CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.
PRINCIPAL BENCH - COURT NO.III

Excise Appeal No.55151 of 2023 (SM)

[(Arising out of Order-in-Appeal No.BHO-EXCUS-001-APP-204-22-23 dated 02.02.2023 passed by the Commissioner (Appeals), CGST and Central Excise, Bhopal (M.P.)]

M/s.Unipatch Rubber Limited **Appellant**
Maharajapura, M.P. Floor Mill Complex,
Industrial Area, Bhind Road,
Village-Jaderua Khurd,
Gwalior (M.P.) 474 005.

VERSUS

Commissioner of CGST and Central Excise, **Respondent**
48-A, Administrative Area, Arera Hills,
Bhopal (M.P.-462 011.

APPEARANCE:

Shri Saurabh Singhal, Advocate for the appellant
Shri Arun Sheoran, Authorised Representative for the respondent

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)

FINAL ORDER NO.55474/2024

DATE OF HEARING: 22.03.2024
DATE OF DECISION: 03.04.2024

BINU TAMTA:

1. The present appeal has been filed against the Order-in-Appeal dated 02.02.2023, whereby the Commissioner (Appeals) denied the utilization of credit of Education Cess ('EC') and Secondary Higher Education Cess ('SHEC') towards the liability of excise duty.

2. The brief facts are that the appellant had utilized the credit of EC and SHEC in the Returns filed for May, 2015 while discharging the

liability to pay the excise duty. During audit of records, it was noticed that the appellant had wrongly utilized the EC and SHEC for discharging the central excise duty as the goods and services for the same were received prior to 01.03.2015 in contravention of the provisions of Rule 3(7)(b) of Cenvat Credit Rules, 2004 (CCR, 2004) inserted by Notification No.12/2015-C.E. (NT) dated 30.04.2015. Show cause notice dated 29.05.2020 was issued to the appellant as to why an amount of Rs.1,97,346/- be not recovered from the appellant along with interest and penalty. On adjudication, vide order-in-original dated 12.01.2022, the proposal in the show cause notice was affirmed. On appeal by the appellant, the Commissioner (Appeals) dismissed the appeal by the impugned order. Hence, the present appeal has been filed by the appellant before this Tribunal.

3. Have heard Shri Saurabh Singhal, learned Counsel for the appellant and Shri Arun Sheoran, learned Authorised Representative for the Department and perused the records of the case.

4. The submission of the learned Counsel for the appellant is limited only to the invocation of extended period of limitation, as the main issue on merit has been decided against them by the Delhi High Court in **Cellular Operators Association of India Limited Vs. Union of India – 2018 (4) GSTL 522 (DEL)**. According to him, the extended period of limitation cannot be invoked when the basis of the demand is already disclosed in the returns filed by the tax payers. In

the present case, the appellant had disclosed the fact of utilization of the Cess towards payment of excise duty in the monthly ER-I. He relied on the decision in the case of **Metco Roof Pvt. Ltd. Vs. The Principal Commissioner of GST and CE, Coimbatore – 2021-VIL-302-CESTAT-CHE-CE,** where on account of interpretational issues, penalty imposed under Section 11AC (c) of the Act was set aside and as the provisions for invoking the extended period of limitation under Section 11 A(4) of the Act have similar ingredients, the same cannot be invoked.

5. Learned Authorised Representative for the respondent reiterated the findings of the Authorities below and submitted that the declaration made by the appellant in ER-I was not complete disclosure. As per the notification, on which the appellant had placed reliance required that the goods and services should have been received in the factory of manufacturer on or after 1.3.2015 was not complied with. The appellant had deliberately suppressed the facts with an intent to evade payment of duty as only an amount of Rs.60,485/- pertained to the period after 1.3.2015 out of the utilized amount of Rs.2,57,831/- and the balance amount of Rs.1,97,346/- pertained to the period prior to 1.3.2015, which was not admissible in terms of the notification and, therefore, the extended period of limitation under Section 11 A was rightly invoked for recovery of duty and penalty under Section 11 AC of the Act.

6. Before considering the issue, the amendment made in the Cenvat Credit Rules, 2004 vide Notification No.12/2015-CE(NT) dated 30.04.2015 is set out below:-

> "Rule 3, in sub-rule (7), in clause (b), after the second proviso, the following was substituted, namely :-
>
> > "**Provided** also that the credit of Education Cess and Secondary and Higher Education Cess paid on inputs or capital goods received in the factory of manufacture of final product on or after the 1st day of March, 2015 can be utilized for payment of the duty of excise leviable under the First Schedule to the Excise Tariff Act:
> >
> > **Provided** also that the credit of balance fifty per cent. Education Cess and Secondary and Higher Education Cess paid on capital goods received in the factory of manufacture of final product in the financial year 2014-15 can be utilized for payment of the duty of excise specified in the First Schedule to the Excise Tariff Act:
> >
> > **Provided** also that the credit of Education Cess and Secondary and Higher Education Cess paid on input services received by the manufacturer of final product on or after the 1st day of March, 2015 can be utilized for payment of the duty of excise specified in the First Schedule to the Excise Tariff Act."

7. I find that the declarations made by the appellant in ER-I is to the following effect –

> "As per notification no.12/2015-CE(NT) dated 30.04.2015 Education Cess amount of Rs.1,71,932/- and Higher Education Cess Amount of Rs.85,899/- used in payment of Excise (Basic) duty."

8. Considering the declaration above, I am of the opinion that it is a mis-leading declaration with an intent to evade payment of duty under the Act. The appellant consciously took the benefit of the notification no.12/2015 for the purpose of utilizing the 'EC' and 'SHEC' towards payment of excise duty, which otherwise was not

permissible. But deliberately did not comply with the conditions specified for such utilization, which required that the credit of EC and SHEC paid on inputs or capital goods received in the factory of manufacture of final products on or after the 1st day of March, 2015 could be utilized for the payment of duty of excise. The appellant cannot bifurcate the benefit, which was granted under the notification and avail the same but ignore the conditions specified for such utilization and hence, the invocation of the extended period of limitation was justified. It is settled law that a party cannot approbate and reprobate at the same time. In this regard, I would like to refer the decision of the Apex Court in the case of **Shyam Telelink Vs. Union of India - 2010(10) SCC 165 and Bharti Cellular Ltd. Vs. Union of India and Ors. – 2010 (10) SCC 174,** laying down that the person taking advantage under an instrument, which both grants a benefit and imposes a burden, cannot take the benefit without discharging the burden. It was, therefore, not permissible for the appellant to avail the benefit of utilization under the notification without discharging the burden of declaring with reference to the cut-off period prescribed therein.

9. Reliance placed by the appellant on the decision of the **Metco Roof Pvt. Ltd. (supra),** where the learned Single Member, although upheld the demand raised as legal and proper, however, rejected the levy of penalty as unwarranted, since the issue is of interpretational nature. With due respect, I beg to differ from the view taken by the

learned Single Member in **Metco Roof Pvt. Ltd. (supra)** as the consistent view of the department and the Tribunal and as upheld by the Delhi High Court in **Cellular Operators Association of India (supra)** that two cesses i.e. 'EC' and 'SHEC' and the excise duty and the service tax had been treated as different and separate and cross utilization was never permitted. Though the decision of the Delhi High Court is under challenge before the Apex Court in SLP (C) No.020273/2018, however, no stay of the impugned order has been granted. Even prior to the decision in **Cellular Operators Association of India (supra)** Ahmedabad Bench of the Tribunal in **Fieldman Engineers Ltd. Vs. Central Excise and ST, Rajkot – 2018 (363) ELT 1067 (T-Ahmedabad)** has specifically held that cenvat credit lying in balance in the account of Higher Secondary Education Cess and accumulated before 1.3.2015 can be used only for discharge of Cess as provided under the rules and cannot be used for discharging the liability of excise duty.

10. I may now consider the peculiar facts of the present case, as discussed above, which have direct bearing on the applicability of extended period of limitation. The appellant though made a declaration that 'EC' and 'SHEC' is being used in payment of excise duty as per the notification no.12/2015 but that was an incomplete declaration with intent to mis-lead the Department. Once the appellant was utilizing the 'EC' and 'SHEC' towards payment of excise duty by virtue of the liberty granted under the notification, it is the

bounden duty to disclose as to whether the credit of the two cesses paid on inputs or capital goods was received on or after 1.3.2015. However, the appellant did not disclose whether the amount was received prior to the cut-off date or after 1.3.2015, knowing that the amount received prior to the said date could not have been adjusted towards the liability of excise duty and deliberately made bald reference to the notification. The reliance placed by the learned Authorised Representative on the decision of the Apex Court in **Continental Foundation Joint Venture Holding Vs. CCE, Chandirgarh – 2007 (216) ELT 177 (SC)** holding that suppression means failure to disclose full information with intent to evade payment of duty, squarely covers the present case. In that view, the extended period of limitation has been rightly invoked.

11. I do not find any error in the impugned order and the same is hereby affirmed. The appeal, is accordingly dismissed.

[Order pronounced on 3rd April, 2024]

(Binu Tamta)
Member (Judicial)

Ckp.