

CENVAT Credit wrongly taken or Erroneously refunded

RULE 14 : CENVAT Credit wrongly taken or Erroneously refunded

Statutory Provision

Where the CENVAT credit has been taken [and] utilized wrongly or has been erroneously refunded, the same along interest shall be recovered from manufacturer or the provider of the output service and the provisions of sections 11A and [11AA] of the Excise Act or sections 73 and 75 of the Finance Act, shall apply *mutatis mutandis* for effecting such recoveries.

COMMENTARY

❑ Scope of the Rule

If the Cenvat credit has been taken and utilised wrongly, the same shall be payable along with interest and provisions of sections 11A and 11AA of Central Excise Act (in respect of excisable goods) and sections 73 and 75 of Finance Act, 1994 (in respect of service tax) shall apply *mutatis mutandis* for effecting the recovery – Rule 14 of Cenvat Credit Rules and amended w.e.f. 1-4-2012. The words 'and' were 'or' up to 1-4-2012.

If the 'amount' which is payable under rule 6 of Cenvat Credit Rules is not paid, the same can also be recovered along with interest.

Section 11A of Central Excise Act and section 73 of Finance Act provide for recovery of duty and service tax respectively.

Section 11AB of Central Excise Act and section 75 of Finance Act provide for interest for delayed payment.

❑ **No Interest if wrong credit reversed at its own** – *In Emmellen Biotech v. CCE 2004 (163) ELT 172 (CEGAT)*, it was held that if Cenvat credit wrongly taken is reversed before issue of show cause notice, interest is not payable quoted and followed in *Hari Krishna Steel Corporation v. CCE 2006 (194) ELT 63 (CESTAT)* – same view in page *Apparels v. CCE 2007 (208) ELT 108 (CESTAT)* [Really doubtful since interest is compensation only].

▪ **No Interest if initially duty paid through Cenvat and later by cash -**

In *CCE v. Banco Products (2011) 33 STT 15 363 (CESTAT SMB)*, assessee first paid duty through Cenvat credit. Later, on being informed that duty should be paid by cash, he paid by cash and reversed Cenvat credit. It was held that no interest is payable as the action was only to rectify procedural irregularity – relying on *CCE v. Vulcan Gears (2009) 23 STT 472 (CESTAT)*.

- **Director cannot be penalised under this rule** - Penalty is imposable on person who has availed the Cenvat credit. Thus, only company can be penalised and not the director as he has not availed Cenvat credit *Ashok Kumar H Fulwadhya v. UOI (2010) 102 SCL 51 (Bom HC DB)*.
- **No interest payable if Cenvat credit taken but not utilised, but penalty can be imposed** - Rule 14 of Cenvat Credit Rules, as amended w.e.f. 1-4-2012 uses words 'availed and utilised'. Hence, if Cenvat credit was wrongly taken but not utilised for payment of excise duty or service tax, interest is not payable.

However, rule 15 of Cenvat Credit Rules uses the words 'takes or utilises' Cenvat credit wrongly or in contravention of any of provisions of Cenvat Credit Rules.

Thus, penalty can be imposed if Cenvat credit is taken though not utilised. However, it should be noted that penal provisions apply if Cenvat credit was 'wrongly' taken. See discussions later on this issue.

❑ **'Wrongly' implies intentionally** – The word 'wrongly' is stronger than 'mistakenly'. 'Wrongly' implies intention to take Cenvat credit where assessee was aware that really he is not eligible for Cenvat credit but still took it. If Cenvat credit was taken by mistake or taken under bona fide belief that assessee is eligible for Cenvat credit, then cannot be said that he has 'wrongly' taken Cenvat credit.

'Wrongful' – characterised by unfairness of injustice, contrary to law Concise Oxford Dictionary.

Wrong – Any damage or injury, contrary to right, Violation of right or of law P Ramanatha Aiyer's Law Lexicon.

'Wrong' has various shades of meaning like mistake, not true, in error, contrary to law, injustice, unjustly – Concise Oxford Dictionary.

'Mistake' – an incorrect idea or opinion, a thing incorrectly done or thought, an error of judgment – Concise Oxford Dictionary. An unconscious ignorance or forgetfulness of a fact, past or present, material to the contract, doing of an act under erroneous conviction, which act, but for the conviction, would not have been done – P Ramanatha Aiyer's Law Lexicon.

If there were conflicting decisions of Tribunal, it cannot be said that assessee has wrongly taken Cenvat credit – *CCE v. Sudarshan Cable Industries (2012) 276 ELT 300 (All HC DB)*.

❑ **Issue of SCN and confirmation of demand** – Issue of show cause notice is mandatory under section 11A, unless assessee voluntarily pays duty and informs excise officer. Principles of natural justice are required to be followed.

❑ Earlier Controversy up to 1-4-2012

Till 1-4-2012, rule 14 was using the words 'Cenvat credit availed or utilised'. Hence, department contended that interest is payable if Cenvat credit was wrongly taken, interest is payable even if Cenvat credit was not utilised.

Following discussions are relevant only in respect of issues prior to 1-4-2012.

❑ Interest for mere 'taking' Cenvat credit without utilization ?- Interest for wrong utilisation is understandable, but can there be liability of interest only because assessee has 'taken' i.e. made entry in Cenvat credit records, without actually utilising it ?

In UOI v. Ind-Swift (2011) 30 STT 461 265 ELT 3 (SC), assessee had taken credit on the basis of fake invoices and admitted that he had availed Cenvat credit wrongly. On basis of the admission, Settlement Commission had ordered payment of interest @ 10%. Based on these facts, it has been held that interest is payable even if Cenvat credit is only availed even if not actually utilized [reversing decision in Ind-Swift Laboratories' v. UOI (2009) 240 ELT 328 (P&H HC DB)].

Thus, this decision has to be seen in light of facts of the case as the assessee had 'wrongly' taken Cenvat credit. Since the issue was before Settlement Commission, it can be argued that though the amount is termed as 'interest', it is in nature of penalty as it is not compensatory in nature.

This decision has been brought to notice of revenue officers and tread vide MF(DR) circular

❑ My view based on recent decision of supreme court – In my view, assessee can put forward following arguments in defence, if SCN is received on basis of CBE&C circular and recent decision of Supreme Court of Ind-Swift.

- ❖ Rule 14 applies only if Cenvat credit was 'wrongly' taken. Rule is not applicable if credit was taken by mistake or under bona fide belief.
- ❖ Reversal of Cenvat credit before utilization means Cenvat credit was not taken.
- ❖ Rule can be challenged before Tribunal as 'interest' under rule 14 can only be compensatory and not penal.

In CCE v. Bill Forge (2012) 34 STT 92 ,279 ELT 209 (Karnatka HC DB), decision of Supreme Court in Ind-Swift was noted, but still it was held that interest is compensatory in nature and if Cenvat credit is not taken and hence interest is not payable – followed in CCE v. Pearl Insulation (2012) 281 ELT 192 (Karan HC DB).

In Parshva Overseasv. Joint Secretary (2011) 274 ELT 496 (Del HC DB), it was held that 'availed' signifies actual utilisation. It has different meaning from 'available'.

In Suzuki Motorcycle v. CCE (2011) 32 STT 333 (CESTAT) also, it was held that once Cenvat credit is wrongly taken, interest is payable even if not utilised – same view in Printo India Graphics v. CCE (2012) 275 ELT 592 (CESTAT).

❑ Reversal before utilisation means Cenvat credit was not taken

In CCE v. Bombay Dyeing (2007) 10 STT 286 (SC) [para 8 of STT], it has been held that reversal of credit before utilisation amounts to not taking credit –followed in CCE v. Indian Hume Pipe Co. Ltd. (2008) 14 STT 462 (CESTAT)* CCE v. Dynaflex P Ltd. (2011) 266 ELT 41 (Guj HC DB).

In Chandrapur Magnet Wire v. CCE 1996 (2) SCC 159 = 81 ELT 3 (SC), it was held that if Cenvat credit taken is reversed, it means no Cenvat credit has been taken.

Rule 15 provides penalty for wrongly taking or utilizing Cenvat credit –

It may be noted that rule 15 of Cenvat Credit Rule already provides for penalty for wrongly taking or utilising Cenvat credit. This is one more reason to state that interest under rule 14 can be only compensatory and not penal.

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