

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH

EXCISE APPEAL NO. 70496 OF 2019

(Arising out of Order-in-Appeal No. 44/CE/ALLD/2019 dated 25.03.2019 passed by the Commissioner (Appeals), Goods & Service Tax, Central Excise, Allahabad)

Dy. Gen. Manager (Finance & Excise)

Bharat Heavy Electricals Ltd.,
P.O Village Khailar Jhansi 284129 (U.P.)

...Appellant

VERSUS

Commissioner, CGST & CE

GST Bhawan, 117/7 Saravodya Nagar,
Kanpur

...Respondent

APPEARANCE:

Shri Z.U. Alvi, Advocate for the Appellant

Shri Amit Bharadwaj, Authorized Representative for the Department

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT

HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing / Decision: 29.04.2022

FINAL ORDER NO. 70111/2022

JUSTICE DILIP GUPTA:

The order dated 25.03.2019 passed by the Commissioner (Appeals), Allahabad¹ has been assailed in this appeal. The said order upholds the order dated 06.12.2018 passed by the Assistant Commissioner that had rejected the refund of accumulated balance amount of credit on education cess, secondary and higher education cess and krishi kalyan cess².

2. The appellant is a manufacturer of power generation/ utilization/transmission/conservation equipments. It supplies these

1. the Commissioner (Appeals)

2. the cess

products to NTPC, NHPC, PGCI, State Electricity Board and Private Thermal/Hydro/Nuclear/Power sector establishments.

3. Prior to 01.03.2015, cess was leviable on goods manufactured by the appellant, in addition to excise duty, and the appellant availed CENVAT credit under the provisions of the CENVAT Credit Rules 2004³ on cess paid on procurement of goods and services. However, the notification dated 01.03.2015 exempted levy of the cess on all goods falling in the First Schedule to the Central Excise Tariff Act, 1985⁴. Thus, w.e.f. 01.03.2015 only central excise duty was leviable and levy of cess was exempted. The closing balance of the cess as on 28.02.2015 could not consequently be utilised by the appellant post 01.03.2015 and it was carried forward in the central excise returns. This was for the reason that credit of cess could be utilised for payment of the cess under the Credit Rules and could not have been utilised for payment of excise duty. On introduction of the Central Goods and Service Tax, 2017 Act⁶ w.e.f. 01.07.2017, the closing balance of the credit on cess appearing in the excise returns filed by the appellant in the month of June 2017 was not carried forward and instead the appellant filed a claim for refund of such balance of Rs. 53,47,491/- of credit on cess on 29.05.2018.

4. A show cause notice dated 16.07.2018 was, however, issued to the appellant stating therein that the claim appeared to be inadmissible. The appellant filed a reply dated 03.10.2018 to the aforesaid show cause notice. The Assistant Commissioner, by order dated 06.12.2018, rejected the refund claim. Feeling aggrieved, the appellant filed an appeal before the Commissioner (Appeals). The said appeal was

3. the Credit Rules

4. the Tariff Act

rejected by the Commissioner (Appeals) by order dated 25.03.2019. It is this order that has been assailed in this appeal.

5. Shri Z.U. Alvi, learned counsel for the appellant made the following the submissions:

- (i) Refund of the credit could not have been denied to the appellant merely on the ground that such credit was not utilized prior to GST regime. In this connection, reliance has been placed on the decision of the Tribunal in **Slovak India Trading Co. Pvt. Ltd. vs. Commissioner of C. Ex., Bangalore**⁵, against which the appeals filed by the department before the Karnataka High Court and the Supreme Court were dismissed. These decisions are reported in **2008 (10) S.T.R. 101 (Kar.)**⁶ and **2008 (223) E.L.T. A170 (S.C.)**⁷;
- (ii) Reliance has also been placed upon the following decisions of the Tribunal:
 - a) **M/s Bharat Heavy Electricals Ltd. (Excise & Taxation Division) vs. The Commissioner, Central Goods Service Tax, Central Excise & Customs, Bhopal**⁸;
 - b) **Schlumberger Asia Services Ltd. vs. Commissioner of CE & ST, Gurgaon-I**⁹;
 - c) **Nichiplast India Private Ltd. vs. Principal Commissioner CGST**¹⁰; and
 - d) **Kirloskar Toyota Textile Machinery Pvt. Ltd. vs. Commissioner of Central Tax, Bengaluru South GST Commissionerate**¹¹;
- (iii) Reliance has also been placed upon the decision of the Punjab and Haryana High Court in **The Commissioner,**

5. 2006 (205) E.L.T. 956 (Tri. – Bang.)

6. Union of India vs. Slovak India Trading Co. Pvt. Ltd.

7. Union of India vs. Slovak India Trading Co. Pvt. Ltd.

8. 2020-VIL-402-CESTAT-DEL-CE

9. Service Tax Appeal No. 60095 of 2021 decided on 24.05.2021

10. Excise Appeal No. 50790 of 2019 decided on 23.07.2021

11. 2021-VIL-375-CESTAT-BLR-CE

Goods & Service Tax Commissionerate vs. M/s Shree Krishna Paper Mills & Industries Ltd. & Ors.¹²;

- (iv) CENVAT credit is a vested right which crystallized in favour of an assessee the moment input goods/services are received and cannot be taken away. In this connection reliance has been placed upon the decisions of the Supreme Court in **Eicher Motors Ltd. and another vs. Union of India and others¹³** and **Samtel India Ltd. vs. Commissioner of Central Excise, Jaipur¹⁴**; and
- (v) The appellant is also entitled to refund in view of the provisions of section 142(8)(b) of the GST Act. In support of this contention, reliance has been placed upon the decision of the Tribunal in **Punjab National Bank vs. Commissioner of Central Tax, Bangalore North¹⁵**.

6. Shri Amit Bharadwaj, learned authorized representative appearing for the Department, however, made the following submissions:

- (i) The assessee cannot claim cash refund or encashment of unutilized and unavailed amount of credit. In support of this connection reliance has been placed on the decision of a learned Member of the Tribunal in **Bharat Electricals Ltd. vs. Commissioner of C.T., Secunderabad-ST¹⁶**;
- (ii) Since cess was not payable after the cut-off date, disallowing credit thereafter is justified. In support of this contention, reliance has been placed on the judgment of the Delhi High Court in **Cellular Operators Association of India vs. Union of India¹⁷**; and

12. CEA No. 36 of 2019 (O & M) decided on 11.12.2019
 13. (1999) 2 SCC 361
 14. (2003) 11 SCC 324
 15. 2021-VIL-289-CESTAT-BLR-ST
 16. 2020 (41) G.S.T.L 465 (Tri.-Hyd)
 17. 2018 (14) G.S.T.L. 522 (Del.)

(iii) Clarification issued by Circular dated 07.12.2015 also disentitles the appellant from claiming refund.

7. The submissions advanced by learned counsel for the appellant and the learned authorized representative appearing for the Department have been considered.

8. It is not in dispute that prior to 01.03.2015 cess was leviable on manufactured goods, in addition to excise duty and the appellant had availed credit under the provisions of the Credit Rules on cess paid on procurement of goods and services. It is also not in dispute that by a notification dated 01.03.2015, levy of cess was exempted. The closing balance of credit of cess as on 28.02.2015, therefore, could not be utilized by the appellant and it was carried forward by him in the central excise returns.

9. The submission of learned counsel for the appellant is that refund of credit of cess cannot be denied merely on the ground that such credit, which could not be utilized prior to GST regime, would stand lapsed. In this connection, learned counsel placed reliance upon the decision of this Division Bench of the Tribunal in **Emami Cement Limited vs. Commissioner (Appeals), CGST, Central Excise**¹⁸.

10. The Division Bench in **Emami Cement**, after placing reliance upon the decision of the Tribunal in **Slovak India Trading** which decision was subsequently affirmed by the Karnataka High Court and the Supreme Court as also Division Bench decisions of the Tribunal in **Bharat Heavy Electricals, Kirloskar Toyota, Nichiplast India** as also the judgment of the Punjab and Haryana High Court in **Shree Krishna Paper Mills**, held that the appellant was entitled to claim

18. Excise Appeal No. 52318 of 2019 decided on 28.03.2022

refund of the balance amount of credit of cess. The Division Bench also held that the notification dated 07.12.2015, on which reliance had been placed by the Department, was contrary to the decisions of the High Court and the Tribunal and, therefore, would not come to the aid of the Revenue. The Division Bench also held that CENVAT credit was a vested right.

11. The facts of this appeal are similar to the facts of **Emami Cement**.

12. The order dated 25.03.2019 passed by the Commissioner (Appeals), therefore, cannot be sustained and is set aside. The appeal is, accordingly, allowed with consequential relief.

(Order Pronounced in Open Court on 29.04.2022)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. V. SUBBA RAO)
MEMBER (TECHNICAL)