CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

EXCISE APPEAL NO. 50702 OF 2017

[Arising out of Order-in-Original No. ALW-EXCUS-O-I-O-COM-64/16-17 dated 01.12.2016 passed by the Commissioner, Central Excise & Service Tax, Alwar]

M/s Varun Beverages Limited **Appellant**

Versus

Commissioner of Central Excise & Service Tax, Alwar **Respondent**

Appearance

Shri Bimal Jain, Advocate for the Appellant
Shri O.P. Bisht, Authorized Representative for the Respondent

CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing : 08.11.2021
Date of Decision : 03.03.2022

Final Order No. 50207/2022

P.V. Subba Rao:

This appeal is filed by the appellant assailing order-in-original dated 1.12.2016 passed by the Commissioner, Central Excise & Service Tax, Alwar [1] whereby Cenvat credit amounting to Rs. 1,18,89,509/- was disallowed to the appellant and its recovery ordered along with interest and a penalty of equal amount was imposed upon the appellant under Rule 15(2) of CENVAT Credit Rules, 2004[2]. The operative part of this order is as follows :

> "(i) I disallow the Cenvat credit of Rs. 1,18,89,509/- and order recovery of the same from M/s Varun Beverage Limited, Chopanki, Bhiwadi in terms of Rule 14 of the Cenvat Credit Rules, 2004 read

---

1 impugned order
2 CCR, 2004

with Section 11 A(2) / Section 11 A(10) of the Central Excise Act, 1944. However, the remaining demand of Cenvat credit of Rs. 18,75,923/- is dropped as the cenvat credit has been taken properly.

(ii) I order for recovery of interest at applicable rates on the aforesaid amount of cenvat credit confirmed at (i) above in terms of Rule 14 of Cenvat Credit Rules, 2004 read with Section 11 AB/Section 11 AA of the Central Excise Act, 1944.

(iii) I impose a penalty of Rs. 1,18,89,509/- upon M/s Varun Beverage Limited, Chopanki, Bhiwadi in terms of Rule 15(1) of the Cenvat Credit Rules, 2004 and order recovery of the same from them.

This order is issued without prejudice to any other action that may be taken under the law relating to Central Excise or any other law for the time being in force."

2. We have heard both sides and perused the records.

3. The facts of the case, in brief, are that the appellant is a manufacturer of soft drinks, mineral water and fruit juices and holds Central Excise registration. During the course of audit of the appellant for the period April 2012 to March 2015, it was observed by the Auditors that the appellant had taken Cenvat credit on the basis of improper challans issued by its head office which is registered as Input Service Distributor as the challans did not contain the addresses of the persons providing the input services. Secondly, it was found that the credit was distributed by the head office of the appellant entirely to the appellant and it was not distributed from various manufacturing units as required under sub-rules (i) and (iv) of Rule 2 and Rule 4 of CCR, 2004. Thirdly, it was observed that the head office of the appellant was distributing input service credit on monthly basis while the pro rata turnover of the previous year of the appellant and of all the units were reckoned for distribution of credit in contravention of Rule 7 of CCR, 2004.

4. A show cause notice dated 18.2.2016 was issued to the appellant alleging that it had wrongly availed Cenvat credit

amounting to Rs.1,37,65,432/- during the period April 2012 to December 2015 in contravention of Rule 3 and Rule 9 of Cenvat Credit Rules, 2004 and Rule 4A of Service Tax Rules, 1994 and proposing to recover it under Rule 14 of the CCR, 2004 read with Section 11A of the Central Excise Act, 1944. The Commissioner passed the impugned order, which is assailed in this appeal on the following grounds:

(i) The adjudicating authority has gone beyond the scope and ground of the show cause notice which is not permissible. In the impugned order, the Commissioner has denied the Cenvat credit on services on the ground that they do not qualify as input services under Rule 2(l) of the CCR, 2004. This ground could not have been taken in the impugned order because the appellant was not put to notice of this ground at all;

(ii) Even otherwise, the input services qualify as input services in terms of Rule 2(l) of CCR, 2004 as they were used directly or indirectly in or in relation to manufacture of the final products. The term "directly or indirectly" and "in or in relation to" as mentioned in the input service definition is very wide and encompasses the services in dispute. The input services have a nexus with the manufacturing of the final product. As far as the house keeping services on which the Cenvat credit was denied by the Commissioner it is essential to keep the factory clean

for the manufacturing. Therefore, the house keeping services qualify as input services. Reliance was placed on the decisions of the Tribunal in **Balkrishna Industries Limited Vs. Commissioner of Central Excise, Aurangabad** [3] and **Commissioner of Central Excise, Delhi-III Vs. Pricol Ltd**[4].

(iii) As far as the air travel agent and air charter services are concerned, the appellant used them in or in relation to the manufacture of final product. Reliance has been placed on **Steadman Pharmaceuticals (P) Ltd. Vs. Commissioner of Central Excise, Chennai-III**[5].

(iv) On the allegation that the head office of the appellant (Input Service Distributor) has not distributed the credit to all units, it has been asserted that the ISD has indeed, distributed eligible CENVAT credit of service tax to all the units on pro rata basis as per Rule 7 of CCR, 2004 which reads as follows :

> **"Rule 7. Manner of distribution of credit by input service distributor. –**
>
> The input service distributor may distribute the CENVAT credit in respect of the service tax paid on the input service to its manufacturing units or units providing output service, subject to the following condition, namely:-
>
> (a) the credit distributed against a document referred to in rule 9 does not exceed the amount of service tax paid thereon; or
>
> (b) credit of service tax attributable to service used by one or more units (upto March 31, 2014 'used in a units') exclusively engaged in manufacture of exempted goods or providing of exempted services shall not be distributed.

---

3 2010 (254) ELT 301 (Tri.-Mumbai)
4 2016 (41) STR 649 (Tri.-Del.)
5 2016 (44) STR 427 (Tri.-Chennai)

> (c) credit of service tax attributable to service used wholly by a unit (up to March 31, 2014 'used wholly in a unit') shall be distributed only to that unit; and
>
> (d) credit of service tax attributable to service used by more than one unit shall be distributed pro rata on the basis of the turnover of such units during the relevant period to the total turnover of all its units, which are operational in the current year, during the said relevant period.
>
> (upto March 31, 2014, clause (d) was read as 'credit of service tax attributable to service used in more than one unit shall be distributed pro rata on the basis of the turnover during the relevant period of the concerned unit to the sum total of the turnover of all the units to which the service relates during the same period')".

5. Learned Counsel of the appellant submitted documents on a sample basis to demonstrate that the head office of the appellant has been distributing Cenvat credit to all the units and not only to the appellant.

6. It has also been submitted that even if the ISD had not distributed the Cenvat credit of input services to all its units on pro rata basis, it will not cause any revenue loss to the Department as the company could not have taken any excess Cenvat credit of input services.

7. On the question as to whether the Cenvat credit was distributed as per applicable Rules during the period or not, it has been submitted that the allegation in the show cause notice is that the ISD was distributing service tax credit on monthly basis whereas the pro rata turn over unit for distribution was taken for previous year. The appellant submits that Explanation (3) to Rule 7 of CCR, 2004 has undergone an amendment with effect from April 01, 2014. The extract of Explanation before and after 1.04.2014 is as follows:

Before 1.04.2014

"Explanation 3 – (a) The relevant period shall be the month previous to the month during which the CENVAT credit is distributed.

(b) In case if any of its unit pays tax or duty on quarterly basis as provided in rule 6 of Service Tax Rules, 1994 or rule 8 of Central Excise Rules, 2002 then the relevant period shall be the quarter previous to the quarter during which the CENVAT credit is distributed.

(c) In case of an assessee who does not have any total turnover in the said period, the input service distributor shall distribute any credit only after the end of such relevant period wherein the total turnover of its units is available."

After 1.04.2014

"Explanation 3 – For the purposes of this rule, the 'relevant period' shall be,-

(a) If the assessee has turnover in the 'financial year' preceding to the year during which credit is to be distributed for month or quarter, as the case may be, the said financial year; or

(b) If the assessee does not have turnover for some or all the units in the preceding financial year, the last quarter for which details of turnover of all the units are available, previous to the month or quarter for which credit is to be distributed."

8. The appellant submits that the company has followed the provisions correctly inasmuch as for the period up to 1.4.2014, turnover of units on monthly basis has been taken and thereafter turnover on yearly basis was taken. However, the appellant had inadvertently taken turnover on calendar year basis instead of on financial year basis. Nevertheless, even if the computation is made as per the provisions of Rule 7 of CCR, 2004, it would be evident that the appellant has not taken excess Cenvat credit taken on input service and it will not be detrimental to the Revenue.

9. The appellant submitted the following details along with copy of the certificate from the Chartered Accountant:

Sl.No.	Particulars	Cenvat credit amount (Rs.)

A	As per Department	1,37,65,432/-
B	Correct value of Cenvat credit taken by the company on the basis of ISD challan during the impugned period	1,45,58,275
C	Cenvat credit required to be distributed by ISD to the Company in terms of the correct provisions under Rule 7 of the Credit Rules	1,58,37,291
	Difference (C-B)	**12,79,116**

10. On the question of nature of the service provided and the details of services in respect of Cenvat credit distributed by the ISD not being shown in the challans, the appellant submitted that these details were shown in annexures to ISD challans, each of which mention "as per details attached". The attachment gives details. Therefore, the allegation that the nature of service provided etc. are not provided is not correct.

11. Without prejudice to the above submissions, it has also been asserted that since the mistake in distribution of Cenvat credit was at the end of the ISD, notice should have been sent to the ISD unit and not to the appellant. It is the responsibility of the ISD to pass credit of only those services which qualify as input service as defined in Rule 2(l) of Rule, 2004.

12. It has also been submitted that during the period, audit had raised three objections. For the first audit objection, the impugned show cause notice was issued and for the second audit objection, a separate show cause notice dated 10.02.2016 was issued demanding excise duty alleged to be short paid. It has been vehemently argued by the learned Counsel for the appellant that Revenue cannot issue two show cause notices for different allegations in the same audit objection. Reliance was placed in the case of **Simplex Infrastructures Ltd. Vs. Commissioner of**

Service Tax, Kolkata[6] , **Paro Food Products Vs. Commissioner of Central Excise, Hyderabad**[7] and **Shreeji Colourchem Industries Vs. Commissioner of Central Excise & Customs, Vadodra**[8]. Therefore, it has been asserted that the show cause notice is not sustainable and needs to be set aside. The appellant also contested the impugned order on the grounds of limitation of time alleging that there is no fraud, collusion, willful mi-statement or suppression of facts and, therefore, the demand cannot be made invoking extended period of limitation. Interest has been asserted to be not recoverable as the demand itself is not sustainable.

13. Lastly, the appellant also contested the penalty imposed under Rule 15 of the Cenvat Credit Rules.

14. Learned Departmental Representative forcefully supported the impugned order. He submitted that the appellant has taken Cenvat credit on the challans issued by the input service distributor. As per Rule 9(2) of CCR, 2004 "no Cenvat credit under sub-Rule (1) shall be taken unless all the particulars as prescribed under the Central Excise Rules or the Service Tax Rules, 1994, as the case may be, are contained in the said documents". Rule 4(A) of the Service Tax Rules provides that every ISD invoice shall contain the following:

> (i) the name, address and the registration number of the person providing input services and the serial number ad date of invoice, b, or as the case may be, challan issued under sub rule (1);
>
> (ii) the name and address of the said input service distributor;

---

6 **2016 (42) STR 634 (Cal.),**
7 **2005 (184) ELT 50 (Tri.-Bang.)**
8 **2013 (294) ELT 615 (Tri.).**

(iii) the name and address of the recipient of the credit distributed.

(iv) the amount of the credit distributed."

15. It is asserted on behalf of the Revenue that sub-rules (i) and (iv) of Rule 4A of Service Tax Rules require some details to be mentioned in ISD challans which were not found in the statements enclosed with the challans and, therefore, these challans were not valid documents as per Rule 9 of CCR, 2004. It has also been asserted that the credit was distributed by ISD only to the appellant instead of distributing to all the 16 units of the company on pro-rata basis as required. It is further asserted that the input service credit had distributed credit on monthly basis, whereas pro-rata turnover of unit for distribution was taken for the previous year. It has been asserted that since the Cenvat credit was taken on the strength of the ISD invoices issued as per Rule 4A of CCR, 2004, such invoices should be as per the requirement of the said rules and contain full information failing which no Cenvat credit will be admissible. Reliance is placed in the case of **State of Jharkhand Vs. Ambay Cements**[9] and **JCT Electronics Ltd. Vs. Commissioner of Central Excise & Service Tax, Vadodara**[10]

16. On the question as to whether two show cause notices could have been issued for the same period, learned Departmental Representative asserts that the case laws relied upon by the appellant are not applicable to this case. It has been held in the case of **Simplex Infrastructures Ltd.** by the High Court of Kolkata as well as in the other case laws, that for the same period of assessment there cannot be more than one show cause notice

9 2004 (178) ELT 55 (SC)
10 2014 (34) STR 778 (Tri.-Ahmd.).

demanding duty even if the grounds on which the duty was demanded were different. In other words, if differential duty was to be demanded on various grounds it cannot be split into various show cause notices and in the same show cause notice all the grounds have to be mentioned to demand the differential duty. The present case is different. The other show cause notice mentioned by the appellant was to recover duty short paid under Section 11A. The show cause notice which culminated in this appeal was to deny and recover Cenvat credit under Rule 14 of CCR, 2004. This is not a case of demand of duty at all. Therefore, reliance placed by the appellant on the case laws to assert that two show cause notices could not have been issued is completely misplaced.

17. We have considered the arguments advanced from both the sides. Following questions need to be answered:

(a) Whether the impugned order gets vitiated on the ground that two show cause notices have been issued for overlapping the periods;

(b) Whether the Commissioner was correct in denying Cenvat credit on the ground that certain input services do not quality as 'input services' under Rule 2(l) of CCR, 2004;

(c) Whether the head office of the appellant (input service distributor) has distributed the total input services credit only to the appellant, i.e., the Bhiwadi unit and not to the other units;

(d) Whether the Cenvat credit is inadmissible if the address of the service provider and amount of credit distributed is not mentioned in the Challan.

(e) Whether the ISD has distributed credit incorrectly on the basis of pro-rata turnover of previous year instead of on the basis of monthly turnover;

(f) Whether any interest is recoverable from the appellant under Rule 14 of CCR, 2004 read with Section 11AB of Central Excise Act, 1944;

(g) Whether penalty has been imposed upon the appellant under Rule 15 of CCR, 2004.

Issue of two show cause notices for the same Period

18. The preliminary objection by the appellant is that a show cause notice dated 10 February 2016 was issued by the Department demanding duty short paid by irregularly availing exemption under Notification No. 1/2011-CE along with interest and penalty. The present show cause notice dated 18 February 2016 was issued for the same audit period seeking to deny Cenvat credit alleged to have been availed by the appellant. It has been asserted that two show cause notices cannot be issued by the Department on piecemeal basis for the same period and for this submission reliance was placed on the **Simplex Infrastructures Ltd.**, in which Calcutta High Court held as follows : "there cannot be a double assessment for the period 10 September 2004 to 31 September 2005 as the Department has sought to do. The periods pertaining to which the show cause notice dated 21 April 2006 and the show cause notice dated 7 September 2009 were issued

overlap to an appreciable extent". It has also been submitted that this is not permissible in law as held by the Calcutta High Court in **Avery India Ltd. Vs. Union of India**[11]**.** Learned Counsel also relied upon in **Duncans Industries Ltd. Vs. Commissioner of Central Excise, New Delhi**[12], **Paro Food Products** and **Shreeji Colourchem Industries**.

19. We find all these case laws dealt with cases in which the assessment of duty/service tax was proposed for the same period and differential duty/service tax was demanded on different grounds in different show cause notices. The present case is different. Consequent upon the audit report, a show cause notice was issued demanding duty which is not the subject matter of the present dispute. Demand of duty is a matter of assessment. If duty is short paid it can be recovered under Section 11A after issuing a notice. The show cause notice which culminated in the present appeal has nothing to do with duty. It deals with a different issue of Cenvat credit. Irregularly availed Cenvat credit is recoverable under Rule 14 of CCR, 2004. There is no detailed mechanism laid down for recovery under Rule 14 of CCR, 2004 and for this purpose the provisions of Section 11A have been made applicable mutatis mutandis for Rule 14 also. Nevertheless, any recovery of irregularly availed Cenvat credit under Rule 14 is not demand of duty at all. Section 11A deals with the duty which the assessee has to pay on final products. Rule 14 deals with the credit of duty on inputs which someone else had paid which the assessee has taken credit of. Any denial of Cenvat taken will not affect the

---

11 **2011 (268) ELT 64 (Cal.)**
12 **2006 (201) ELT 517 (SC)**

duty liability. Similarly, any demand of duty will not affect the Cenvat credit. If Cenvat credit is wrongly availed, a penalty can be imposed under Rule 15 of CCR, 2004. If duty is short paid, penalty can be imposed under Section 11AC. Therefore, we do not find any illegality in the Revenue issuing two show cause notices; one for recovery of irregular availed Cenvat credit (which is subject matter of the present appeal) and another show cause notice for recovery of duty short paid. It does not amount to two assessments for the same period in this case.

Distribution of input service credit only to the appellant

20. It has been alleged in the show cause notice that the total amount of input service credit taken by the input service provider has been distributed in the challans issued to the assessee, whereas as per service tax registration, the ISD was required to distribute the amount of input service credit among all the 16 units. of the assessee. The appellant contested this factual assertion before the Commissioner which has been recorded in paragraph 10 of the impugned order. The Commissioner has recorded his findings as follows in the impugned order:

> "From the above notification, if is clear that the provisions of pro rata distribution on turnover basis apply only to credit attributable to services used in more than one unit. In view of the above, the turnover of the assessee and their entire company was enquired from the jurisdictional Assistant Commissioner. The Assistant Commissioner vide his letter dated 10.11.2016 provided the turnover figures of M/s Varun Beverage Limited, Chopanki which are based upon figures provided by the assessee vide their e-mail dated 2.11.2016 and the same are reproduced in Table 2 below:

Table 2

(Amount in Rs.)

Period	Turnover of Bhiwadi Unit	Turnover of all other than Bhiwadi Unit	Depot turnover	Total turnover	Ratio of Bihwadi Unit to total turnover

Jan-Dec. 2012	20995.24	111744.94	32676.39	165416.57	12.69%
Jan.-Dec.2013	19329.10	171950.60	39806.59	231086.29	8.36%
Jan.-Dec.2014	25505.73	201544.66	31496.51	258546.90	9.87%
Jan.-Dec.2015	25385.96	231506.56	132789.64	389682.16	6.51%
Total	91216.03	716746.76	236769.13	1044731.92	

> 62. On going through the submission made by assessee it revealed that the assessee have never claimed that credit of service tax in dispute was exclusively used in or in relation to manufacture of excisable goods at their Chopanki (Bhiwadi) unit, Critical examination of invoices/challans along with its annexures issued by ISD, revealed that the credit involved in the said invoices is of the common nature of services used by their head office which is equally attributable to their all manufacturing units as well as other units. Though the assessee have argued that ISD have distributed the credit proportionately, but they have not provided any valid documentary evidence in their support. On examination of invoices issued by ISD, it was found that ISD has passed on the entire credit of service tax, involved in the said invoice, to the assessee. For example, ISD issued Challan No. 131/2013-14 dated 25.11.2013 to the assessee on the strength of documents (invoices) issued by M/s IDBI Bank for providing Banking and other financial services and M/s Dhara Jaipuria for providing Renting of Immovable Property Service for service tax involved of Rs. 247200/- and Rs. 68189/- respectively, totaling to Rs. 315389/-. This entire amount has been transferred to the assessee i.e. Chopanki unit. All the challans were issued in the similar manner up to September 2015. Vide Challan No. 90/2015 dated 9.10.2015; 106/2015 dated 19.11.2015 and 122/2015 dated 24.12.2015, the ISD have distributed the Cenvat Credit on pro rata basis taking ratio of 9.52%, 10.15% and 10.15% respectively calculating the ratio on monthly basis which is in excess from the ratio of 6.51% for the year 2015 as discussed above. Therefore, I have no hesitation in holding that the ISD has distributed the entire amount of service tax involved in the said challans to the assesee up to September 2015 and have passed excess credit from October 2015 to December 2015 in contravention provision of Rule 7 of the Cenvat Credit Rules, 2004.

21. Learned Counsel for the appellant has demonstratred through challans and documents that the Cenvat credit has, indeed, been distributed by the head office of the appellant to other units of the appellant. We find that the Commissioner has, in the impugned order, held that the ISD has distributed the entire amount of service tax involved in the challan up to September, 2015 only to the Bhiwadi unit, i.e. the appellant and thereafter for the period October 2015 to December 2015 passed on excess credit to the appellant. However, from the impugned order, it is not clear how the Commissioner has come to the conclusion that the entire credit

has been distributed to only Bhiwadi unit up to September 2015 and excess credit has been distributed to the appellant i.e. Bhiwadi unit from October 2015 to December, 2015 based on his examination of two or three challans. We find that the appellant has submitted Company Secretary's calculation sheet showing Cenvat credit taken by company on the basis of ISD challan and the distribution of Cenvat credit to different unit by the ISD which was enclosed as Annexure-9 to the reply to the show cause notice filed before the Commissioner. There is no discussion and the impugned order that the Company Secretary certificate was not correct and the Cenvat credit has been wrongly distributed. Therefore, we find that the charge of the ISD distributed the entire credit to the appellant is not sustainable and needs to be rejected.

Address of the service provider and amount credit distributed not being mentioned in the ISD challans

22. The next allegation in the show cause notice is that the address of the service provider providing the input service and the amount of credit distribution to the assessee as required in sub-rules (i) and (iv) of Rule 4A of Service Tax Rules were not found mentioned in the statement enclosed with the challans. The appellant's contention before the learned Commissioner was that substantial benefit of Cenvat credit cannot be denied merely due to not mentioning the address of the service provider on the challans which is stated to be on account of procedural lapses.

23. Learned Counsel for the appellant submits that the details were provided in the Annexures to the challans issued by the ISD. We find that the ISD challans must contain details mentioned in

Rule 4A of the Service Tax Rules to qualify as Cenvatable documents. We find that these details require a thorough examination of each of the documents on which Cenvat credit is taken. Therefore, we find it a fit case to remit the matter to the adjudicating authority for conducting the necessary verification and decide as to which ISD challans, coupled with the Annexures contain all the essential details to be eligible for Cenvat credit.

24. The next question is whether the Commissioner could have denied Cenvat credit on the ground that certain input services do not qualify under Rule 2(l) of CCR, 2004. We find that the show cause notice did not raise this ground and the Commissioner cannot confirm the demand on a new ground.

25. The last question is whether the ISD had distributed the credit incorrectly as held by the Commissioner in the impugned order or has done it correctly as per Rule 7 read with Explanation 3, as applicable during the relevant period. This issue also needs thorough examination by the Commissioner.

26. In view of the above, we find that the impugned order is not vitiated on the ground that another show cause notice demanding short paid duty of excise was issued to the appellant during the same period. The Commissioner was not correct in denying Cenvat credit on the ground that the input service do not qualify under Rule 2(l) of the CCR, 2004 because the appellant was not put to notice on this ground. It is apparent from the records produced by the learned Counsel that the headquarters of the appellant had distributed the Cenvat credit to the appellant as well as to other

units. However, there are two issues which require verification by the Commissioner. The first is whether the essential details required in the ISD challans were available in the challans along with any Annexures thereto as asserted by the learned Counsel or otherwise. The second issue is whether credit was properly distributed by the headquarters of the appellant as per the new Explanation 3 to Rule 7 of CCR 2004 applicable from 1st April, 2014.

27. In view of the above, we find that the matter needs to be remitted to the adjudicating authority for determining the above two facts and re-computing the liability of Cenvat credit, if any.

28. The appeal is allowed by way of remand to the adjudicating authority. The impugned order shall abide by the order to be passed.

(Pronounced on 03.03.2022)

(Justice Dilip Gupta)
President

(P.V. Subba Rao)
Member (Technical)

RM