IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

<u>BENCH-SM</u>

COURT –III

<u>Excise Appeal No. E/60457/2013-Ex [SM]</u>

[Arising out of Order-in-Appeal No. MTR/EXCUS/002/App/92&13-14 dated 29.08.2013 passed by the Commissioner (Appeals), Customs, Central Excise, Meerut-II.]

M/s. Mahindra & Mahindra. **...Appellant**

Vs.

C.C.E., & S.T., Meerut-ii **... Respondent**

Present for the Appellant : Mr. Anurag Kapur, (Adv.)
Present for the Respondent : Mr. K. Poddar, A.R.

Coram: HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

Date of Hearing.22.06.2018
Date of Decision.04.07.2018

FINAL ORDER NO. _52413/2018___

PER: AJAY SHARMA

The instant Appeal has been filed by the Appellant from the impugned order dated 29.08.2013 passed by the Commissioner (Appeals), Customs, Central Excise, Merut-II.

2. The Appellant are engaged in manufacturing of tractors classifiable under Chapter heading 8701 of the First Schedule to the Central Excise Tariff Act, 1985 . With effect from 9.7.2004 'Tractors' were exempted from payment of excise duty. However, Tractor cess @ 0.125% Adv. were levied on the Tractors of engine capacity of more than 1800 cc. Besides Education Cess @ 2% and Secondary Higher Education Cess @ 1% is also levied w.e.f.

9.7.2004. During the course of audit of the Appellant's accounts by the Audit team of Central Excise observed that the Appellant were availing credit of Education Cess and Secondary Higher Education Cess paid on the inputs and is utilising the same towards payment of Education Cess and Secondary Higher Education Cess payable on Tractor Cess on the Tractors although the same is not admissible in terms of Rule 6(1) of the CENVAT Credit Rules, 2002 since the final product i.e. 'Tractors' are wholly empted from payment of Excise duty.

3. Accordingly two show cause notices were issued to the Appellant. The 1st show cause notice dated 4.10.2011 was issued for the period from September, 2006 to March, 2011, as to why:-

(i) *Cenvat Credit of Rs. 42,06,647.00 (Rupees Forty Two Lakh Six Thousand Six hundered and Forty Seven Only) wrongly availed and utilized by them towards payment of Education Cess (Rs. 29,19,956.00) and Higher Education Cess (Rs. 12,86,691.00), as per details shown in Annexure A to this notice, should not be disallowed and recovered from them under Rule 14 of Cenvat Credit Rules' 2004 read with proviso to Section 11 A(1) of the Central Excise Act, 1944.*

(ii) *Interest under Section 11 AB of the Central Excise Act, 1944, should not be recovered from him, as applicable.*

(iii) Penalty under Rule 15(2) of Cenvat Credit Rules 2004, read with Section 11 AC of Central Excise Act, 1944 should not be imposed upon them.

4. The 2nd Show cause notice dated 2.5.2012 was issued for the period from April, 2011 to March, 2012 as to why:-

(i) Cenvat Credit of Rs. 7,64,850/- (Rupees Seven Lakhs sixty forty thousand eight hundred and fifty only) wrongly availed from April, 2011 to March 2012 and utilized by them towards payment of Education Cess (Rs. 5,09,900/-) and Higher Education Cess (Rs. 2,54,950/-), as per details shown in Annexure A to this notice, should not be disallowed and recovered from them under Rule 14 of Cenvat Credit Rules' 2004 read with proviso to Section-11 A(1) of the Central Excise Act, 1944.

(ii) Interest under Section 11 AB of the Central Excise Act, 1944, should not be recovered from him, as applicable.

(iii) Penalty under Rule 15(2) of Cenvat Credit Rules 2004, read with Section 11 AC of Central Excise Act, 1944 should not be imposed upon them.

5. The Adjudicating Authority i.e. Additional Commissioner Central Excise, Meerut-II vide Order-in-Original dated 28.12.2012 confirm the demand of Rs.42,06,647/- for the period from September, 2006 to March, 2011 and Rs.7,64,850/- for the period from April, 2011 to March, 2012 under Rule 14 of Cenvat Credit Rules, 2004 alongwith interest and penalty.

6. Aggrieved, the Appellant filed Appeal before the Commissioner (Appeals) and the ld. Commissioner (Appeals) vide impugned order dated 29.8.2013 rejected the Appeal filed by the Appellant.

7. I have heard ld. Counsel for the Appellant and ld. AR for the respondent and perused the record.

8. Ld. Counsel for the Appellant submitted that the issued involved in the instant Appeal has already been decided by this Tribunal against the Appellant in Appellant's own case titled as *Mahindra & Mahindra Ltd. vs. CCE, Mumbai; reported in 2007(211) ELT 481 (Tri-Mumbai)* in which this Tribunal has held that even if cesses are payable on tractors, even then since tractors are exempt from basis Excise duty, they would be considered as exempted goods in terms of Rule 2(d) of the Cenvat Credit Rules. He further submitted that since they have preferred Appeal before the Hon'ble High Court of Judicature at Bombay in the year 2007 itself being Central Excise Appeal No.120 of 2007 and since the said Appeal is Admitted and is pending before the Hon'ble High Court, therefore they are availing the Cenvat Credit since the issue has not been settled and is still pending. He also submitted that the Tractors are not exempted goods, therefore Rule 6(1) of Cenvat Credit Rules are not applicable. His further contention was that the Extended period has been wrongly invoked in the present case and that the Appellant is not liable for any penalty or interest. It was his contention that the demand for the period upto August, 2010 is beyond the normal period of limitation; that the demand in the 1st show cause notice dated 4.10.2011 pertains to the period from September, 2006 to March, 2011 and therefore substantial portion of demand is barred by limitation and extended period is

not invokable in the instant case. He relied upon the decision of this Tribunal in the matters of CGST & CE v. Adani Gas Pvt. Ltd.; 2017(356) ELT 541 (Guj.), CCE, Noida v. Accurate Chemical Industries; 2014 (310) ELT 441 (All., HPL Chemicals Ltd. V. CCE, Chnd; 2003 (154) ELT 435 (Tri.-Del) and Triveni Engineering & Industries Ltd. V. CCE, Allahabad, 2001 (136) ELT 617 (Tri.-Del.), supporting the argument that since all the facts were within the knowledge of the department therefore the extended period of limitation cannot be invoked in the matter.

9. The ld. AR for the department reiterated the findings recorded by the Commissioner (Appeals) in the impugned order and submitted that the Appeal filed by the Appellant is devoid of merit and is liable to be dismissed. He further submitted that the present Appeal is squarely covered by the decision of this Tribunal in Appellant's own case i.e. *Mahindra & Mahindra (supra)* in which it has been specifically held that the Appellant is not entitled to utilise Cenvat Credit towards payment of Education Cess and Secondary Higher Education Cess. It was his further submission that the Appellant wilfully contravened the provisions of the CENVAT credit Rules, 2004 r/w Central Excise Act, 1944, utilising inadmissible Cenvat Credit towards payment of Education Cess and Secondary Higher Education Cess with an intent to evade payment of duty and therefore the extended period of limitation has been rightly invoked. According to him since even after the decision of this Tribunal in the year 2007 in Appellant's own case i.e. *Mahindra & Mahindra (supra)* the Appellant did not pay the

Education Cess and Secondary Higher Education Cess, therefore a letter dated 5.2.2008 was issued to the Appellant asking them to pay the amount of Education cess and Secondary Higher Education Cess. After that from time to time reminders were issued to the Appellant on 23.10.2008, 3.3.2009, 25.8.2010 and 19.10.2010 respectively, but the Appellant did not pay the same. After that the Appellant was asked to provide the data relating to CENVAT credit availed and utilised in payment of Education Cess and Secondary Higher Education Cess on Tractor Cess for the past period vide letter dated 12.7.2011. According to him after pursuing several times, the requisite data was provided by the Appellant on 18.8.2011 and therefore only after that the show cause notice dated 4.10.2011 was issued to the Appellant. He further submitted that since the Appellant was fully aware about the decision of this Tribunal in Appellant's own case i.e. *Mahindra & Mahindra (supra)* but still they deliberately availed and utilized CENVAT credit towards the payment of Education Cess and Secondary Higher Education Cess, with an intent to evade payment of duty and therefore the extended period has been rightly invoked. He further submitted that despite knowing that the credit is not available to the Appellant, but still for so many years they keep on availing the Cenvat credit towards the payment of Education Cess and Secondary Higher Education Cess and the said conduct of the Appellant is sufficient for invoking the extended period of limitation and therefore the allegation of the appellant that the facts were within the knowledge of the department is not going to support the appellant in any way. The ld. AR further submitted that the action of the appellant of availing and utilizing the Cenvat Credit despite the earlier decision of this Tribunal in Appellant's own case proves that the appellants wilfully contravened the provision of Cenvat Credit Rules r/w Central Excise Act, 1944 and therefore the extended period of limitation has been rightly invoked and the imposition of penalty is justified.

The provisions which are relevant for deciding the issue involved are extracted as under:-

- <u>The industries (Development and Regulation) Act 1951</u>

9. Imposition of Cess on scheduled industries in certain cases.—

(1) There may be levied and collected as a cess for the purposes of this Act on all goods manufactured or produced in any such scheduled industry as may be specified in this behalf by the Central Government by notified order a duty of excise at such rate as may be specified in the notified order, and different rates may be specified for different goods or different classes of goods:

- <u>Govt. of India, Ministry of Industry and Company Affairs, Department of Heavy Industry, Order No. 662(E) dtd 6 Sept 1985</u>.

In exercise of the powers conferred by sub-section (1) of Section 9 of the Industries (Development & Regulation) Act, 1951 (65 of 1951), the Central Government hereby specifies the class of goods manufactured or produced in the schedules Industry as an agricultural machinery as mentioned in column (1) of the Table below on which a duty of excise shall be levied and collected as a Cess for the purposed of the said Act with effect from the 1st October, 1985 at the rate specified in the corresponding entry in column (2) of the said Table.

- Ministry of Industry. Department of Industrial Development Order dtd 12th November 1993 S.O 869(E)-

In exercise of the powers conferred by sub-section(1) of Section 9 of the Industries (Development & Regulation) Act, 1951 (65 of 1951), the Central Government hereby makes the following amendments in the notified order of the Government of India in the erstwhile Ministry of Industry and Company Affairs (Department of Heavy Industry) number S.O. 662(E) dated the 6th September, 1985, published in the Gazette of India, Extra-Ordinary, Part-II, section 3, sub-section (ii)dated the 9th September 1985 namely:-

In the said notified order, in the Table, in column I relating to description of class of goods, for the words and figures Tractors of Power Take-Off Horse Power exceeding 25, the following shall be substituted, namely:-

Tractors (other than those for export) exceeding engine capacity of 1800 c.c.

- Ministry of Industry. Department of Industrial Development Notification No. S.O. 55E dated 19 January 1993.

(1)(i) These rules may be called the Tractor Cess Rules, 1992.

(ii) They shall come into form on the dated their publication in the Official Gazette.

(2) Definition:- In these rules, unless the context otherwise requires:

(a) – Act means the Industrial (Development and Regulation Act, 1951 (65 of 1951);

(b) "Tractor" means tractor as covered under the Sub-heading(1) of heading 10 "Agricultural Machinery" of the First Scheduled of the Act and Act and of power take-off Horse Power exceeding 25;

(c) "Cess" means the Cess levied and collected in terms of notification of Government of India in the Ministry of Industry (Department of Heavy Industry) No. 662(B) dated the 6th September, 1985 issued under sub-section (1) of section 9 of the Act,

(3) Application of Central Excise and Salt Act, 1944 and the rules made thereunder:- Save as otherwise provided in these rules, the provisions of the Central Excise and Salt Act, 1944 (1 of 1944) and the rules made thereunder including those relating to refund of duty shall, so far as may be apply in relation to the levy and collection of the Cess as they apply in relation to the levy and collection of the duty of excise on manufacture of tractors under the Act and the rules.

E. Finance (No. 2) Act 2004

91...........Education Cess-. *(1) Without prejudice to the provisions of sub-section (11) of section 2, there shall be levied and collected, in accordance with the provisions of this Chapter as surcharge for purposes of the Union, a cess to be called the Education Cess, to fulfil the commitment of the Government to provide and finance universalised quality basic education.*

(2)..............

92...............

93......Education Cess on excisable goods-

- *The Education Cess levied under section 81, in the case of goods specified in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), being goods manufactured or produced, shall be a duty of excise (in this section referred to as the Education Cess on excisable goods), at the rate of two per cent, calculated on the aggregate of all duties of excise (including special duty of excise or any other* *duty of excise but excluding Education Cess on excisable goods) which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue), under the provisions of the Central Excise Act, 1944 (1 of 1944) or under any other law for the time being in force.*

(2)……………

(3) The provisions of the Central Excise Act, 1944 (1 of 1944) and the rules made thereunder, including those relating to refunds and exemptions from duties and imposition of penalty shall, as far as may be, apply in relation to the levy and collection of the Education Cess on excisable goods as they apply in relation to the levy and collection of the duties of excise on such goods under the Central Excise Act, 1944 or the rules, as the case may be.

<u>*Finance Act 2007*</u>

136. *Without prejudice to the provisions of sub-section (12) of section 2, there shall be levied and collected, in accordance with the provisions of this Chapter as surcharge for purposes of the Union, a cess to be called the Secondary and Higher Education Cess, to fulfil the commitment of the Government to provide and finance secondary and higher education.*

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138. *The Secondary and Higher Education Cess levied under section 136, in the case of goods specified in the First Schedule to the Central Excise Tariff Act, 1985, being goods manufactured or* *produced, shall be a duty of excise [in this section referred to as the Secondary and Higher Education Cess on excisable goods], at the rate of one per cent., calculated on the aggregate of all duties of excise [including special duty of excise or any other duty of excise but excluding Education Cess chargeable under section 93 of the Finance (No. 2) Act, 2004 and Secondary and Higher Education Cess on excisable goods] which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue), under the provisions of the Central Excise Act, 1944 or under any other law for the time being in force.*

(2)…………….

(3) The provisions of the Central Excise Act, 1944 and the rules made thereunder, including those relating to refunds and exemptions from duties and imposition of penalty shall, as far as may be, apply in relation to the levy and collection of the Secondary and Higher Education Cess on excisable goods as they apply in relation to the levy and collection of the duties of excise on such goods under the Central Excise Act, 1944 or the rules made thereunder, as the case may be.

G. <u>Notification No. 6/2006-C.E dtd1.3.2006. as amended.</u>

In exercise of the powers conferred by sub-section (1) of Sec. 5 A of the Central Excise Act, 1944 (1 of 1944), the Central Government; on being satisfied that it is necessary in the public interest so to do, hereby exempts excisable goods of the description specified in column (3) of the Table given below read with the

Chapter, heading or sub-heading or tariff item of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), (hereinafter referred to as the Central Excise Tariff Act), as are give in the corresponding entry in column (2) of the said table, from so much of the duty of excise specified thereon under the First Schedule to the Central Excise Tariff Act, as is in excess of the amount calculated at the rate specified in the corresponding entry in column (4) of the said table; and subject to the relevant conditions specified in the Annexure to this notification and condition number of which is referred to in the corresponding entry in column (5) of the Table aforesaid.

Provided that nothing contained in this notification shall apply to goods specified against S.No. 10 of the said table on or after the 1st day of May, 2007

Explanation……….

Table				
S.No.	Chapter or Heading of sub-heading or tariff of the First schedule	Description of excisable goods	Rate	Condition No.
40	8701	All goods (except road tractors for semi trailers of engine capacity more than 180 CC)	NIL	–

Rules 6(1) & 6(2) of the Cenvat Credit Rules, 2004.

"6. <u>Obligation of manufacturer of dutiable and exempted goods and provider of taxable and exempted services</u>.-

(1) *The CENVAT credit shall not be allowed on such quantity of input or input service which is used in the manufacture of exempted goods or exempted services, except in the circumstances mentioned in sub-rule (2).*

Provided that the CENVAT credit on inputs shall not be denied to job worker referred to in rule 12AA of *the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule.*

(2) *Where a manufacturer or provider of output service avails of CENVAT credit in respect of any inputs or input services, except inputs intended to be used as fuel, and manufactures such final products or provides such output service which are chargeable to duty or tax as well as exempted goods or services, then, the manufacturer or provider of output service shall maintain separate accounts for receipt, consumption and inventory of input and input service meant for use in the manufacture of dutiable final products or in providing output service and the quantity of input meant for use in the manufacture of exempted goods or services and take CENVAT credit only on that quantity of input or input service which is intended for use in the manufacture of dutiable goods or in providing output service on which service tax is payable."*

The term 'Exempted goods' has been defined under Section 2(d) of the Cenvat Credit Rules, 2002/2004 as under"-

" 'Exempted goods' means goods which are exempt from whole of duty of excise leviable thereon and includes goods which are chargeable to nil rate of duty."

11. The issue whether tractors on which Automobiles Cess and Education Cess is payable can be considered as exempted from the whole of duty of excise thereon or chargeable to nil rate of duty as required under Rule 2(d) of Cenvat Credit Rules came up

before this Tribunal in Mahindra & Mahindra's Case (supra). In which in this Tribunal held as under:-

" Here we find that the terms exempted goods has been defined under Section 2(d) of the Cenvat Credit Rules, 2002/2004 as under:-

"Exempted goods" means goods which are exempt from whole of duty of excise leviable thereon and includes goods which are chargeable to nil rate of duty."

It is pertinent to note that the word used is 'duty of excise' and not 'duties of excise'. The expression 'whole of duty of excise' and 'chargeable to nil rate of duty' is 'singular expression' referring to one 'duty of excise' and not all 'duties of excise'. Section 2A of the Central Excise Act, 1944 uses four terms:-'duty', duties', 'duty of excise' and 'duties of excise' which means that there is a difference between them, if the intention of the legislature was that it should be exempted from all duties of excise then the words used should have been 'from whole of duties of excise and not duty of excise'. We further note that Rule 3 of the Cenvat Credit Rules, 2002/2004 allows a manufacture credit of all duty of excise an also of education cess national calamity contingent only etc. but duty of excise has been referred to in Rule 3(1)(i) and Rule 3(1)(ii) and no where else and in fact education cess has been separately referred to. In this context the duty of excise has to be considered as referring to duty of excise as referred to in Rule 3(1)(i) & Rule 3(1)(ii) and not others. The decision in the case of Malwa Industries – 2004(171) E.L.T. 67 cited by the learned Advocate for the appellants is not relevant an in that case the provision of Rule 57AB (1) (b) were interpreted which used the term that the Cenvat Credit can be utilized for payment of any duty of excise and thereof any duty of excise cannot be restricted to basic duty of excise only. In the present case the term used is not 'any duty of excise' but 'duty of excise' only. Similarly, *the decision in the case of Silvasa Industries Pvt. Ltd. V. CCE-2006 (196) ELT 213 (T) is also not relevant as in that case, finished goods were exempted only from NCCD and were otherwise chargeable to other duties which may include excise duty also. The Tribunal was no where required to interpret the term 'exempted goods' as defined under Rule 2(d) of the Cenvat Credit Rules and the issue as to whether the final product which is exempted from excise duty but chargeable to cess can be considered as exempted goods or not. since the tractors are exempted from duty of excise specified both in First Shedule of the Tariff Act and Second Schedule to the Tariff Act, it has to be considered as exempted and not dutiable as is being contended by the Appellant. in view of the same the appellants are required to follow the provision of Rule 6(2) and (3) of the Cenvat Credit Rules."*

12. Although tractors are exempted from duty but cess of Education on automobile are paid thereon. Though these cess are governed and collected under the procedure laid down in Central Excise law but they borrow their legislative authority under duty statue. Therefore, they are not included in whole duty of excise and charge of nil rate of duty as has been referred in Rule 2 (d) of Cenvat Credit Rules 2004 defining exempted goods. Therefore, it is clear that tractors is exempted goods and not dutiable. Since tractors are exempted goods therefore credit of inputs (Inputs used in the manufacture of final product) is not admissible in terms of Rule 6(1) of Cenvat Credit Rules 2002/2004 for the reason that the final product i.e. tractor are wholly exempted from payment of duties of excise. The case law cited by ld. Counsel for the Appellant are not applicable since in no case issue

addressed is similar to the issue considered and decided by this Tribunal in the matter of Mahindra & Mahindra (supra). Mere filing of appeal before the Hon'ble High Court against the Tribunal's orders does not entitle the appellants to avail and utilized cenvat credit, since no stay has been granted by the Hon'ble High Court. The conduct of the appellants by availing and utilizing the cenvat credit despite the order pass by this Tribunal in the matter of Mahindra & Mahindra (supra) establishes that they have contravened the provisions of Central Excise Act and Rules made therein with intention to avail in-admissible credit and utilizing the same for discharging the education cess and secondary higher education cess. It also proves that the appellants have willfully contravened the provisions of this the Cenvat Credit Rules 2004 read with Central Excise Rules 1944.

13. The ld. Counsel for the Appellant also made a submission that the demand for the period from September, 2006 to March, 2012 has been incorrectly calculated. He submitted that an amount of Rs.9.20,492/- on Education Cess and Secondary Higher Education Cess was wrongly availed by the Appellant but the same was duly reversed in the month of September, 2008. But the department has not taken that into consideration and the amount showed in the show cause notice included that duly reversed Credit amount also and that therefore the demand has to come down to Rs.32,86,153.49/-. According to him although the said submission before the Commissioner (Appeals) but the same has not been considered in the impugned order.

14. This issue require re-consideration and verification by the ld. Commissioner (Appeals) whether the Cenvat credit amount of Rs.9.20,492/- which according to the Appellant they have already reversed, has been taken care of while raising the demand from the Appellant.

15. In conclusion, the impugned order is upheld and the matter is remanded to the ld. Commissioner (Appeals) for the limited purpose of verifying whether the Cenvat credit amount of Rs.9.20,492/- which according to the Appellant they have already reversed, has been taken care of while raising the demand from the Appellant and also for passing appropriate order on this issue only.

(Pronounced in the open court on __04.07.2018___)

(**Ajay Sharma**)
MEMBER (JUDICIAL)

Sakshi