

"And", "or" game ended. For good?

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Issue : If any Cenvat Credit has been availed wrongly, whether any interest is payable, if such credit has not at all been used for payment of excise duties / service tax, but only remained in the books?

Rule 14 of the Cenvat Credit Rules, 2004 stood as below.

Rule 14. Recovery of CENVAT credit wrongly taken or erroneously refunded :- 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."

The Hon'ble Supreme Court has considered the above rule in the case of UOI Vs Ind-Swift Laboratories Pvt. Ltd. (2011-TIOL-21-SC-CX) and it has concluded that the word "or" in the phrase "taken or utilised" should not be read as "and" and hence interest is payable, even if the wrongly availed credit has not been used at all.

In a benevolent move, the said "or" was substituted with "and" vide Notification 18/2012 CE (NT) Dt. 17.03.2012, with effect from 01.04.2012. Thereby, interest liability would arise, only if the wrongly availed cenvat credit is utilised.

In as much as all cenvat credit availed by a registrant is accumulated in a common pool, it is practically difficult to say whether the wrongly availed credit was utilised or not. Customarily, if an assessee had always maintained a balance in Cenvat Account, more than the wrongly availed credit, from the date of availing of such wrong credit, to the date of its reversal / repayment, it is considered as if the wrongly availed credit had not been used.

In order to remove any ambiguity in this regard, a new Rule 14 has been substituted vide Notification 6/2015 CE (NT) Dt 01.03.2015, which reads as below.

14. Recovery of CENVAT credit wrongly taken or erroneously refunded. – (1) (i) Where the CENVAT credit has been taken wrongly but not utilised, the same shall be recovered from the manufacturer or the provider of output service, as the case may be, and the provisions of section 11A of the Excise Act or section 73 of the Finance Act, 1994 (32 of 1994), as the case may be, shall apply *mutatis mutandis* for effecting such recoveries;

(ii) Where the CENVAT credit has been taken and utilised wrongly or has been erroneously refunded, the same shall be recovered along with interest from the manufacturer or the provider of output service, as the case may be, and the provisions of sections 11A and 11AA of the Excise Act or sections 73 and 75 of

the Finance Act, 1994, as the case may be, shall apply mutatis mutandis for effecting such recoveries.

(2) For the purposes of sub-rule (1), all credits taken during a month shall be deemed to have been taken on the last day of the month and the utilisation thereof shall be deemed to have occurred in the following manner, namely: -

(i) the opening balance of the month has been utilised first;

(ii) credit admissible in terms of these rules taken during the month has been utilised next;

(iii) credit inadmissible in terms of these rules taken during the month has been utilised thereafter.”.

Though sub rule (2) of Rule 14 as above, on a first reading suggests that more clarity has been brought to the issue, a close reading of the same reveals potential danger in it and it is not known whether such implication is intentional or otherwise. Let us understand through an example.

1	Opening Balance of Cenvat Credit on 01.04.2015	Rs.5,00,000
2	Cenvat Credit availed from 01.04.2015 to 30.04.2015 (Deemed to be availed on 30.04.2015)	Rs.1,00,000
3	Ineligible credit availed during April 2015, out of (2) above	Rs.50,000
4	Credit utilised on 05.05.2015 for payment of duty for clearances made during April 2015 *	Rs.5,50,000
5	Balance of Cenvat credit available	Rs.50,000

* For better clarity, it is assumed that no credit was utilised during April 2015.

Now the question is as to whether the wrongly availed credit of Rs.50,000 in April 2015 has been used or not, so as to decide on interest liability.

As per sub rule (2) of Rule 14, the amount of Rs.5,50,000 utilised on 05.05.2015, first comprises of Rs.5,00,000 from the opening balance and comprises of Rs.50,000 from the eligible credit availed in April 2015. As a result, the wrongly availed cenvat credit of Rs.50,000 has not at all been used.

So far so good.

But if we carry the illustration further,

1	Opening Balance of Cenvat Credit on 01.05.2015	Rs.6,00,000
2	Cenvat Credit utilised on 05.05.2015	Rs.5,50,000
3	Cenvat Credit balance on 05.05.2015 (This represents the unutilised ineligible credit)	Rs.50,000
4	Cenvat credit availed during May 2015	Rs.2,50,000
5	Opening Balance of Cenvat Credit on 01.06.2015	Rs.3,00,000
6	Cenvat Credit utilised on 05.06.2015 for payment of duty for the clearances made during May 2015	Rs.2,50,000
7	Balance of Cenvat Credit	Rs.50,000

It may be observed that as per clause (i) of sub rule (2) of Rule 14, the credit of Rs.2,50,000 utilised on 05.06.2015 is first from the opening balance. But such opening balance includes the ineligible credit of Rs.50,000 too. Does it mean that the credit wrongly availed in April 2015, if not utilised in May 2015, would become opening balance of June 2015 and when such opening balance is first used in June 2015, it would amount to utilisation of such wrongly availed credit in June 2015? In other words, though the credit balance was always maintained at a level higher than the wrongly availed credit, that does not offer any protection from interest liability and interest liability can at best be avoided only for the first month?

Is it really intentional?