IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA

REGIONAL BENCH – COURT NO.2

Excise Appeal No.78 of 2012
(On behalf of Appellant)

(Arising out of Order-in-Original No.38/Addl.Commr./CE/SLG/10-11 dated 28.01.2011 passed by Commissioner of Central Excise,Customs & Service Tax, Siliguri)

M/s Godrej Consumers Products Limited
Pirojshanagar, Eastern Express, Highway,Vikhroli (E), Mumbai-400079

Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Siliguri
C.R.Building, Hakimpara, Haren Mukherjee Road, Siliguri-734001

Respondent

WITH

Excise Appeal No.75415 of 2016
(On behalf of Appellant)

(Arising out of Order-in-Original No.23-25/Commr./CE/SLG/15-16 dated 08.01.2016 passed by Commissioner of Central Excise,Customs & Service Tax, Siliguri)

M/s German Remedies Limited
Bhaghey Khola, N.H. 31A, Majhitar,Rangpo, East Sikkim-737132

Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Siliguri
C.R.Building, Hakimpara, Haren Mukherjee Road, Siliguri-734001

Respondent

APPERANCE :

Ms.Payal Bharwani, Advocate for the Appellant
Shri S.S.Chattopadhyay, Authorised Representative for the Respondent

CORAM:
HON'BLE MR.ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR.K.ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO…76521-76522/2023

DATE OF HEARING : 21.08.2023

DATE OF PRONOUNCEMENT : 29.08.2023

Per Ashok Jindal :

Both the appeals are bearing a common issue. Therefore, both are disposed off by a common order.

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2. The facts of the case are that the the Appellant is engaged in manufacturing various products such as powder hair dye, shaving cream, etc. falling under CTH 33 of the Central Excise Tariff Act, 1985 in their factory situated at Sikkim. Accordingly, the Appellant was eligible for refund under Notification No.32/1999-CE dated 08.07.1999 of duty paid through PLA cash balance.

2.1 During the course of audit conducted for the period from April 2008 to March 2009, it was observed that the Appellant was utilizing Cenvat Credit of Basic Excise Duty (BED) for payment of EC and SHEC. Accordingly, the Appellant was issued a show-cause notice proposing to demand BED utilized for payment of EC and SHEC in contravention of Rule 3(7)(b) of the CCR, 2004 by alleging wilfull evasion on part of the appellant in payment of EC and SHEC.

2.2 A show-cause notice was issued to that effect on 06.01.2010 and the same was adjudicated by the adjudicating authority confirming the demand on account of recovery of cenvat credit utilised for payment of EC and SHEC.

2.3 The appellant challenged the order of adjudicating authority before the Commissioner, who upheld the order of the adjudicating authority. Against the said order, the appellant is before us.

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2.4 The appellant is engaged in the manufacture of P & P Medicaments and availing benefit of cenvat credit on input/capital goods and on input services and also availing area based exemption Notification No.20/2008-CE dated 27.03.2008.

2.5 During the course of audit, it was found that the appellant has utilised the credit of Basic Excise Duty (BED) for payment of Education Cess (EC) and Secondary & Higher Education Cess (SHEC) during the financial year 2011-12, which is inadmissible as per the provisions of Rule 3 (7)(b) of the Cenvat Credit Rules, 2004..

2.6 Therefore, proceedings were initiated against the appellant and a show-cause notice dated 09.12.2013 was issued for recovery of realization of cenvat credit for the period from September, 2013 to March, 2015.

2.7 The matter was adjudicated and the cenvat credit of BED is sought to be recovered from the appellant by way of impugned order.

2.8 The appellant filed this appeal before this Tribunal and this Tribunal allowed the appeal filed by the appellant vide order dated 24th October, 2019.

2.9 The said order was challenged by the Revenue before the Hon'ble High Court by way of Tax Appeal No.01/2020, where the Hon'ble High Court set aside the order passed by this Tribunal and remanded the matter back to this Tribunal for fresh adjudication. Therefore, this appeal is before us.

3. The ld.Counsel for the appellants submits that the issue involved in these matters is no longer *res integra* and has been decided in favour of the appellants in their own case reported in 2007 (219) ELT 585 (Tri.-Kolkata).

3.1 It was further submitted that the said issue came up before the Hon'ble High Courts and the Tribunal in the following cases and have decided the issue in favour of the appellants :

a. Union of India v. Kamakhya Cosmetics & Pharmaceutical Pvt. Ltd – 2015 (323) ELT 33 (Gau.)
b. Dharampal Satyapal Ltd. v. CCE – 2015 (323) ELT 55 (Gau.)
c. CCE v. Prag Bosimi Synthetics Ltd. – 2013 (295) ELT 682 (Gau.)
d. Dharampal Satyapal Ltd v. CCE, Shillong, 2017 (4) TMI 147 CESTAT Kolkata.
e. Vedanta Ltd v. CCE, Tirunelveli, 2018 (7) TMI 158 CESTAT Chennai.
f. VVF Ltd. v. CCE, Rajkot, 2018 (12) TMI 492 CESTAT Ahmedabad.
g. CCE, Jammu v. Jindal Drugs Pvt. Ltd., 2018 (5) TMI 1403 CESTAT Chandigarh.
h. Emami Paper Mills Limited v. Commr. Of CGST & CX, Bhubaneswar, 2022 (11) TMI 148 CESTAT Kolkata

3.2 It is further submitted that as per Rule 3 (4) of the Cenvat Credit Rules, 2004, the duty of excise includes EC & SHEC. Therefore, even any Cess collected pursuant to the taxable event of manufacture, it shall be construed as a duty of Excise.

3.3 Further, as per Section 93 of Finance Act, 2004 and Section 138 of Finance Act, 2007, which levied EC & SHEC respectively specifically mention that it shall be the duty of Excise. Therefore, from the perusal of the said provisions, it is clear that although EC & SHEC may not be a duty of Excise levied under Section 3 of Central Excise Act, 1944, but nevertheless it is a duty of Excise in terms of Central Excise Rules, 2004. Therefore, the cenvat credit of BED can be utilised for payment of any duty of Excise, which includes EC & SHEC.

3.4 He further submitted that Rule 3(7)(b) of CCR, 2004 does not impose any restriction on utilization of BED for the payment of EC and SHEC. To support, he relied on the decision of this Tribunal in the case of Sun Pharmaceutical Industries v. CCE, Jammu – 2007 (207) ELT 673 (Tri.- Del.).

4. On the other hand, the ld.A.R. for the Revenue, relied on the decision of this Tribunal in the case of in the case of CCE, Jammu v. Tawi Chemical Industries – 2013 (290) ELT 734 (Tri.- Del), wherein this Tribunal distinguished the decision of the Hon'ble High Court of Guwahati in the case of CCE Vs. Prag Bosimi Synthetics Limited reported in 2013 (295) ELT 682 (Gau.) to say that was the decision by the Hon'ble High Court in case of NCC duty and held that BED can be utilized for payment of for payment of EC & SHEC, which are not exempted under Notification No.32/99-CE dated 08.07.1999. This issue has been decided by the Hon'ble Apex Court in the case of Hitachi Home Vs. Commissioner reported in 2018 (361) ELT A17 (SC).

5. In rebuttal to the decision relied upon by the Revenue in the case of Tawi Chemical Industries (supra), it is the submission of the ld.Counsel for the appellants that in the said case, the credit of BED cannot be utilised for payment of EC & SHEC on the basis of full amount

of indirect refund of EC and SHEC, which was not permissible. It is his submission that in the case of Hitachi Home (supra), the Hon'ble Supreme Court disposed off of this appeal holding that "the present appeals are covered by our judgement in SRD Nutrients Private Limited Vs. Commissioner of Central Excise,Guwahati [2017 (355) ELT 481 (S.C.)]" and in the case of SRD Nutrients Private Limited (supra), the Hon'ble Supreme Court held that even the refund of EC and SHEC was permissible under the area based notifications, thus, the issue was decided in favour of the assessee. The Hon'ble Supreme Court did not decide the case on merit whether the Cenvat credit of excise duty can be utilized by the area based exempt units to pay EC and SHEC. Therefore, the said decision is not on the facts of this case and cannot be relied upon. In fact, in the said case, the issue before the Hon'ble Apex Court that whether the assessee can avail the refund of EC & SHEC paid through PLA availing area based exemption or not. Therefore, the said decision has no relevance to the facts and circumstances of the case.

6. Heard both sides and considered the submissions.

7. We find that the short issue is decided by us whether the appellants are entitled to utilise the cenvat credit of BED for payment of EC and SHEC while availing area based exemption under Notification No.20/2008-CE dated 27.03.2008 or not.

8. We find that the Revenue is having on the decision of Tawi Chemical Industries (supra). As per this decision, the appellants are not entitled to utilise the BED for payment of EC and SHEC, which has been affirmed by the Hon'ble Apex Court.

9. We have gone the decision of the Hon'ble Apex Court wherein the appeals have been disposed off in the light of the decision of the Hon'ble Apex Court in the case of SRD Nutrients (supra). In the case of SRD Nutrients (supra) the issue is before the Hon'ble Apex Court is whether the refund of EC & SHEC is available to the assesse paid through PLA availing area based exemption or not.

10. Although the said decision has been examined by the Hon'ble Apex Court in the case of Unicorn Industries Vs. Union of India reported in 2019 (370) ELT 3 (S.C.), which has been disposed off in the light of the decision of the Hon'ble Apex Court in the case of SRD Nutrients (supra).

11. Therefore, we find that the issue whether the BCD can be utilised for payment of EC & SHEC was not examined by the Hon'ble Apex Court in the case of Hitachi Home (supra).

12. Now, the jurisdictional High Court of Guwahati has an occasion to examine the issue in hand in the case of Kamakhya Cosmetics & Pharmaceutical Private Limited reported in 2015 (323) ELT 33 (Gau.), wherein the Hon'ble High Court has observed as under :

> ***"5.*** *In the present case, the assessee utilized Cenvat credit of Basic Excise duty for paying Education Cess to which department raised objection. The Adjudicating authority held that Cenvat Credit of Basic Excise Duty could not be utilized for payment of Education Cess and accordingly deducted the amount from the refund due to the assesse.*
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> ***6.*** *The assessee preferred revision petition under Section 35EE of the Act which was allowed as follows :*

"The appellant has utilized the Cenvat credit for payment of education Cess on final products in respect of which exemption under said notification is availed of and since Education Cess is also a Duty of excise, I hold that the appellant's action is correct and is in conformity with the Cenvat Credit Rules, 2004."

7. *The above view was upheld by the Tribunal while dismissing appeal of the Revenue against the above order. It was held that there was no bar to utilize Cenvat credit of Basic Excise Duty for payment of Education Cess.*

8. *Since the view taken by the Tribunal is in conformity with the view taken by this Court referred to above, the question of law raised by the Revenue has to be decided against it and answered in the affirmative."*

13. Therefore, following the decision of the Hon'ble Guwahati High Court, we hold that the appellants are entitled to utilise the cenvat credit of BED for payment of EC and SHEC.

14. Accordingly, the impugned orders are set aside and the appeals are allowed with consequential relief, if any.

(Pronounced in the open court on 29.08.2023)

Sd/

(Ashok Jindal)
Member (Judicial)

Sd/
(K.Anpazhakan)
Member (Technical)

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