THE GODS MUST BE CRAZY – PART II

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THE P-AND-OR-A BOX

"Deal not unjustly, and ye shall not be dealt with unjustly"

002.279: THE HOLY QURAN

Last week Mr. Ganapathy, who works as a Central Excise clerk in a small scale unit and known to me for years, came to see me. He is 60 and going to retire next month. He was so nervous and agitated that I thought it maybe due to his old age and retirement blues. But when he told me the reason, I could only sympathize…

Being a SSI unit, they were filing the periodical returns end of every quarter. Last quarter, due to sheer clerical posting error, while bringing forward the Cenvat credit balance from the previous page, he had posted 100000.00 as 10000000. The company had never used the credit taken wrongly and it remained only in the books. When they realized the mistake themselves and wanted to correct it, the vigilant (!) department had given a show cause notice, demanding interest for 99 lakhs, alleging "credit wrongly taken as per Rule 14 of the Cenvat Credit Rules, 2004 (CCR) based on the latest Apex Court decision in the case of UOI vs Ind-Swift laboratories Ltd.

Rule 14 of CCR is the recovery provision for the Cenvat credit taken or utilized wrongly or erroneously refunded. Rule 14 of CCR reads as :

> *"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."*

All these years, the conjunction OR contained in the above Rule had been read substituting with the conjunction AND by various Courts and Tribunals. This interchange was in an attempt to make the Rule more meaningful and avoid a possible inequity and absurdity.

As we all know, in the Cenvat scheme, credit is TAKEN into the books by a manufacturer or a service provider, upon receipt of inputs, capital goods or availment of services, as the case maybe. In fact, the CCR itself mandates that the Cenvat credit has to be taken "immediately" (Ref: Rule 4(1) of CCR).

The Cenvat credit so taken will subsequently be UTILISED by the manufacturer or service provider, as the case maybe, for payment of his tax liability. In short, the

TAKING of Cenvat credit and UTILISATION of the same are two independent acts. There can be many situations where a manufacturer or a service provider would only TAKE the Cenvat credit in his books to comply with the "immediate" mandate prescribed in Rule 4(1) of CCR and may not UTILISE for a considerable period of time because of variety of reasons. For example, a green field manufacturer, who is constructing his factory would only be TAKING the Cenvat credit on his various inputs/input services/capital goods in his books and may not be UTILISING it, as he might not have commenced his production and clearance.

In such situations, the TAKING of Cenvat credit in the books and not UTILISING the same against any tax liability, is a mere book entry having no impact to the treasury. If the conjunction OR contained in above Rule is given plain effect, it would create an undue charge of interest on the manufacturer or service provider, for a mere book entry. Thus, all these years, the Courts and Tribunals read down the OR contained in the said Rule as AND so as to avoid such absurdity.

Now the Apex Court in the case of Ind-swift *supra* has held that a bare reading of the said Rule would indicate that the manufacturer or the provider of the output service becomes liable to pay interest along with the duty where CENVAT credit has been taken or utilized wrongly

or has been erroneously refunded and that in the case of the aforesaid nature the provision of Section 11AB would apply for effecting such recovery.

It has been further held that as the above 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 recovered from the manufacturer or the provider of the output service, there is no reason to read the word "OR" in between the expressions `taken' or `utilized wrongly' or `has been erroneously refunded' as the word "AND". In fine, it has been held that, in the happening of any of the three aforesaid circumstances such credit becomes recoverable along with interest.

While concluding so, the Apex Court has also observed that the attempt of the High Court to read down the provision by way of substituting the word "OR" by an "AND" so as to give relief to the assessee is erroneous. While appreciating the submissions of the counsel, the Hon'ble Apex Court had also observed that **once the said credit is taken the beneficiary is at liberty to utilize the same, immediately thereafter, subject to the Credit Rules.**

Drawing parallel, should I pay interest on my credit limit available in my credit card instead of to the extent I have used it?

Before parting…

Sec 35F of CEA reads as under:

> *"Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of Central Excise authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority* ***the duty demanded or the penalty levied****"*

Now that the Apex Court has held that the word "OR" cannot be substituted by the word "AND", would it suffice that the appellant deposits **either the duty demanded OR the penalty levied** so as to comply with the requirement under Sec 35F?