**CUSTOMS, EXCISE & SERVICE TAX**
**APPELLATE TRIBUNAL**
**NEW DELHI**

**PRINCIPAL BENCH,**
**COURT NO. IV**

**Excise Appeal No. 50081 of 2019**

[Arising out of the Order-in-Appeal No. BHO-EXCUS-001-APP-230-18-19 dated 28/09/2018 passed by The Commissioner GST C & CE (Appeals), Bhopal.]

**M/s Bharat Heavy Electricals Ltd.** **Appellant**
**(Excise & Taxation Division)**
Block VI, Annexe WWGF, P.O. Piplani
Bhopal – 462 022.

Versus

**The Commissioner** **Respondent**
**Central Goods Service Tax,**
**Central Excise & Customs,**
178, Bhagya Bhavan, M.P. Nagar, Zone II,
Bhopal (Madhya Pradesh).

**APPEARANCE**

Shri U. Alvi, Advocate – for the appellant

Shri R.K. Mishra, Authorized Representative (DR) – for the Respondent

CORAM: **HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)**
**HON'BLE SHRI C.L. MAHAR, MEMBER (TECHNICAL)**

**FINAL ORDER NO. 51849/2019**

DATE OF HEARING : 26/04/2019.
DATE OF DECISION : 26/04/2019.

**C.L. MAHAR :-**

The appellant is engaged in the manufacture of Electrical and Mechanical Equipment, besides transmission, utilization, conservation and generation of power and as such are supplying equipment for generation at and transmission of electrical energy ex-Thermal, Hydro, and Nuclear Power Stations. They have been carrying the following un-utilized Credit Balances as reflected in

their ER-Returns as 30th June 2017, the date on which the new GST Regime came into force.

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|---|---|---|
| (i) | ST & C.Ex Duty Inputs Goods Credit | Rs.8,22,39,035/- |
| (ii) | Education Cess | Rs. 63,75,932/- |
| (iii) | S & HE Cess | Rs. 33,70,625/- |
| (iv) | KK Cess | Rs. 58,80,684/- |

The credit was accumulated for the reason that their products were exempted from payment of duty under Sub-rule 6(6) of the CENVAT Credit Rules 2004 which exempted the supplies to Mega /Ultra Mega Power Projects, SEZ, EOU, etc. besides for physical export from payment of excise duty and applicable cesses even when the cenvat credit has been availed on the inputs. The appellant have been a major supplier of power generation equipment over past several decades in as much as 85% installed capacity of power generation equipment has been contributed by the appellant. Besides the appellant have been executing orders for export, thus while credit of indigenous inputs and inputs services has been admissible to them even in respect of their clearances to Mega/Ultra Mega Power Project, SEZ and Physical Export, no duty of Central Excise or Cess was payable by them on bulk of their supplies, there by resulting in huge amount of un-utilizable accumulated credit being carried over the past several years. The appellants did not go for refund of unutilized cenvat credit in terms of Rule 5 of the Cenvat Credit Rules, 2004 on the expectation that they would be able to use the credits available with them on domestic clearances on the basis of their past clearances. While the credit balance of service tax & central excise duty was carried over through TRAN-1 under the new GST Regime the credit balances of the three Cesses namely Education Cess, Secondary and Higher Education Cess and the Krishi Kalyan Cess remained un-utilizable in as much as these Cess stood abolished in the new Tax Regime. The appellant filed refund claim of the unutilized cesses with the Adjudicating authority, which

rejected the refund claim of the appellant on the ground that since there was no provision to carry over the impugned cesses under the GST regime and there was no provision for refund of the same and thus such credits would lapse. Even the appeal filed by the appellant was rejected by the Commissioner (Appeals) on these grounds. The appellant is before us in the present appeal against the rejection order of their refund claim of the Ed. Cess, S&H Cess and KK cess ( in short 'cesses').

2. The learned Counsel appearing on behalf of the appellants has vehemently argued that the refund is admissible to the appellants as the impugned credits valid stood in their accounts on 01/07/2017 and they were eligible to utilized the same for payment of duty on their domestic clearances but the same could not be utilized as the said cesses were not carried over to the GST regime. Different benches of the Tribunal have consistently held that where lawful Cenvat credit accumulated in the accounts of an assesses becomes unutilizable due to closure of the factory or that the factory was shifted to another area which was exempt from payment of duty, refund such credit valid earned could be granted in cash. He relied upon decisions reported as **2014 (314) E.L.T. 729 (Tri-Mum)** in the case of **CCE Hyd. Vs. Apex Drugs & Intermediates Ltd. , 2016 (343) ELT 1105 (Tri-Che.) Leo Oils & Libricants Vs. CCE Chennai-I, 2017 (347) ELT 100 (Tri-Bang) in the case of Bangalore Cables P. Ltd. Vs. CCE Bangalore-III**. and some other cases. Hon'ble High courts in the cases reported as **2015 (322) E.L.T. 834 (A.P.)** in the case of **CC,CE&ST Hyd.-IV Vs. Apex Drugs & Intermediates Ltd., 2015 (325) ELT (Del)** in the case of **CCE Vs. Birla Textile Mills and 2006 (201) ELT 559 (Kar)** in the case of **Slovak India Trading Co. Pvt Ltd.** have also held that where the credit becomes un-utilizable due to some reason like stoppage of factory, it can be granted by cash as there is no provision in the central excise law which prohibits such credit. The learned Counsel has emphasized that the present situation is

similar to such cases. The credits were validly earned and suddenly became unutilizable due to transition to GST regime where there was no provision to carry over these cesses. He further argued that judgment of Delhi High Court in the case of Cellular operator's case in W.P. (C ) no. 7837/2016 was no applicable as the relief claimed by the appellant is not by way of allowing the appellant to pay GST through these cesses which was the issue in Cellular Operator's case and which was not permissible under the new scheme, but the appellant had only sought refund of the accumulated cesses under the provisions old the regime. He further relied upon Hon'ble Supreme Court judgment in the case of **Eicher Motors Vs. UOI [1999 (106) E.L.T. -3 (S.C.)**] that the right to credit becomes a vested and duly crystallized right in favour of Assessee the moment input goods / services are received and by virtue of assessee paying the duty thereon by reimbursing the said amounts to the supplier of goods.

> "Para.-5 Thus the assessees became entitled to take the credit of the input instantaneously once the input is received in the factory on the basis of the existing scheme. Now by application of Rule 57F(4A) credit attributable to inputs already used in the manufacture of the final products and the final products which have already been cleared from the factory alone is sought to be lapsed. that is, the amount that is sought to be lapsed relates to the inputs already used in the manufacture of the final products but the final products have already been cleared from the .factory before 16-3-1995. Thus the right to the credit has become absolute at any rate when the input is used in the manufacture of the finalproduct. The basic postulate, that the scheme is merely being altered and, therefore, does not have any retrospective or retro-active effect, submitted on behalf of the State, does not appeal to us. As pointed out by us that when on the strength of the rules available certain acts have been done by the parties concerned, incidents following thereto must take place in accordance with the scheme under which the duty had been paid on the manufactured products and if such a situation is sought to be altered, necessarily it follows that right, which had accrued to a party such as availability of a scheme, is affected and in particular, it loses sight of the fact that provision for facility of credit is as good as tax paid till tax is adjusted on future goods on the basis of the several commitments which would have been made by the assessees concerned. Therefore, the scheme sought to be introduced cannot he made applicable to the goods which had already come into existence in respect of which the earlier scheme was applied under which the assessees had availed of the credit facility for payment of taxes. It is on the basis of the earlier scheme necessarily the taxes have to be adjusted and

> payment made complete. Any manner or mode of application of the said rule would result in affecting the rights of the assessees.

Relying upon the ratio of the above decision the learned Counsel has argued that a right accrued to the assessee on the date when they paid the tax on the raw materials or the inputs and that right would continue until the facility available thereto gets worked out or until those goods existed. Therefore, it becomes clear that Section 37 of the Act does not enable the authorities concerned to make a rule which is impugned herein and, therefore, we may have no hesitation to hold that the rule cannot be applied to the goods manufactured prior to 16/3/1995 on which duty had been paid and credit facility thereto has been availed of for the purpose of manufacture of further goods".

3.2 The Appellant's claim for refund of the Edn, HSE & KK Cess, as brought out in para-B of relevant facts springs from the factual matrix that the Right to Credit accrued to and got vested in Appellant by virtue of their payment of the value of the Cess to the manufacturer of who supplied the goods used by Appellant as inputs in the manufacture of their final dutiable products on clearance of which the Appellant could not utilize such credit on account that either goods were exported or supplied to deemed export contracts or on account of exemption carved out vide Notification dated 01/06/2015. That the credit balance constitutes a valuable and substantive right which stood cemented once the final goods in respect of inputs whereof the appellants availed the said credit, cannot be obliterated or taken away and the exchequer is bound to refund the same. He further argued that the Hon'ble Supreme Court following the declaration of law by it in Eicher Motors's case to the effect that credit balance was a duly vested right which could not be taken away and is liable to be refunded. The Apex Court observed in **Samtel India Vs. CCE 2003(155) E.L.T.-14(S.C.)**.

> **"7.** Thus, the then sub-rule 4A is identical to sub-rule 17 which is under consideration. In *Eicher Motors* case

(supra), it has been held that the assessee became entitled to take the credit on the input having been received in the factory on the basis of the existing Scheme. It is held that the right to credit became absolute when the input was used in the manufacture of the final product. It is held that the incident following thereto must take place in accordance with the Scheme under which the duty had been paid on the manufactured product. It is held that if such a situation is sought to be altered necessarily it follows that right which accrued to a party gets affected. It is held that the Scheme sought to be introduced cannot be made applicable to the goods which had already come into existence in respect of which the earlier Scheme was applicable and under which the assessee had availed of the credit facility for payment of taxes. It is held that the right which accrued to the assessee on the date when they paid the taxes would continue until the facility available thereto gets worked out or until those goods existed. It is held that the amended sub-rule could not be applied to the goods manufactured prior to 16th March, 1995 (date on which sub-rule 4A came into existence).

**8.** The principles laid down in *Eicher Motors* case (supra) are fully applicable, here. It is however submitted that is no challenge to the validity of sub-rule 17. It is submitted that this Court cannot, therefore, strike down nor read down sub-rule 17. It is submitted that in the absence of such a challenge full effect has to be given to the wording of sub-rule 17. It is submitted that sub-rule 17 specifically provides that the credit would lapse and that credit shall not be allowed. We are unable to accept this submission. What was then sub-rule 4A is now sub-rule 17(a). Sub-rule 17(b) is identical to sub-rule 17(a) except that it is in respect of a different final product. Once a validity of a provision is challenged and the validity is upheld by reading down that provision, then it is not necessary that in all subsequent proceedings the validity must again be challenged. It is sufficient if a party claims that the provision has to be read in the manner laid down by a judgment of this Court. In the light of the judgment of this Court in *Eicher Motors* case (supra), sub-rule 17 cannot apply to vested rights. Therefore to the extent that the goods have already been exported, prior to March, 1997, the assessee would be entitled to a refund".

3. Per contra the Ld. Departmental representative ha s argued that once there was no provision to carry over the cesses credit to the GST regime and nor there was any specific provision to refund the same under the scheme, the same would lapse. He relied upon the decision of larger bench of the Tribunal in the case of **Steel Strips Vs. CCE Ludhiana** reported as **2011 (269) E.L.T. 257 (Tri-LB)** where the Tribunal has held teat claim of

refund is not a vested right unless vested by law. Therefore, refund of cenvat credits could not be granted at the time of closure of a factory because there was no law which permitted such refund.

4. We have carefully gone through the rival arguments. There is no dispute that on 01/07/2017, the cesses credit validly stood in the accounts of the assessee and very much utilizable under the existing provisions. The appellants could not carry over the same under the GST regime. Thus the appellants were in a position where they could not utilize the same. We agree with learned Counsel of the appellant that the credits earned were a vested right in terms of the Hon'ble Apex Court judgement in Eicher Motors case and will not extinguish with the change of law unless there was a specific provision which would debar such refund. It is also not rebutted by the revenue that the appellants had earned these credits and could not utilize the same due to substantial physical or deemed exports where no Central Excise duty was payable and under the existing provisions, had the appellants chosen to do so they could have availed refunds/ rebates under the existing provisions. There is no provision in the newly enacted law that such credits would lapse. Thus merely by change of legislation suddenly the appellants could not be put in a position to lose this valuable right. Thus we find that the ratio of Apex courts judgment is applicable as decided in cases where the assessee could not utilize the credit due to closure of factory or shifting of factory to a non dutiable area where it became impossibly to use these credits. Accordingly the ratio of such cases would be squarely applicable to the appellant's case. Following the judgement of Hon'ble Karnataka High Court in the case of **2006 (201) E.L.T. 559 (Kar)** in the case of **Slovak India Trading Co. Pvt Ltd.** and similar other judgements/decisions cited supra, we hold that the assessee is eligible for the cash refund of the cessess lying as cenvat credit balance as on 30/06/2017 in their accounts. The decision of the

larger bench in the case of Steel Strips cited by the learned Departmental Representative could not be applicable in view of the contradictory decisions of High Courts on the same issue.

5. Accordingly we hold that impugned order-in-appeal is without any merit and thus we set aside the same. The appeal is accordingly allowed.

(Operative part of the order pronounced in the open court.)

**(Ashok Jindal)**
**Member (Judicial)**

**(C.L. Mahar)**
**Member (Technical)**

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