under:-

"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."

6. In the facts and circumstances of the case, no penalty is imposable on the appellant.

In these terms, I set aside the impugned order and allow the appeal with consequential relief, if any.

(Dictated and pronounced in the open Court.)

Sd/
(ASHOK JINDAL)
MEMBER (JUDICIAL)

sm