CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD

Single Member Bench

Court – I

Service Tax Appeal No. 30525 of 2019

(Arising out of Order-in-Appeal No.HYD-EXCUS-SC-AP2-123-18-19-ST dt.25.03.2019 passed by CGST & CE (Appeals-II), Hyderabad)

Bharat Heavy Electricals Ltd,
Power Sector, Southern Region, 39,
Sarojini Road, Ek Tara Building,
Secunderabad, Telangana – 500 003

......Appellant

VERSUS

Commissioner of Central Tax – Secunderabad - GST
Kendriya Shulk Bhavan, L.B. Stadium Road,
Basheerbagh, Hyderabad, Telangana – 500 004

......Respondent

Appearance
Shri T. Venugopal Swamy and Shri Makrand, Advocates for the Appellant.
Shri A. Rangadham, Authorized Representative for the Respondent.

Coram:
HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No. A/31159/2019

Date of Hearing: 23.12.2019
Date of Decision: 23.12.2019

[Order per: P.V. SUBBA RAO.]

1. This appeal is filed against Order-in-Appeal No.HYD-EXCUS-SC-AP2-123-18-19-ST dt.25.03.2019.

2. The appellant M/s BHEL is a large public sector undertaking which manufactures various products and avails benefit of Cenvat credit. After the introduction of GST they have moved from the excise and service tax into the GST regime. As per the new provisions of GST, Cenvat credit lying in balance in their accounts at the time of the transition could be taken as input service credit and utilized accordingly. However, as per June, 2017 ST-3 Return of the appellant, Cenvat credit amounting to Rs.1,46,733/- remained unutilized. This Cenvat credit pertains to Education Cess (EC), Secondary & Higher Education Cess (SHEC) and Krishi Kalyan Cess (KKC). They submitted an application to the Principal Commissioner of Central Tax,

Hyderabad dt.30.05.2018 stating "Since this transitory cess amount cannot be carried forward under GST law, we are lodging a claim in Form-R for refund of Rs.1,46,733/- (EC-Rs.96,483/-, SHEC-Rs.47,349/- & KKC-Rs.2,901/-)". Along with that letter they have submitted an application for refund of excise duty under Rule 173S of the Central Excise Rules for the aforesaid amount. This application was rejected by the original authority as there is no legal provision under which the refund could have been sanctioned. On appeal, the first appellate authority upheld the order of the original authority and rejected the appeal. Hence, this appeal.

3. After hearing both sides and perusing the records, it is apparent that the application for refund was with respect to the Cenvat credit which has accumulated and remained unutilized on account of EC, SHEC & KKC. Admittedly, these Cesses could not be carried forward by the appellant to the GST as per the provisions of CGST Act. Hence they wanted cash refund of this amount. The application was filed for refund under section 11B of the Excise Act. Section 11B allows refund of duty paid and not of Cenvat credit. In the scheme of Cenvat, the duty/service tax/cesses which have been paid can only be taken as credit by the manufacturer and utilized towards payment of duty/service tax/Cesses, etc., on their final products. There is no scheme under which Cenvat credit can be refunded to them in cash except under Rule 5 of Cenvat Credit Rules (CCR), 2004 in respect of Cenvat credit utilized in manufacture exported goods or exported services. Since export of both goods and services are exempt, cash refund of Cenvat credit which has gone into manufacture of the goods exported or services exported is allowed under Rule 5 of CCR, 2009. Otherwise, there is no provision under which Cenvat credit can be refunded in cash.

4. Learned departmental representative draws the attention of the bench to the judgment of the Larger Bench of the Hon'ble High Court of Bombay in the case of Gauri Plasticulture Pvt Ltd [2019-TIOL-1248-HC-MUM-CX-LB] on this issue in which questions framed by the Hon'ble Larger Bench were as follows:

> *"(a) Whether cash refund is permissible in terms of clause (c) to the proviso to section 11B(2) of the Central Excise Act, 1944 where an assessee is unable to utilize credit on inputs?*
>
> *(b) Whether by exercising power under Section 11B of the said Act of 1944, a refund of un-utilised amount of Cenvat Credit on account of the closure of manufacturing activities can be granted?*

(c) Whether what is observed in the order dated 25th January 2007 passed by the Apex Court in Petition for Special Leave to Appeal (Civil) No. CC 467 of 2007 (Union of India vs Slovak India Trading Company Pvt Ltd.) can be read as a declaration of law under Article 141 of the Constitution of India?"

and they were answered as follows:

"40. As a result of the above discussion, we answer the questions of law framed above as (a) and (b) in the negative. They have to be answered against the assessee and in favour of the Revenue. Questions (a) and (b) having been answered accordingly, needless to state that the order of the Hon'ble Supreme Court in the case of Slovak India (supra) cannot be read as a declaration of law under Article 141 of the Constitution of India."

5. Per contra, learned counsel for the appellant relies on the judgment of the Hon'ble High Court of Madras in the case of Sutherland Global Services Pvt Ltd [2019 (11) TMI 278 – Madras HC] to assert that the accumulated credit of EC, SHEC & KKC does not lapse on switchover to the GST regime and could be carried forward as credit under GST.

6. I have carefully considered the judgments relied upon by the both sides. The judgment of the Larger Bench of the Hon'ble High Court of Bombay was precisely on the point as to whether the assessee can get cash refund of Cenvat credit which they were not able to utilize and it was answered in negative. The Hon'ble High Court of Madras was examining a different issue as to whether the precision of the credit of EC, SHEC & KKC into the new GST regime was permissible or otherwise. The Hon'ble High Court of Madras has not dealt with the issue of cash refund of unutilized Cenvat credit which is the question in dispute. In view of the above, I find that there is no legal provision under which the assessee's appeal could be entertained.

7. Accordingly, the appeal is rejected and the impugned order is upheld.

(Dictated and pronounced in the open court)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

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