

**LIABILITY TO PAY INTEREST IS IT ABSOLUTE
OR CONDITIONAL - WHETHER REVERSAL
FROM CASH OR ITC.**

By

Pradeep K Mittal*

The question of payment of interest by the assessee arises under various provisions of Central Goods & Services Act, 2017 (hereinafter called CGST Act) and more particularly in relation to availment of Input Tax Credit (hereinafter called ITC). The Section 41(1) read with Section 16 enable the party to take credit of ITC, in his return, and such amount shall be credited on provisional basis. Section 41(2) & 49(4) says this ITC could be utilized for payment of output tax and, of course, Section 49(5) further explain about its utilization for payment of CGST, IGST, SGST and UGST.

*Advocate – Past Central Council Member, ICSI
pkmittal171@gmail.com

2” The Section 42(8) says that output tax liability increases because of reasons set out under Section 42(5) & (6), he shall be liable to pay interest at the rate prescribed under Section 50. The question is whether the assessee would be liable to be pay interest under Section 42(8) immediately upon availment or upon its actual utilization by the assessee?

3: The Section 50(3) CGST Act, reads as under:-

(3) A taxable person who makes an undue or excess claim of input tax credit under sub-section (10) of Section 42 or undue or excess reduction in output tax liability under sub-section (10) of Section 43, shall pay interest on such undue or excess claim or on such undue or excess reduction, as the case may be, at such rate not exceeding twenty four percent, as may be notified by the Government on the recommendations of the Council.

3.1: From first part of Section 50(3), it is apparent that interest may be claimed by the Department when there is a undue or excess claim of ITC.

3.2: Section 107(6) CGST calls for payment of 10% of disputed amount of tax (by way of pre-deposit) – whether it could be paid through accumulated cenvant or ITC accrued after 1.7.2017.

3.3: Under Section 73 or Section 74, where only interest or penalty is levied upon the assessee and the same is challenged by way of appeal before the First Appellate Authority and later on before Appellate Tribunal;

3.4: When appeal either before First Appellate Authority under Section 107 or before Appellate Tribunal under Section 112 is preferred, whether ITC could be used for payment of disputed tax by way of pre-deposit.

3.5: The second proviso to Section 107(11) says that Appellate Authority will issue SCN before passing any order for payment of (i) short payment of tax or (ii) ITC where ITC has been wrongly availed or utilized.

4: First of all, let us appreciate land mark judgment of Supreme Court in the case of Chandrapur Magnet Wires (P) Ltd., VS. CCE : MANU/SC/1061/1996, where common inputs were used in the manufacture of both dutiable goods and also finished exempt goods and later on, when question arose about reversal of modvat credit on inputs used in the manufacture of finished goods which were exempt, has observed as under:-

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.

4.1: The Hon'ble Supreme Court clearly holds that in case, debit entry has been made at a subsequent stage, it cannot be said that the assessee has at all taken credit – presumably that credit, during the intervening period, has not been actually utilized.

5: The Supreme Court in the case of CCE Vs. Bombay Dyeing and Mfg. Co. Ltd. : MANU/SC/3318/2007 on the issue of payment of interest when modvat credit/cenvat credit (now ITC), has not been utilized, has observed as under:-

In the present case, before the account could be debited and before the assessee could avail of CENVAT credit, the assessee has reversed CENVAT credit which would amount to the assessee not taking credit for duty paid on input.

6: The Karnataka High Court in the case of CCE Vs. Bill Forge Pvt. Ltd. MANU/KA/1284/2011MANU/KA/1284/2011 : 2012 (26) STR 204 (Kar), while holding that if the Cenvat has been reversed before its utilization, it amounts to non-availment at all and also held that interest is compensatory in nature and would be payable only cenvat has been actually utilized and not where it is merely a book entry.

The assessee uses the credit to make payment of excise duty on excisable product. Instead of paying excise duty, the cenvat 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 utilize 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 cenvat 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 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."

7: In another judgment, the Karnataka High Court in the case of CCE Vs. Pearl Insulation Ltd: MANU/KA/0787/2012 has

observed that interest cannot be claimed merely on its availment but only from the date of actual utilization:-

The levy of interest is on the actual amount, which is withheld and the extent of delay in paying the tax from the due date. The 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. In that view of the matter, we do not see any merit in this appeal. Accordingly, the appeal is dismissed.

8: The Punjab & Haryana High Court in the case of CCE, vs. Maruti Udyog Limited [2007 (214) E.L.T. 173 (P & H)] upheld the findings of the Tribunal that the assessee was not liable to pay interest as the credit was only taken as an entry in the Modvat record and was not in fact utilized. The Tribunal held that in absence of utilization of credit, the assessee was not liable to pay interest. The relevant para of the decision is quoted below:-

Learned Counsel for the appellant is unable to show as to how the interest will be required to be paid when in absence of availment of Modvat credit in fact, the assessee was not liable to pay any duty. The Tribunal has clearly recorded a finding that the assessee did not avail of the Modvat credit in fact and had only made an entry.

5. In view of this factual position, we are unable to hold that any substantial question of law arises."

9: The above decision of the Hon'ble Punjab & Haryana High Court has been upheld by the Hon'ble Supreme Court reported as Commissioner v. Maruti Udyog Ltd. - 2007 (214) E.L.T. A50 (S.C.)

10: The Gujarat High Court in the case of CCE vs. Dynaflex Pvt. Ltd. : MANU/GJ/1431/2010 has made the following very interesting observations in a case pertaining to unamended provisions of Rule 14 i.e. what is the meaning of word (i) availment and (ii) actual utilization:-

The Apex Court in CCE Vs. Bombay Dyeing & Mfg. Co. Ltd. MANU/SC/3318/2007 wherein it has been held that when an entry has been reversed before utilization, the same amounts to not taking credit. Rule 14 of the Rules makes provision for recovery of interest where the CENVAT credit has been taken or utilized wrongly or has been erroneously refunded. Thus, both, in case where CENVAT credit has been wrongly taken or wrongly utilized, interest, is recoverable under Rule 14 of the Rules. However, in the light of the aforesaid decision of the Supreme Court, when the entry has been reversed before utilization, the same amounts to not taking credit. In the circumstances, where CENVAT credit is taken wrongly, but reversed before the same is utilized, it amounts to not

taking credit. Accordingly, when no credit is taken, the provisions of Rule 14 of the Rules would not be attracted.

11: The Gujarat High Court in another interesting case reported as CCE Vs. Sweet Industries MANU/GJ/1402/2010, emphatically held that when the credit has not been utilized, it does not amount to having taken the credit as such, the question of paying interest does not arise.

In this regard, before the Tribunal, on behalf of the Assessee, it had been pointed out that though CENVAT Credit of Rs. 6,38,393/- had been availed by the Assessee in April 2004, the credit taken was never utilized till the date of reversal and as such, there was no liability to pay interest. The Tribunal has held that in view of the fact that the credit was not at all utilized, in the light of the earlier decisions of the Tribunal; the Assessee was not liable to pay interest if the credit had not been utilized. The aforesaid view of the Tribunal is in line with the view taken by the apex court in the case of Commissioner of C. Ex., Mumbai-I v. Bombay Dyeing & Mfg. Co. Ltd. MANU/SC/3318/2007MANU/SC/3318/2007 : 2007 (215) E.L.T. 3 (S.C.) wherein the Assessee therein had reversed the entry before utilization, it was held that the same amounts to not taking credit.

12: The Larger Bench of the CETAT in the case of J.K. Tyre and Industries Ltd. vs. CCE) : MANU/CB/0152/2016, prior to amendment of Rule 14, has held as follows:-

We answer the reference by holding that the decision of the Karnataka High Court in CCE Vs Bill Forge Pvt. Ltd. - MANU/KA/1284/2011 constitutes the law governing and operative on the facts and transactions in the current appeal. Since the appellant had merely availed credit and had reversed the same before utilizing the availed credit for remittance of duty, interest liability would not arise. The reference is answered as above in favour of assessee.

13: The Tribunal in a very latest judgment in the case of Echjay Industries Pvt. Ltd. vs. C.C.E.,: MANU/CM/0357/2019, has dealt with the issue of reversal of cenvat credit before its utilization and liability of the assessee to pay interest, in a very lucid manner.

It is not disputed that the irregularly availed Cenvat Credit was reversed by the appellants immediately upon being pointed out by the audit that too with interest and therefore no show cause notice was issued for that purpose. The said credit was not utilized by the appellant for payment of excise duty etc. It is merely a book entry and, therefore, the credit wrongly availed does not amount to short payment of duty. The interest is compensatory in nature and is liable to be paid only when the principal amount is paid belatedly or there is any loss to the government exchequer. In other words, the provisions to recover interest are enacted to compensate the exchequer for the delay it suffers in receiving the revenue due to it. The credit having been

taken inadvertently stands reversed by the Appellant even before utilisation, no interest liability would arise inasmuch as there is no loss to the Revenue and the credit remained as a paper entry in their books of accounts. Since there was no loss of revenue to the government exchequer, therefore the question of compensating the revenue by way of interest does not arise. In the facts of the present case, Revenue cannot impose liability to pay interest on the assessee invoking the provisions of Rule 14 of Cenvat Credit Rules, 2004.

14: The Punjab & Haryana High Court in the case of CCE Vs. Maruti Udyog Limited: MANU/PH/2827/2006, when cenvat has not been utilized and it is merely an book entry, no interest is liable to be paid. The court observed as follows:-

2.1. The Tribunal, however, held that the assessee was not liable to pay interest as the credit was only taken as an entry in the Modvat record and was not in-fact utilized. The Tribunal held that in absence of utilization of credit, the assessee was not liable to pay interest.

4. Learned counsel for the appellant is unable to show as to how the interest will be required to be paid when in absence of availment of Modvat Credit in-fact, the assessee was not liable to pay any duty. The Tribunal has clearly recorded a finding that the assessee did not avail of Modvat credit, in fact, and had only made an entry.

15: The Tribunal, New Delhi Bench, in the case of CCE Vs. Secure Meters Ltd. : MANU/CE/1069/2016 has observed as follows:-

Even if subsequent to clearance of final product, reversal of credit is appropriate and results in a situation as if no credit was ever availed by the assessee. One such reference can be made to Gujarat High Court decision in the case of CCE v. Ashima Dyecot Ltd. [MANU/GJ/0780/2008 affirmed by Supreme Court [2009 (240) E.L.T. A41 (S.C.)].

16: In view of the above settled position of law, we can consider each of the following questions framed in the preceding paras i.e. para 3.1 to 3.5:-

3.1: From first part of Section 50(3), it is apparent that interest would be claimed by the Department when there is a undue or excess claim of ITC.

17: So long as ITC has not been actually utilized, there is no question of claiming any interest. As seen above, the Supreme Court and High Courts have consistently held that once cenvat/modat and now ITC has been reversed before its utilization, it amounts to not taking the credit at all and hence, there is no warrant for issue of SCN either for (i) reversal of ITC (ii) claiming any interest. There are number of judgments of various benches of CESTAT holding that where there was reversal of Cenvat along with accrued interest (before its actual

utilization) before SCN, there is no warrant to levy even penalty at all.

3.2: Section 107(6) CGST calls for payment of 10% of disputed amount of tax by way of pre-deposit at the time of filing of appeal before First Appellate Authority – whether it could be paid through accumulated cenvat or ITC accrued after 1.7.2017.

18: The Gujarat High Court in the case of Sunland Metal Recycling Vs. CCE MANU/GJ/0339/2014, it has been held that Cenvat is nothing but a Excise duty charged under Section 3 of Central Excise Act, 1944. The DB of Delhi High Court in the case of Jai Bharat Maruti Ltd Vs. CCE MANU/DE/0513/2009 has also held that Modvat is nothing but a Excise Duty. Hence, mandatory of reversal of 10% by way of pre-deposit before First Appellate Authority and another 10% before Appellate Tribunal, accrued Cenvat Credit/ITC could be utilized by way of reversal from the Credit Ledger Account - as Section 49(4) permits only payment of Tax and does not permit payment of interest and/or penalty.

3.3: Under Section 73 or Section 74, only interest or penalty is levied upon the assessee and the same is challenged before the First Appellate Authority and later on before Appellate Tribunal;

19: In case the appeal either before the First Appellate Authority or Appellate Tribunal pertains to levy of interest

and/or penalty, no pre-deposit is required to be made as there is no mandate either in Section 107 or in Section 112 of CGST Act to deposit since the words used are “disputed tax” and there is no mention of either “penalty” or “interest” – hence, it could be safely assumed that in the event Order in Original or Order in Appeal pertain to levy of either “interest” or “Penalty” no pre-deposit is required to be made. It would be pertinent to see to Section 35FF (i) of Central Excise Act.

Section 35FF(i): under sub-section (1) of 35, unless the appellant has deposited seven and half percent of duty, in case where duty or duty and penalty are in dispute, or penalty where penalty is in dispute, in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the (principal commissioner of Central Excise or Commissioner of Central Excise.

In Section 107(6)(b), the words used are a sum equal to ten percent of the remaining amount of tax in dispute. No such words like “Penalty” or “Interest” is appearing.

3.4: When appeal either before First Appellate Authority under Section 107 or before Appellate Tribunal under Section 112 is preferred, whether ITC could be used for payment of disputed tax.

20: The answer is given para 18 hereinabove.

3.5: The second proviso to Section 107(11) says that Appellate Authority will issue SCN before passing any order for payment of (i) short payment of tax or (ii) ITC where ITC has been wrongly availed or utilized.

21: In views of the judgments of Supreme Court in (i) Chandrapur Magnets Wires (P) Ltd, (supra) (ii) Bombay Dyeing & Mfg Co Ltd (supra) (iii) and Karnataka High Court in the cases of Bill Forge (P) Ltd (supra) and Pearl Insulation Ltd: (supra) and Punjab & Haryana High Court in Maruti Udyog Ltd (supra), where it has been consistently held that when Cenvat has been reversed before utilization or not at all utilized, it could be said that it is neither availed nor utilized at all.

23: The Tribunal in the case of Paper Products Ltd. vs. CCE MANU/CS/0401/2012, relying upon the judgment of the Gujarat High Court in the case of Gujarat Narmada Fertilizers Co. Ltd. - MANU/GJ/0611/2012, has held that when the duty has been reversed before issue of SCN, neither any interest nor any penalty is leviable and observed as under:-

We have clearly held that there is no dispute of availment of credit of duty paid by the current appellant, by their sister unit to whom the goods were cleared. It is also undisputed that the said differential duty has been paid by the appellant before the issuance of Show Cause Notice and

we have also held that there cannot be any mala fide on the part of the appellant in adopting lesser value which has resulted in differential duty being paid by the appellant. On this background, we find that the appellant had, in fact, taken a plea before us that the interest liability does not arise. We find that the judgment of Hon'ble High Court of Gujarat in the case of Gujarat Narmada Fertilizers Co. Ltd. - MANU/GJ/0611/2012 indicates the same view.