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# IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

**Excise Appeal No.40546 of 2021**

(Arising out of Order-in-Appeal No. 65/2021 (CTA-I) dated 29.6.2021 passed by the Commissioner of GST and Central Excise (Appeals – II), Chennai)

**M/s. Bharat Heavy Electricals Ltd.** **Appellant**
Boiler Auxiliary Plant
Indira Gandhi Industrial Complex
Ranipet 632 406.

Vs.

**Commissioner of GST & Central Excise** **Respondent**
Chennai Outer Commissionerate
NEWRI Towers, 2054, II Avenue
12th Main Road, Anna Nagar
Chennai – 600 040.

**APPEARANCE:**

Shri Z.U. Alvi, Advocate for the Appellant
Ms. Sridevi Taritla, ADC (AR) for the Respondent

**CORAM**

**Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)**

Final Order No. **42466 / 2021**

Date of Hearing : 13.12.2021
Date of Pronouncement: 15.12.2021

Brief facts are that the appellants are engaged in manufacture of boiler auxiliaries namely electrostatic precipitator, air pre-heaters, fans etc. and are registered with the Central Excise Department. They also have Service Tax registration as they are service providers as well as recipient of service. After introduction of GST, they migrated to GST and obtained necessary registration.

2. During the period from March 2017 to June 2017, the appellant received various inputs and input services into their factory for the use in their manufacturing activity. As per the provisions under CENVAT Credit Rules, 2004, as amended in 2015, the appellants were eligible to avail credit of the duty / tax paid on inputs and input services within a period of one year. However, they had not availed the credit on such inputs and input services till 30.6.2017. They had filed the ER-1 returns for this period without reflecting the credit on the inputs and input services. After introduction of GST with effect from 1.7.2017, the appellant could not process for carry over through TRAN-1 the credit eligible on the inputs and input services as they had not availed the credit prior to 30.6.2017 and did not reflect in their ER – 1 returns. They later filed an application for refund of the credit vide their letter dated 27.3.2018. After due process of law, the original authority rejected the claim stating that they ought to have taken the credit within 90 days of the appointed day and submit a declaration electronically informing GST TRAN-1 in accordance with Rule 117 of CGST Rules, 2017. This view was upheld by the Commissioner (Appeals) vide order impugned in this appeal. The appellants are thus before the Tribunal.

3. The learned counsel Shri Z.U. Alvi appeared and argued for the appellant. He submitted that the appellant has been receiving on an average of about 8000 nos. of cenvatable and other invoices per year. The credit of the duty / tax is availed only after

a systematic verification of admissibility of credit after acceptance of the quality of the goods and scrutiny of the vendors' invoices by finance department. This process takes time resulting in a time-lag between receipt of input / capital goods and availment of credit.

4. During the period 28.3.2017 to 8.6.2017, the appellant received 20 numbers consignment of inputs. During 23rd to 28th June, input services (involving reverse charge mechanism) were received for which payments to vendors were effected during the period 5th July to 4th October 2017. Since credit on the inputs / input services could not be availed before 30.6.2017, the same was not reflected in the ER-1 returns filed by them. It could not be carried forward through TRAN-1 to new GST regime.

5. The learned counsel submitted that the department has no case that the credit availed by them for which refund claim has been filed is ineligible. The refund claim has been rejected merely stating that the appellant has not availed the credit and carried forward to GST regime by filing TRAN-1. That the time for filing such TRAN-1 has expired on 27.12.2017 and therefore the appellant cannot claim refund.

6. The learned counsel adverted to Section 142(3) of CGST Act, 2017. This sub-section states that the refund claim has to be processed under erstwhile law. He argued that the 3rd proviso to Rule 4 of CENVAT Credit Rules, 2004 provide for availment of credit within one year of receipt of inputs / input services. The

appellant would be able to take the credit on all these invoices but for the introduction of GST regime and consequent closure of CENVAT Credit Rules with effect from 30.6.2017. The refund of credit has to be adjudicated under the erstwhile law. If that be so, the appellant would be eligible for credit and also refund of the unutilized credit.

7. The learned counsel submitted that various High Courts and the Tribunal have consistently held that if an assessee for any reason is not in a position to utilize the credit duly accrued to him, the same has to be refunded in cash. To support this argument, he relied upon the decision in the case of Union of India Vs. Slovak India – 2006 (223) ELT 559 (Kar.). The said decision is affirmed by the Hon'ble Supreme Court as reported in 2008 (223) ELT A170 (SC).

8. The decision of the Hon'ble High Court of Delhi in the case of CCE Vs. Birla Textile Mills – 2015 (325) ELT 651 (Del.) was relied by the learned counsel to submit that when the factory of the assessee was shifted from Delhi to Baddi and was exempted from paying central excise duty, the unutilized credit has to be refunded to the assessee.

9. In CCE Vs. Apex Drug Intermediates Ltd. – 2015 (322) ELT 834 (AP), the Hon'ble High Court of Andhra Pradesh held that the provisions of CENVAT Credit Rules entitles a manufacturer for refund of the CENVAT credit where for any reason the credit is

not able to be utilized. Various other decisions were also relied to support this argument.

10. Alternatively, the learned counsel submitted that the appellant has to be refunded the amount of duty / tax paid on the inputs / input services as a buyer / receiver. The appellant follows the guidelines of the Institute of Chartered Accountants of India whereby in costing of the inputs / input services, the value of such inputs / input services is taken bare of tax element. It is clear that the tax has not been passed on to another person. Thus, there is no unjust enrichment and the appellant is entitled for the refund of the duty / tax element borne by them on the input / input services procured by them. He prayed that the appeal may be allowed.

11. The learned Ms. Sridevi Taritla supported the findings in the impugned order.

12. Heard both sides and perused the records.

13. On going through the Order in Original as well as the impugned order, I find that there is no allegation raised by the department that the appellant is not eligible to avail credit of the duties / taxes paid on the inputs / input services. To put it more clearly, the appellant would be eligible to avail the credit but for the introduction of new GST law. It is also explained by the appellant that they are able to avail credit only after they make the full payment to the vendors. The appellants have cleared payments to vendors of the impugned invoices during the period

from 5.7.2017 to 4.10.2017. The provisions of CENVAT Credit Rules, as it stood during the disputed period (March to June 2017), allowed the appellant to avail credit within a period of one year. They could not avail the credit only because of the introduction of GST law by which the CENVAT account has ceased to exist. There was also a cut-off date for filing TRAN-1 return for carry forward of eligible credit. As per the accounting system followed by the appellant, they were to take credit only after making payment to vendors which was completed in October 2017 (after introduction of GST). Thus, they could not avail the credit or reflect the same in their ER-1 returns for the month of June 2017.

14. In the case of Adfert Technologies Pvt. Ltd. Vs. Union of India – 2020 (32) GSTL 726 (P&H), it is held that transitional credit being vested right cannot be taken away on procedural or technical ground. This decision was upheld by the Hon'ble Supreme Court as reported in 2020 (34) GSTL J138 (SC). Again, the jurisdictional Hon'ble High Court in the case of Tara Exports Vs. Union of India reported in 2019 (20) GSTL 321 (Mad.) has held that GST law contemplates seamless flow of tax credit on all eligible inputs. It is settled legal position that substantive credit cannot be denied on procedural grounds.

15. In the present case, at the cost of repetition, the appellant would be eligible to avail credit but for the introduction of GST law. The said right cannot be frustrated by pressing on the

procedural requirement of filing TRAN-1 before 27.12.2017. The accounting practice adopted by the appellant allows to avail credit only after making payments to the vendors which has made it impossible to carry forward the credit as set out in the GST law. When the credit is eligible, the same cannot be denied by stating procedural requirements. In Pujan Buliders, Engineers and Contractors Vs. CCE & ST, Vadodra – 2021-TIOL-101-CESTAT MUM, the Tribunal allowed the refund even though initially the credit was carried forward to TRAN-1 and later reversed, after which the claim for refund was filed. The relevant para reads as under:-

> *"5. I have considered the submissions made by both the sides and perused the records. The facts in the present case is not under dispute that the appellant have paid the excess service tax during the quarter April to June, 2017, however, the appellant under bona fide belief transferred the said excess paid service tax into their TRANS-1 as balance in personal ledger account. Subsequently, on objection raised by the GST department the appellant have reversed the said amount and also paid an interest of Rs. 52,256/- on 27.02.2019. In these peculiar circumstances, I find that since the appellant has transferred the amount of excess paid service tax in the TRANS-1 and same was reversed on 27.02.2019, therefore till the date up to 27.02.2019 there is no cause for claiming refund of this amount. The refund is arising only after the appellant reversed the amount on 27.02.2019. The refund was admittedly filed on 05.04.2019 i.e well within the prescribed time limit of 1 year in terms of section 11B. Therefore, in my considered view, the refund was filed well within the time. Hence, the same is not time barred. As submitted by the Learned Authorized Representative the issue of unjust enrichment need to be verified at the time when the refund is to be granted to the assessee. Therefore in the present case also though the refund is not 4 | P a g e S T / 1 0 5 1 6 / 2 0 2 0 hit by limitation but the fact that whether the incidence of the refund amount has been passed on or otherwise needs to be examined by the sanctioning authority."*

16. The Tribunal vide Final Order No. 42366/2021 dated 11.10.2021 in the case of Terex India Pvt. Ltd. Vs. CGST & Central Excise had occasion to analyse an issue of eligibility of credit and refund post-GST regime. The same is reproduced as under:-

> *"6.4 Section 142 (3) is the transitional provision for claim of refund after the introduction of GST Act, 2017. It says that refund claims of any amount paid under the erstwhile law have to be disposed according to the provisions of the erstwhile law and the amount has to be paid in cash. The appellants have paid the tax under the erstwhile law. In the present case, the claim is only for refund and not proceedings for assessment or adjudication. In such a scenario, only sub-section (3) of section 142 will be attracted. Rejection of the refund claim by referring to sub-section (8) of Section 142 of CGST Act, 2017 is mis-placed. For these reasons, rejection of refund is unjustified."*

17. From the foregoing decisions and applying the principles laid in the above decisions, I am of the view that the rejection of refund claim cannot be justified. The impugned order is set aside. The appeal is allowed with consequential relief, if any.

(Pronounced in open court on 15.12.2021)

(**SULEKHA BEEVI C.S.**)
Member (Judicial)

Rex