CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

REGIONAL BENCH - COURT NO. I (E-HEARING)

Service Tax Appeal No. 60095 of 2021

[Arising out of Order-in-Appeal No. 43-ST-CGST-APPEAL-GURGRAM-SG-2020-21 dated 28.09.2020 passed by the Commissioner (Appeals) CGST, Gurugram]

Schlumberger Asia Services Ltd **……Appellant**
14th Floor, Tower C Building No. 10, DLF Cyber City,
Phase III, Gurugram, Haryana 122002

VERSUS

Commissioner of CE & ST, Gurgaon-I **……Respondent**
Plot No. 36-37, Sector 32, Near Medanta Hospital,
Gurgaon, Haryana

APPEARANCE:

Present for the Appellant: Mr. Mihir Deshmukh, Advocate

Present for the Respondent: Mr. Vijay Gupta, Authorized Representative

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

FINAL ORDER NO. 60844/2021

DATE OF HEARING: 24.05.2021
DATE OF DECISION: 24.05.2021

PER ASHOK JINDAL:

The appellant is in appeal against the impugned order wherein the refund claim filed by them of Education Cess, Secondary & Higher Education Cess and Krishi Kalyan Cess filed by them lying unutilized in their cenvet credit account on 01.07.2017 when GST Regime came into force has been denied.

2. The facts of the case are that the appellant is providing various services. The cenvet credit of various duties and services paid by

them and Education Cess, Secondary & Higher Education Cess, Krishi Kalyan Cess were lying unutilized in their cenvet credit account and the appellant could not utilize the same till 30.06.2017. On 01.07.2017, the GST Regime came in force and the credit lying in the account was allowed to be transferred under GST Regime. The appellant took the cenvat credit lying unutilized in their cenvat credit account of services, goods, Education Cess, Secondary & Higher Education Cess and Krishi Kalyan Cess to their GST account. Later on, an amendment came on 30.08.2018 in Section 140 of the CGST Act, 2017 that the assessee cannot carry forward the credit lying in their cenvat credit account of Education Cess, Secondary & Higher Education Cess and Krishi Kalyan Cess. Consequent the amendment, the appellant immediately reversed the amount of cenvet credit pertaining to Education Cess, Secondary & Higher Education Cess and Krishi Kalyan Cess and filed the refund claim of the amount lying unutilized as on 01.07.2017 in their cenvat credit account of Education Cess, Secondary & Higher Education Cess and Krishi Kalyan Cess. A show cause notice was issued to the appellant that in terms of Section 140 of the CGST Act, 2017 the appellant is not entitled to carry forward the cenvat credit in GST Regime; therefore, the refund claim filed on 30.08.2019 is barred by limitation, therefore, their refund claim has lapsed of credit as Education Cess including Secondary & Higher Education Cess has been abolished from 01.06.2015. The matter was adjudicated and refund claim was rejected. Hence, the appellant is in appeal before me.

3. The ld. Counsel for the appellant submits that in similar set of facts in the case of *M/s Bharat Heavy Electricals Ltd vs. Commr. of CGST & Customs*, this Tribunal vide its *Final Order No. 51849/2019 dt. 26.04.2019* has allowed the refund claim, therefore, the impugned order is to be set aside.

4. On the other hand, the ld. AR opposes the contention of the ld. Counsel and submits that in this case, the appellant has taken the cenvat credit of Education Cess, Secondary & Higher Education Cess and Krishi Kalyan Cess under GST Regime on 01.07.2017, therefore, it has become GST credit and if any refund is required to be filed by them, it is to be filed under CGST Act, 2017 in terms of the amendment to Section 140 of the CGST Act, 2017. He also submits that as the cenvat credit lying unutilized on 01.07.2017 and they were required to file the refund, if any, within the one year from the said date, but the same has not been filed within the one year. In that circumstance also, the refund claim has become time barred. He also submits that the facts in the case of *M/s Bharat Heavy Electricals Ltd (supra)* are not relevant to the facts of this case; therefore, decision in the case of *M/s Bharat Heavy Electricals Ltd (supra)* is not applicable to the facts of the case in hand.

5. Heard both the sides and considered the submissions.

6. I find that the facts of the case are not in disputed that on 01.07.2017, the new regime of GST came into force and on the said date, there was no bar on carry forward of the cenvat credit of Education Cess, Secondary & Higher Education Cess and Krishi Kalyan Cess to GST regime. In these circumstances, the appellant has taken

the cenvat credit under CGST Act. It is also a fact on record that Section 140 of the CGST Act, 2017 was amended on 30.08.2018 and was applied retrospectively. As per the amendment, any credit which was not admissible by the appellant is cannot be a GST credit for transitional credit to the appellant, when it is no GST credit, the appellant reversed the credit abandoned caution the said amount in their GST account and filed the refund claim on 30.08.2019. As the appellant has reversed the said amount in their GST account, in terms of the amendment to Section 140 of the CGST Act, 2017 on 30.08.2018, the said amount shall remain lying unutilized in their cenvat credit account on account of Education Cess, Secondary & Higher Education Cess and Krishi Kalyan Cess as good as on 01.07.2017. Further, as admitted by both the sides that in terms of Section 140 of the Act, the amount of Education Cess, Secondary & Higher Education Cess and Krishi Kalyan Cess cannot be transferred to GST account then it is only a cenvat credit of Education Cess, Secondary & Higher Education Cess and Krishi Kalyan Cess lying unutilized as on 01.07.2017 in their cenvat credit account. Therefore, the contention of the ld. AR that it is a GST credit, is not acceptable when the provision of law is very much clear that the said credit cannot be transferred to GST Regime.

7. Now the question arises whether the refund claim filed by the appellant is barred by limitation or not?

7.1 The amendment to Section 140 came after one year of the switching to the GST Regime on 30.08.2018 which is applicable retrospectively. In that circumstances how the appellant could have

filed the refund claim within one year from 01.07.2017 till 30.08.2018, when there was no provision of law existed, when amendment itself takes on 30.08.2018, therefore, the relevant date of filing the refund claim shall be 30.08.2018 and within one year of the said date, the refund claim has been filed by the appellant. In that circumstance, I hold that the refund claim filed by the appellant is not barred by limitation.

8. Now come to the issue whether the decision in the case of *M/s Bharat Heavy Electricals Ltd (supra)* can be relied in this case or not?

8.1 In the case of *M/s Bharat Heavy Electricals Ltd (supra)* this Tribunal laid down in law That Education Cess, Secondary & Higher Education Cess and Krishi Kalyan Cess cannot be transferred to GST account and as they were lying unutilized in their cenvat credit account on 30.06.2017, the assesee is entitled to claim the refund thereof. In other words, if the appellant could have filed the refund claim before 30.06.2017 of Education Cess, Secondary & Higher Education Cess and Krishi Kalyan Cess, the same is admissible to the appellant. The same view has been taken by this Tribunal in the case of *M/s Bharat Heavy Electricals Ltd (supra)* in para 4, which is reproduced herein below:

> *"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."

9. In view of the above observations, I hold that the appellant is entitled to file the refund claim; accordingly, the impugned order is set aside. The refund claim is allowed which is subject to verification of the records.

10. The appeal is disposed of in the above terms.

(Dictated and pronounced in the open court)

(ASHOK JINDAL)
MEMBER (JUDICIAL)

RA_Saifi