

CENVAT Credit is 'as good as tax paid' and its utilization indefeasible

Date : August 23 2017



**Poonam Harjani, Partner,
Nitya Tax Associates**



Neha Jain, Associate

Over the years, CENVAT Credit ('Credit') provisions had been flooded with numerous litigations. Yet another area is the restrictions on its utilization posed in varied manner by the Government from time to time. This write-up is a critique on the recent judgement of Gujarat High Court in the case of ***Advance Surfactants India Ltd vs. Union of India, 2017 (8) TMI 594- Gujarat HC TS-212-HC-2017(GUJ)-EXC***, regarding validity of the proviso to sub-rule (4) of the rule 3 of CENVAT Credit Rules, 2004 ('Credit Rules').

Powers to make rules by the Central Government was conferred under clauses (xviii) and (xvii) of Section 37(2) of the erstwhile Central Excise Act, 1944 ('the Act') *inter alia* to provide for the credit of the duties or tax paid on inputs, capital goods and input services used in or in relation to the manufacture of excisable goods or for the provision of taxable output services.

Pursuant to the aforementioned enabling provision under the Act, CENVAT scheme was introduced with the main objective of allowing Credit to prevent cascading effect of central duties and taxes paid on procurements used in or in relation to manufacture of the final products or for the provision of taxable output services. Credit Rules were introduced in supersession of CENVAT Credit Rules, 2002 and the Service Tax Credit Rules, 2002 and were made effective from September 10, 2004.

Basically, Rule 3 of the Credit Rules provides for availing the Credit by the manufacturer of final products or by the provider of output services. However, restriction was imposed by the Government on the utilization of the Credit under proviso to rule 3(4) of Credit Rules.

Recently, the validity of this proviso has been challenged because it disentitles the utilization of Credit available in the subsequent month against the previous month's liability.

However, rule 8 of the extant Central Excise Rules, 2002 ('Excise Rules') provides for the manner of payment of the duty payable related to a particular month. Per the said rule, the amount due is to be paid by 6th / 5th day of the following month if the duty is paid electronically or in any other manner respectively.

Question is that whether CENVAT credit for the period subsequent to the month to which the duty payable relates, is available for utilization against the duty related to the previous period (month or quarter as the case may be).

In the instant matter, in view of the proviso to rule 3(4), the assessee was called upon by the department to pay the duty relating to the month or quarter by utilizing the Credit available on the last day of the month or quarter and the Credit available in the subsequent month to the assessee was not allowed to be utilized against that liability. Against such action by the department, the assessee filed the instant writ petition and argued before the court that the restriction in the aforesaid proviso did not have any nexus to the object sought to be achieved by the Credit Rules as Credit is available as and when duty or tax is paid. The assessee accordingly challenged the validity of the proviso to sub-rule (4) of rule 3 of the Credit Rules.

The High Court appreciated the assessee's plea that though the manufacturer might have Credit available after the end of month in his account, the same was not permitted to be utilized between the last day of the month

and 6th day of the following month, and therefore, proviso to sub-rule (4) of rule 3 of the Credit Rules would be just contrary and /or in conflict with rule 8(1) of the Excise Rules. The court accordingly held that a manufacturer can be and should be permitted to utilize the Credit legally availed during the first 5 or 6 days of the subsequent month for paying the duty related to the previous month.

Consequently, the said proviso was held to be ultra vires and unconstitutional to the CENVAT Scheme.

In this context, it is pertinent to note that the rendering of the said proviso as invalid and unconstitutional to the scheme of Credit Rules would make the utilization of the Credit related to the subsequent month to the month to which duty payable was related as infeasible. The possible effects of this judgement can be seen in the following scenarios:

1. Duty payment by the due date i.e. the assessee while discharging the duty liability duly utilizes the credit available from the first day up to the 5th / 6th day of the subsequent month against the liability of the preceding month. In that case, no duty demand (to the extent of Credit utilized for credit accruing post close of the month / quarter) and the interest liability would get attracted upon the tax payer in view of this ruling.

2. Delayed payment of duty i.e. the assessee files the periodic return after the due date and utilizes the Credit relating to the period after the 5th or 6th day of the subsequent month. Here, the duty demand to the extent of Credit utilized post the due date can be defended basis this ruling. That said, as per section 11AA of the Act, interest liability may still get attracted on amount of failure to discharge duty payable by the due date which was later adjusted against the subsequent period Credit.

3. Duty demand i.e. the duty demand is raised on the assessee pursuant to departmental proceedings. Here again, proviso to rule 3(4) having been held unconstitutional, the duty payable on arising of any demand would be allowed to be adjusted against the future eligible credit. However, the same may also be subject to the interest liability.

In this regard, it is important to take note of the *Circular No. 962 / 5 / 2012 - CX* issued by the Central Board of Excise & Customs on 28th March 2012 wherein it was clarified that *'the restriction on the utilization of the Credit accruing subsequent to the last date of the preceding month, would not be applicable to the demands confirmed under Section 11A of the Act'*. This view has now also received judicial backing through this recent ruling.

Before concluding, it is relevant to note that this ruling would not have any impact on the input tax credit utilization under the current GST regime, which is based on matching concept. This is for the reason that, such subsequent input tax credit will not get reflected in the periodic return of the supplier and thus will not be available for adjusting the previous month's liability of the recipient. Further, the condition of payment of such tax by the supplier will have to be fulfilled to take the benefit of the input tax credit.

To wind up, the instant ruling certainly, once again, highlights the liberal approach of the Indian judiciary in interpreting the Credit Rules. That said, this judgement will have limited ramifications upon the past pending dispute related to credit utilization, late payments and defaults in payment of duties. The recently introduced GST law remains unimpacted with this ruling.