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Interest on Credit 'availed' but 'not utilised' — Resurrection of Conflict – 'Or' vs 'And'

Introduction:

Whether interest is payable or not on the amount of tax credit that was wrongly availed but reversed without utilising the same is always a bone of contention between taxpayer and Revenue under Indirect Tax laws. Under the erstwhile CENVAT Credit Rules, 2004, Rule 14 as prevailing prior to 01.04.2012 provided for recovery of CENVAT Credit that has been taken or utilized wrongly or has been erroneously refunded. The said issue was originated from the use of the phrase ***"CENVAT Credit has been taken or utilized wrongly"*** in Rule 14.

The said Rule 14 was amended with effect from 01.04.2012 to provide for recovery of CENVAT Credit that has been wrongly taken and utilised or has been erroneously refunded. The above-mentioned phrase has been suitably amended as "CENVAT Credit has been wrongly taken and utilized" to put an end to this controversy. However, the amendment was not expressly notified to be retrospective. This has made the issue wide open and the litigation is continuing for more than a decade with respect to interest demanded for the periods prior to 01.04.2012. The matter is now pending before the Supreme Court under the second round of litigation.

Coming to Good & Service Tax (GST) regime, Sections *73(1) and 74(1)*[1] of the Central Goods & Services Tax Act, 2017 (CGST Act) provides for recovery of input tax credit that was *wrongly availed or utilised.* The use of the phrase 'wrongly availed or utilised' marks invocation of same issue and litigation under GST regime as well. Notices are also issued by the Department to recover interest amounts in cases where credit was wrongly availed but reversed before utilisation. With the above backdrop, we will now analyse the issue based on jurisprudence evolved as on date under the erstwhile CENVAT Credit Rules, 2004 and under GST laws as well.

Position in Erstwhile Era:

Rule 14 of CENVAT Credit Rules, 2004:

As mentioned above, under the erstwhile CENVAT Credit Rules, 2004, Rule 14 provides for recovery of CENVAT Credit, which is as under:

*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.*

In view of the use of the language 'taken or utilised wrongly', Revenue proceeded to recover interest from the date on which CENVAT Credit was availed irrespective of the fact whether the availed credit was utilised or not. As mentioned in the introduction para, with effect from 01.07.2012, the referred language was amended with the phrase **'taken and utilised wrongly'**. However, the dispute whether interest is recoverable in cases where CENVAT Credit was availed but not utilised continued for the period prior to amendment. The main grounds on which the assessee was before the forums was that the interest which was intended to be collected by Revenue was compensatory in nature and hence in absence of utilisation, there was no loss accruing to the exchequer and accordingly no interest is required to be paid just

[1] Section 73(1) is applicable in case other than those involving fraud, willful misstatement or suppression of facts while section 74(1) is applicable in cases involving fraud, willful misstatement or suppression of facts.

because of an accounting entry dealing with availment. If at all the said erroneous credit was utilised, no doubt that there would be an interest liability which the assessee were ready to pay. In this connection, we would like to take you back to the judgments, wherein it was held that 'interest' under fiscal statutes is compensatory in nature and other jurisprudence which dealt with liability in case of erroneous availment of interest.

Interest must be of compensatory character:

Before we take up the jurisprudence on this issue, let us consider the essential principle related to collection of interest in fiscal statutes as laid down by the Supreme Court in the landmark judgment Prathiba Processors v Union of India[2]. In the said judgment, the Supreme Court has explained the distinction between 'tax', 'interest' and 'penalty' imposed under the fiscal laws. The relevant paras are as under:

In fiscal Statues, the import of the words - "tax", "interest", "penalty", etc. are well known. They are different concepts. Tax is the amount payable as a result of the charging provision. It is compulsory exaction of money by a public authority for public purposes, the payment of which is enforced by law. Penalty is ordinarily levied on an assessee for some contumacious conduct or for a deliberate violation of the provisions of the particular statute. ***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 geared to actual amount of tax withheld and the extent of the delay in paying the tax on the due date****. Essentially, it is compensatory and different from penalty - which is penal in character (para 13)*

(emphasis supplied)

In the said landmark judgment of Supreme Court, the essential principle laid down with respect to collection of interest is that it must be compensatory in character and can be imposed only when the assessee withhold any tax amount when it is due and payable. Taking into consideration this principle, we will now proceed to examine the jurisprudence on this issue.

Honourable Supreme Court's decision in Ind-Swift Laboratories Limited:

In the case of Union of India vs Ind-Swift Laboratories Limited[3], the fact pattern was that the Respondents therein availed CENVAT Credit based on fake invoices from 01.04.2001 to 31.03.2006. The availed CENVAT Credit was utilised for payments or claimed refund in the months of February 2006, March 2006 and November 2006. Considering the said fact pattern, the Commissioner was of the view that the appropriate interest liability has to be borne by the Respondent on such wrongful availment of CENVAT credit. Pursuant to the Settlement Commission order, Revenue has calculated the interest liability from the date of availment.

The Respondent approached Punjab and Haryana High Court wherein it was held that Rule 14 has to be read down to mean that where CENVAT credit has been taken ***and*** utilized wrongly, interest should be payable on the CENVAT credit from the date the said credit had been utilized wrongly and that 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. Aggrieved by this order, the Revenue approached Honourable Supreme Court wherein it was held as under vide para 17 of the order in the matter of Ind-Swift Laboratories Limited (supra) as under:

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

[2] 1996 (88) ELT 12 (SC)
[3] 2011 (265) ELT (SC)

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.***

(emphasis supplied)

In our view, the facts involved in this case before the Honourable Supreme Court were on a different footing and the dispute is arising from an order of the settlement commission. Further, reference was not made to Prathiba Processors decision (supra) and the aspect of interest being compensatory nature was not examined in this context. Further, the Court has opined that reading down of the law 'or' as 'and' is not permitted by reasoning out that such exercise is generally undertaken in interpreting statutes only to save a provision from being declared as unconstitutional or Illegal.

However, it is a well-established legal principle that the word 'or' should be read as 'and' or vice versa if the literal interpretation of the provision would lead to any absurdity or would render the provision nugatory. With due respect to the decision of Honourable Supreme Court, whether the word 'or' can be read as 'and' has not been examined in this context by taking into consideration the principle that interest is of compensatory nature, which in our opinion may not be a valid precedent.

Honourable Karnataka High Court's decision in matter of Bill Forge Private Limited:

After the decision of the Honourable Supreme Court in the matter of Ind-Swift Laboratories Limited (supra), the said issue was considered by Honourable Karnataka High Court in the case of CCE vs. Bill Forge Private Limited[4] wherein the Respondent availed CENVAT Credit wrongly on Capital Goods before their actual receipt. Upon pointing the lapse, the same was reversed without utilisation. The Revenue demanded interest from the date of availment of CENVAT Credit which was struck down by CESTAT. In this context, the Karnataka High Court after considering Rule 14 and the Apex Court's decision in Ind-Swift (supra) held as under:

A reading of the aforesaid provisions makes it very clear that the said provision is attracted where the Cenvat Credit has been taken or utilized wrongly or has been erroneously refunded. ***In view of the aforesaid judgment of the Apex Court, the question of reading the word 'and' in place of 'or' would not arise. It is also to be noticed that in the aforesaid Rule, the word 'avail' is not used. The words used are 'taken' or 'utilized wrongly'.*** *Further the said provision makes it clear that the interest shall be recovered in terms of Section 11A and 11B of the Act. (para 19)*

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***

[4]2012 (26) STR 204 (Kar)

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. *(para 22)*

(emphasis supplied)

In view of the above excerpts, it is clear that the Honourable Karnataka High Court has distinguished the facts involved in the case before them with those of Ind-Swift Laboratories Limited (supra) and accordingly held that mere wrong availment of CENVAT Credit is different from CENVAT Credit that was wrongly taken or wrongly utilised. Accordingly, held that the principle laid down by Apex Court in Ind-Swift Laboratories Limited (supra) is not applicable to the facts of the case before them. The word 'taken' as used in Rule 14 is considered on a different footing from the word 'availed'. Further, the Honourable Karnataka High Court has refereed to Prathiba Processors Limited (supra) and interpreted the provisions of Rule 14 based on the principle that interest is compensatory in nature.

Honourable Madras High Court's decision in Sundaram Fasteners Limited & Sri Kumaran Alloys (P) Ltd:

Subsequent to the above decision of Honourable Karnataka High Court, the said issue has been considered by the Honourable Madras High Court in the case of CCE vs. Sundaram Fasteners Limited[5] wherein the facts involved are that CENVAT Credit was availed on CTD bars used in construction of foundation for machinery. The availed CENVAT Credit was reversed without utilisation. The Madras High Court by relying on Ind-Swift Laboratories Limited (supra) held that interest is payable from the date of availment. The relevant extracts are reproduced as under:

In the light of the above findings of the Hon'ble Apex Court, particularly with regard to Rule 14 of the Act, we do not find any justifiable ground to accept the plea of the assessee based on the decisions relied on by the assessee *reported in 1996 (81) E.L.T. 3 (S.C.), 2004 (174) E.L.T. 422 (All.) and 2012 (279) E.L.T. 209 (Kar.)*[6]

The learned counsel for the assessee submitted his notes on the contention that interest being compensatory and that question of payment of interest would arise only where the principal is due. To that contention, by placing reliance on the decision reported in 1996 (88) E.L.T. 12 (S.C.) - Prathiba Processors v. Union of India as well as the decision reported in 2007 (215) E.L.T. 3 - CCE v. Bombay Dyeing, the learned counsel for the assessee contended that, when credit has been reversed before utilization, the same did not amount to taking credit.

We reject the arguments of the assessee. In the said decisions, it has been no doubt held that interest is compensatory and the question arises only where principal is due. If one gets into the background of the scheme of Modvat credit, his contention that the assessee has taken credit, does not merit consideration, particularly so, in the background of Rule 14. *As it stands today, one has to go only by the provisions contained in Rule 14 and nothing beyond.*

(emphasis supplied)

Thus, the Honourable Madras High Court has followed the Ind-Swift Laboratories Limited (supra) of Honourable Supreme Court by rejecting the findings of Honourable Karnataka High Court in Bill Forge Private Limited (supra). Further, on the aspect that interest is compensatory in nature, the Honourable Madras High Court held that the contention of the assessee that interest arises only where the principal is due is not applicable having regard to the background of CENVAT Credit and Rule 14.

[5] 2014 (304) ELT 7 (Mad)

[6] Decision in Bill Forge Private Limited by Honourable Karnataka High Court

In our view, the principle that interest is compensatory in nature would equally hold good with respect to outstanding tax amount payable or recovery of CENVAT Credit for the reason that CENVAT Credit is nothing but a tax paid on input transactions and available for set-off with output tax payable.

Interestingly, within few days of the judgment given by Honourable Madras High Court (supra), the said issue was also considered by Honourable Madurai Bench of the Madras High Court in the case of CCE vs. Strategic Engineering (P) Ltd[7]. However, the Honourable Madurai Bench without cognizance of the decision given in Sundaram Fasteners Limited (supra), relied on decision of the honourable Karnataka High Court in the matter of Bill Forge Private Limited (supra) and held that interest is not payable when the CENVAT Credit was merely availed but not utilised.

The Honourable Madras High Court has again considered this issue in the case of CCE vs. Sri Kumaran Alloys (P) Ltd[8], wherein the facts involved are that the Respondent was claiming SSI exemption and availed CENVAT Credit on capital goods received from July, 2008 to March, 2009 and the CENVAT credit taken was kept in balance in their CENVAT credit account in March, 2009 and carried over up to March, 2011. Having cognizance of these facts, the Department proceeded to recover interest from the date of availment. Prior to the matter reaching the Honourable Madras High Court, the CESTAT Chennai has ruled out in favour of the Respondent for the reason that the Revenue did not dispute the fact that the credit availed remained as mere entry in books.

In the above factual backdrop, the Honourable Madras High Court examined the above decisions pronounced earlier and has upheld the view expressed in Sundaram Fasteners Limited (supra) that interest is payable from the date on which CENVAT Credit was wrongly taken. Though the question of law has been decided in favour of the Revenue, interestingly, the Madras High Court has not accepted to apply the said legal proposition to the facts of the said case by taking into consideration the fact that credit availed remained as mere entry in books. The relevant extracts are reproduced as under:

The above referred decision in Sundaram Fasteners Limited (supra) was rendered on 30-1-2014 and it appears that the same was not placed before the Division Bench, while the decision was rendered in the case of Strategic Engineering (P) Ltd. (supra), which was rendered on 10-2-2014. As observed earlier, the amendment to the statute not being clarificatory cannot be retrospective. Thus, an amendment to a statute done prospectively cannot be interpreted to be an answer to doubts which had arisen earlier to the amendment. Thus, we are not persuaded to apply the decision in Strategic Engineering (P) Ltd. (supra).

For all the above reasons, the first substantial question of law, as framed above, is answered in favour of the Revenue and against the assessee. However, for the reasons assigned by us in the preceding paragraphs and the discussions contained therein, we dismiss the appeal of the Revenue and confirm the order of the Tribunal for the reasons stated therein and decide the question of law in favour of the Revenue. No costs."

(emphasis supplied)

In view of the above decision given by the Honourable Madras High Court, a view is possible the Honourable Madras High Court is also of the understanding that the facts of Ind-Swift Laboratories Limited (supra) stands on a different footing and cannot be applied in general.

Subsequent Conflicting Judgments, Reference to Larger Bench and Appeal to Honourable Supreme Court:

[7] 2014 (310) ELT 509 (Mad)
[8] 2019 (365) E.L.T. 305 (Mad)

Subsequent to the above decisions of Honourable Karnataka High Court and Madras High Court, the issue was considered by various judicial forums and are divided. There are instances[9] where the Honourable CESTAT Chennai Bench has followed the decision of Honourable Karnataka High Court while the Honourable CESTAT Bangalore Bench followed the decision of Honourable Madras High court.

In view of the contrary views expressed by Honourable Karnataka High Court and Madras High Court on the requirement to pay interest for mere availment of CENVAT Credit without its actual utilisation, the Honourable CESTAT Bangalore Bench in the case of J.K.Tyre and Industries Limited vs. Asst.Commr. of C.Ex[10], has referred the matter to the larger bench. The relevant extracts are as under:

Inasmuch as there are two contrary decisions of the High Courts, one by the Hon'ble Karnataka High Court and the other by the High Court of Madras and inasmuch as the said issue keeps on repeatedly coming up before the Tribunal. I deem it fit to refer the matter to the Hon'ble President for constitution of a Larger Bench on the following question of law : -

When the wrongly availed credit is reversed before utilising the same, whether interest liability would arise in respect of the same or not?

(emphasis supplied)

However, the larger bench of CESTAT in the case of J.K.Tyre and Industries Limited vs. Asst.Commr. of C.Ex[11] instead of addressing the issue involved by answering the above question of law, held that in case of contrary High Court decisions including the one of the Jurisdictional High Court, the decision of the Jurisdictional High Court is required to be followed and accordingly followed the decision of Honourable Karnataka High Court in Bill Forge Private Limited (supra) and held that interest is not payable.

The Chhattisgarh High Court in the case of CCE vs. Vandana Vidyut Limited[12] has disagreed with the view of Honourable Karnataka High Court in Bill Forge Private Limited (supra) and it was held vide para 12 as under:

Since Learned Counsel for the Respondent has heavily relied upon Bill Forge Pvt. Ltd. (supra), we consider it proper to discuss the same also even though it is not binding on us. We regret our inability to concur with the discussion in paragraph 22 of the same that the mere taking of Cenvat credit wrongly by making entries would not invite liability for interest unless it had been utilised also. In our respectful opinion, that would be against the discussion and the law laid down in Ind-Swift Laboratories Ltd. (supra) that the liability for interest arises on the wrong taking independent of utilisation.

(emphasis supplied)

The above decision of Chhattisgarh High Court in appealed[13] before the Honourable Supreme Court and the matter is pending for disposal. Accordingly, the entire controversy has landed up before the Honourable Supreme Court one more time after Ind-Swift Laboratories Limited.

Amendment to Rule 14— Prospective or Retrospective:

[9] 2014 (36) S.T.R. 451 (Tri. - Chennai) & 2017 (49) S.T.R. 357 (Tri. - Bang.)
[10] 2015 (324) E.L.T. 571 (Tri. - Bang.)
[11] 2016 (340) E.L.T. 193 (Tri. - LB)
[12] 2016 (331) E.L.T. 231 (Chhattisgarh)
[13] 2016(336) ELT A087 (SC)

On the other hand, after the amendment to Rule 14 effective from 01.04.2012, it was argued in several cases that the amendment is clarificatory in nature and is retrospective. Some of these cases[14] are decided in favour of the assessee while others are against. Therefore, the issue whether the amendment is clarificatory in nature having retrospective implications or not is also not yet decided. As we are analysing the litigation under CENVAT Credit Rules, 2004 in order to interpret the language of section 73 and 74 of CGST Act, 2017, we are not detailing out these cases.

Recent perspective on 'Or' vs 'And' Conflict:

Recently, the Honourable CESTAT Mumbai has considered this issue in the case of Vodafone South Limited vs. CST[15] and has brought a new perspective to this 'or' vs 'and' conflict. The CESTAT Mumbai observed that it is logical to collect interest if the CENVAT Credit is wrongly availed or erroneously got refunded. However, it is unusual to contemplate a scenario that utilization can go wrong as it is solely meant for the purpose of discharge of tax/duty liability. Therefore, the phrase 'taken or utilised wrongly' can only mean utilisation after credit has been wrongly taken. The relevant extract under para 14 is reproduced as under:

*From a perusal of rule 14 of CENVAT Credit Rules, 2004 and, **in particular, of the disjunctive collation of 'taken', 'utilized' and 'erroneously refunded' with the expression 'wrongly' qualifying, not all three but only two of these, it would appear that the assumption of credit and a refund of credit, if wrong, would have to pay the price in the form of 'interest.' However, it is unusual for 'utilization' to be qualified with 'ineligibility' on its own as 'utilization' is solely for the purpose of discharge of tax/duty liability which, even if not warranted, does not, by any stretch of usage, behove description as 'wrongly.' Such transfer of epithet, borne out of drafting frailty, can only reasonably mean 'utilization' after having been wrongly taken and, therefore, ineligible.** When the allegation of ineligibility is sought with fastened on the taking of the credit, demonstration by the assessee of the superfluity of such disputed credit to the integrity of its accountal, and acceptance thereof, stands on an entirely different footing from that resolved by the Hon'ble Supreme Court and the decisions that followed therefrom referred to supra. In determining the submissions of the appellant herein in de-novo proceedings, the adjudicating authority is also directed to bear in mind the limits of applicability of the referred decisions.*

(emphasis supplied)

In view of the above jurisprudence under CENVAT Credit Rules, 2004, it is clear that various contradicting views are expressed by courts and the matter is yet to attain finality. In light of the above discussion, the essential questions that are required to be answered on this issue are as under:

- Whether principle that interest is compensatory holds good for cases of wrong availment of CENVAT Credit?
- Whether legal proposition in Ind-Swift Laboratories Limited (supra) is fact driven or applied in general?
- Whether non-reading of 'or' as 'and', lead to a state that interest obligation arises even in there is no revenue loss?
- Whether subsequent amendment to Rule 14 is prospective or retrospective?
- Whether use of phrase 'credit taken or utilised wrongly' involves drafting error would mean 'credit utilised after having been wrongly taken'?

[14] 2019 (9) TMI 886 - Cestat Kolkata, 2019 (365) E.L.T. 305 (Mad.), 2017 (49) S.T.R. 331 (Tri. - Mumbai)
[15] 2020 (3) TMI 320 - CESTAT Mumbai

Position under GST Law:

With the above understanding of jurisprudence under CENVAT Credit Rules, 2004 we will now proceed to examine the position under GST law. As mentioned above sections *73(1) and 74(1)* of the CGST Act, 2017 provides for recovery of input tax credit that was *wrongly availed or utilised.* Against the findings of the Honourable Karnataka High Court in Bill Forge Private Limited (supra), the phrase used under these sections is 'wrongly availed or utilised' as against the phrase 'wrongly taken or utilised' used under the erstwhile CENVAT Credit Rules, 2004. In order to analyse this issue under GST law, the provisions of section 73(1)[16] is reproduced as under:

Where it appears to the proper officer that ***any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised for any reason, other than the reason of fraud or any wilful-misstatement or suppression of facts to evade tax,*** he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, *requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty leviable under the provisions of this Act or the rules made thereunder.*

In view of the above reproduced provisions of section 73(1), the phrase ***'where input tax credit has been wrongly availed or utilised for any reason'*** has been preceded by the phrase 'tax has not been paid, or short paid or erroneously refunded'. **The phrase 'wrongly availed or utilised' has to be interpreted keeping in mind the meanings of the phrase 'tax not paid, short paid, erroneously refunded' and the objective of section 73.** All these phrases signify non-payment of tax or erroneous claim of refund causing loss to the exchequer.

In the humble opinion of the paper writers, the interpretative principle '*noscitur a sociis'*[17] has to be applied in this context. Accordingly, the phrase 'wrongly availed or utilised' should also be understood as situations causing loss to the exchequer. Further, the use of the word 'or' in the phrase 'wrongly availed or utilised' is possibly to recover or to ensure reversal of credit involved in cases where credit was wrongly availed but not utilised as non- reversal of the wrongly availed credit is likely to cause utilisation in future thereby causes loss to the exchequer.

The Honourable Patna High Court, recently in the case of Commercial Steel Engineering Corporation vs. State of Bihar[18], has examined whether the provisions of section 73(1) can be invoked in a case where transitional credit was availed and reversed in electronic credit ledger without utilisation and it was held as under:

I have reproduced the relevant provisions of the 'BGST Act' which finds mention in the discussion held for ready reference. The legislative intent present in these provisions is eloquent and I am in no confusion to hold that be it a charge of wrong availment or utilization, each is a positive act and it is only when such act is substantiated that it makes the dealer concerned, liable for recovery of such amount of tax as availed from the input tax credit or utilized by him but in each of the two circumstances, the tax available at the credit of the dealer concerned must have been brought into use by him thus, reducing the credit balance. ***A plain reading of Section 73 would confirm that it is only on such availment or utilization of credit to reduce tax liability, which is recoverable under Section 73(1) read alongside the other provisions present thereunder. In fact the position is made even more clear by reading the said provision alongside sub-section (5), (7), (8), (9) to (11).***

[16] Provisions of section 73(1) and 74(1) are in Pari Materia. Hence reference was made only to section 73(1) to avoid repetition.

[17] a doctrine or rule of construction which provides that the meaning of an unclear or ambiguous word (as in a statute or contract) should be determined by considering the words with which it is associated in the context

[18] 2019(28)GSTL579(Patna)

Had it been a case where the credit shown in electronic ledger, was availed or utilized for meeting any tax liability for any year, there would be no error found in the action complained but it would be stretching the term 'availment' beyond prudence to treat the mere reflection of the transitional credit in the electronic credit ledger as an act of availment, for drawing a proceeding under Section 73(1) of 'the BGST Act'. The provisions underlying Section 73 is self eloquent and it is only if such availment is for reducing a tax liability that it vests jurisdiction in the assessing authority to recover such tax together with levy of interest and penalty under Section 50 but until such time that the statutory authority is able to demonstrate that any tax was recoverable from the petitioner, a reflection in the electronic credit ledger cannot be treated as an 'availment'.

(emphasis supplied)

Thus, the Honourable Patna High Court has opined that the objective of Section 73 is to recover taxes or input credit that was due to be recovered and held that if the availment or utilisation has not resulted in reduction of tax liability, the provisions of section 73 cannot be invoked to recover or ensure of credit along with interest and penalty.

While expressing the above views, the Honourable Patna High Court has considered the decision of Honourable Supreme Court in Ind-Swift Laboratories Limited (supra) and has distinguished the same based on facts. The decisions of Honourable Karnataka High Court and Madras High Court and other conflicting judgments were not considered. Therefore, the possibility of overruling the proposition laid down in this case by Honourable Patna High Court cannot be ruled out.

Conclusion:

Immediately, after the introduction of GST, the issue whether interest is payable on gross tax liability or on net tax liability after adjustment of credit has popped up, after extensive litigation and with the latest decision of GST Council to give retrospective effect to the amendment under Section 50 to CGST Act, the same has been eventually settled in favour of tax payer. As mentioned, notices are issued under GST law to recover interest in cases of wrong availment of credit but reversed without utilisation of the same.

Considering the above discussed conflicting judgments under erstwhile CENVAT Credit Rules, 2004, there is a great possibility that this issue would also be subject to extensive litigation and conflicting views are possible in the same manner as interest payable on gross or net tax liability. The conflict whether 'Or' should be read as 'And' or not would continue. Hence, it is strongly recommendable that the GST Council takes this aspect in upcoming meetings and put an end to the same as they did for Rule 14 in erstwhile law to contain the possible litigation.