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

Service Tax Appeal No.40436 of 2021

(Arising out of Order-in-Appeal No. 09/2021 (CTA-I) dated 27.1.2021 passed by the Commissioner of GST & Central Excise (Appeals – I), Chennai)

M/s. International Seaport Dredging Pvt. Ltd. **Appellant**
5th Floor, Challam Towers
Dr. Radhakrishnan Salai
Mylapore, Chennai – 600 004.

Vs.

Commissioner of GST & Central Excise **Respondent**
Chennai North Commissionerate
26/1, Mahatma Gandhi Road
Nungambakkam, Chennai – 600 034.

APPEARANCE:

Shri Mihir Deshmukh, Advocate for the Appellant
Ms. K. Komathi, ADC (AR) for the Respondent

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

Final Order No. **40249 / 2022**

Date of Hearing : 16.06.2022
Date of Decision: 17.06.2022

Brief facts are that the appellant is engaged in providing dredging services and is registered with the department for the services rendered by them. They filed refund claim under section 11B of the Central Excise Act, 1944 on 5.2.2020 for the refund of unutilized CENVAT credit availed on Education cess, Secondary and Higher Education cess and Krishi Kalyan cess. The refund claim was filed on the basis of the judgment of the Hon'ble High Court of Madras dated 5.9.2019 in the case of Sutherland Global Services Pvt. Ltd. Vs. UOI in W.P. No. 4773/2018.

2. They had carried forward the CENVAT credit in respect of Education cess, Secondary and Higher Education cess and Krishi Kalyan cess to TRAN-1 after the introduction of GST. Later, on the insistence of the department, they reversed the same. Pursuant to the decision of the Hon'ble High Court in Sutherland Global Services Pvt. Ltd. (supra), they filed refund claiming refund of the Education cess, Secondary and Higher Education cess and Krishi Kalyan cess lying unutilized in their CENVAT account. After due process of law, the original authority rejected the refund claim holding that under section 140 of the CGST Act, 2017, refund can be sought only for eligible duties and that duties excludes refund of cess. Aggrieved by the order, the appellant filed appeal before Commissioner (Appeals) who vide the order impugned herein upheld the same. Hence this appeal.

3. On behalf of the appellant, learned counsel Shri Mihir Deshmukh appeared and argued the matter. He submitted that the issue stands covered by the decision of the Tribunal in the case of Emami Cement Ltd. Vs. Commissioner of GST & Central Excise, Raipur – 2022-TIOL-280-CESTAT-DEL. The Tribunal in the said case had observed that CENVAT credit is a vested right as held by the Hon'ble Supreme Court in Eicher Motors Ltd. Vs. CCE – 2002-TIOL-149-SC-CX-LB. The decision in Samtel India Ltd. Vs. CCE – 2003-TIOL-40-SC-CX was also relied by the Tribunal to hold that the assessee is eligible for refund of the balance amount of credit of cess lying in CENVAT account. He also relied upon the

decision of the Tribunal in the case of Schlumberger Asia Services Ltd. Vs. CCE, Gurgaon – 2021-TIOl-313-CESTAT-CHD to argue that in the said case, the Tribunal held that the refund claim with regard to Education cess, Secondary and Higher Education cess and Krishi Kalyan cess lying unutilized in the CENVAT account is eligible for refund after introduction of GST.

4. The learned AR Ms. K. Komathi supported the findings in the impugned order.

5. Heard both sides.

6. The issue is whether the appellant is eligible for refund of Education cess, Secondary and Higher Education cess and Krishi Kalyan cess lying unutilized in their CENVAT account. The Tribunal in the case of Emami Cement Ltd. (supra) on identical issue observed as under:-

> *"2. The appellant is engaged in the business of manufacture of clinker and cement. Prior to 01.03.2015, cess was leviable on goods manufactured by the appellant, in addition to excise duty, and the appellant availed CENVAT credit under the provisions of the CENVAT Credit Rules 2004 4 on cess paid on procurement of goods and services. However, the notification dated 01.03.2015 exempted levy of the cess on all goods falling in the First Schedule to the Central Excise Tariff Act, 1985 . Thus, w.e.f. 01.03.2015 only central excise duty was leviable and levy of cess was exempted. The closing balance of the cess as on 28.02.2015 could not consequently be utilised by the appellant post 01.03.2015 and it was carried forward in the central excise returns. This was for the reason that credit of cess could be utilised for payment of the cess under the Credit Rules and could not have been utilised for payment of excise duty. On introduction of the Central Goods and Service Tax, 2017 Act w.e.f. 01.07.2017, the closing balance of the credit on cess appearing in the excise returns filed by the appellant in the month of June 2017 was not carried forward and instead the appellant filed a claim for refund of such balance of Rs. 53,47,491/- of credit on cess on 29.05.2018.*
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> *25. Learned authorised representative for the Department also placed upon the decision of the Delhi High Court in Cellular*

Operators Association. This judgment was rendered in a Writ Petition that had been filed for quashing the notification dated 29.10.2015 and for a direction that the credit accumulated on account of cess should be allowed to be utilised for payment of service tax leviable on telecommunication services. The submissions of the petitioner was that the unutilised amount of cess, after it was exempted w.e.f. 01.03.2015, should be permitted to be utilized for payment for payment of tax on excisable goods and taxable services as it was subsumed in the central excise duty which had been raised in 2015. The High Court rejected this contention.

26. In the present case, the plea of the appellant is not for adjustment of the credit on cess amount against payment of excise duty or service tax, but it is for refund of credit accumulated on account of payment of tax on cess. This decision would, therefore, not help the respondent.

27. Learned authorised representative also place reliance upon the notification dated 07.12.2015 issued by CBEC to contend that a policy decision had been taken not to allow utilisation of accumulated credit of cess, after cess had been phased out and it is reproduced below:

"Discussion & Decision

The conference after discussion and briefing from the officers from the Board noted that it was Government conscious policy „decision to withdraw the Education Cess and Secondary and Higher Education Cess. It is a policy decision to not allow utilization of accumulated credit of education cess and secondary and higher education cess after these Cesses have been phased out. As these Cesses have been phased out and no new liability to pay such Cess arises, no vested right can be said to exist in relation to the accumulated credit of the past. The rule and notifications as they exist need to be followed and do not need any amendment.

28. The aforesaid policy contained in the notification dated 07.12.2015 is clearly contrary to the decisions of the High Courts and the Tribunal referred to above and, therefore, cannot be come to the aid of the Revenue.

29. It needs to be noted that CENVAT credit avail is a vested right as has held by the Supreme Court in Eicher Motors and Samtel India.

30. The appellant is, therefore, clearly entitled to the refund of the balance amount of credit of cess and the decision to the contrary taken by the Commissioner (Appeals) cannot be sustained. The order dated 12.06.2019 passed by the Commissioner (Appeals) is, therefore, set aside and the appeal is allowed with consequential reliefs, if any."

7. Further, in the case of Schlumberger Asia Services Ltd. (supra), on an identical issue, the Tribunal held that all the cess

are eligible for refund. The relevant portion of the order is as follows:-

> *"2. The facts of the case are that the appellant is providing various services. The cenvet credit of various duties and services paid by 2 ST Appeal No. 60095 of 2021 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.*
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> *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?*
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> *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:*
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> *"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 6 ST Appeal No. 60095 of 2021 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."

8. Following the above decisions, I am of the view that the rejection of refund is not justified. The impugned order is set aside. The appeal is allowed with consequential reliefs, if any.

(Pronounced in open court on 17.6.2022)

Sd/-
(**SULEKHA BEEVI C.S.**)
Member (Judicial)

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