CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 20320 of 2020

[Arising out of Order-in-Appeal No. 328/2020 dated 23/06/2020 passed by the Commissioner of Central Tax, Bangalore-I (Appeals)]

Kirloskar Toyota Textile Machinery Pvt. Ltd.
Plot No 10-13, Phase -11,
Jigani Industrial Area, Jigani
Bengaluru – 560 102
Karnataka

Appellant(s)

VERSUS

Commissioner of Central Tax, Bengaluru South GST Commissionerate
C.R. Building, Queens Road
Bangalore - 560 001
Karnataka

Respondent(s)

Appearance:

Mr. Akbar Basha, CA
Hiregange & Associates
#1010, 1st floor (Above Corp. Bank)
26th Main, 4th T Block, Jayanagar,
Bangalore - 560 041
Karnataka

For the Appellant

Mr. P. Gopakumar, Joint Commissioner (AR)

For the Respondent

CORAM:
HON'BLE SHRI S.S GARG, JUDICIAL MEMBER

Date of Hearing: 07/07/2021
Date of Decision:19/08/2021

Final Order No. 20697/2021

Per : S.S GARG

The present appeal is directed against the impugned order dated 23/06/2020 passed by the Commissioner of Central Tax (Appeals),

Bangalore whereby the appeal of the appellant is dismissed and the order of rejection of refund passed by the Assistant Commissioner was upheld. Briefly the facts of the present case are that the appellant is engaged in the manufacture of parts and accessories of textile machinery and also renders Commissioning and Installation Services. Appellant is engaged in export of service without payment of tax under LUT and they are also availing the benefit of cenvat credit facility availed under Cenvat Credit Rules, 2004. Since the appellant is engaged in export, there is an accumulated balance of unutilized credit of Education Cess (EC) and Secondary and Higher Education Cess (SHEC) available in the books. With the introduction of GST, these credits of cess were restricted to be transitioned into GST by virtue of Section 140(1) of the Act. Accordingly, the appellant did not carry forward accumulated credit of cess amounting to Rs. 36,53,362/- (Rupees Thirty Six Lakhs Fifty Three Thousand Three Hundred and Sixty Two only) in Tran-1. As these accumulated credit could not be utilized towards taxable supplies under existing law and also not transitioned into GST, appellant preferred a refund claim on 29/06/2018 under Section 11B of the Central Excise Act. Refund claim was filed within one year from the introduction of GST. The original authority as well as the appellate authority have rejected the refund application mainly on the ground that transfer of cess is restricted under Section 140(1) of the CGST Act, 2017. Hence, the present appeal.

2. Heard both the parties and perused the records.

3. Learned consultant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the provisions of the refund under the existing law and without considering the judgments delivered on the refund of cess by the Tribunal and the High Court. He further submitted that the

appellant being exporter of goods made without payment of tax under LUT was entitled to claim the accumulated credit of EC and SHEC in terms of Rule 3(7) of Cenvat Credit Rules, 2004 which allows the appellant to take cenvat credit on Education Cess and Secondary and Higher Education Cess and since these credit could not be utilized for payment of output liability and hence the appellant filed the refund claim under Section 11B of the Central Excise Act. He further submitted that there is no express provision for lapsing of Education Cess and Secondary and Higher Education Cess credit and therefore the appellant is rightly entitled to refund of Education Cess and Higher Education Cess. He also submitted that the impugned order while rejecting the refund of Education Cess has relied on the transitional provision under 140(1) to deny the refund claim of credit of cess assuming that the refund is filed under GST whereas the present claim is not filed under Section 142 of GST but is filed under Section 11B of the Central Excise Act. He further submitted that with the introduction of GST, assessee in respect of balance of cenvat credit lying in his account was left with only three options which is also admitted in para 6 of the impugned order viz. (a) refund of cenvat credit in terms of existing law (b) transfer to the ITC Ledger of GST regime through Tran-1 and lapse of cenvat credit. He further submitted that these accumulated credits of cess were not transitioned into GST due to specific restriction under Section 140(1), the appellant had to resort to the option of refund under existing law to avoid lapsing of credit. He further submitted that this issue of refund of cenvat credit of cesses has been considered by the Division Bench of the Delhi Tribunal in the case of ***M/s. Bharat Heavy Electricals Ltd. Vs. Commissioner of CGST reported in 2020-TIOL-1341-CESTAT-DEL.*** wherein the Division Bench of the Tribunal after relying upon the decisions of the Apex Court in case of ***Eicher Motors Vs. UOI reported in 1999 (106) E.L.T. 3 (S.C)*** and Apex Court decision in ***Samtel India Vs. CCE reported in 2003 (155) E.L.T. 14 (S.C)*** and also the decision

of the Karnataka High Court in the case of ***Slovak India Trading Co. Pvt. Ltd. reported in 2006 (201) E.L.T. 559 (kar.)*** has allowed the appeal of the assessee relating to refund of cesses under the existing law. Learned consultant further submitted that the findings in para 9 of the Order-in-Appeal that the claim was time-barred, the appellant submits that this issue goes beyond the scope of original show-cause notice as this issue was never raised at the time of show-cause notice and the original authority has also not given any findings on the issue of limitation and therefore the findings in the impugned order regarding time-bar is not sustainable in view of the following decisions:

- *CCE Vs. Suresh Synthetics – 2007 (216) E.L.T. 662 (S.C)*
- *CCE Vs. Gas Authority of India – 2008 (232) E.L.T 7 (S.C)*
- *CCE Vs. Toyo Engineering India Ltd. – 2006 (201) E.L.T. 513 (S.C)*

3.1. He further submitted that even otherwise also the refund claim filed by the appellant is within one year from the introduction of GST and the same was held to be within time by the decision of the Chandigarh CESTAT in the case of ***Schlumberger Asia Services Ltd. Vs. Commissioner(Appeals). of C.E & S.T – 2021-TIOL-313-CESTAT-CHD.*** He further submitted that impugned order has rejected the refund relying on the proviso to Section 174(2)(c) which is not applicable to the facts of the present case as it is related to tax exemption as an incentive, which is not related to refund of cesses as is the issue in the present case. He further submitted that it has been consistently held by the Tribunal and the High Court that when the assessee has moved out of the Modvat Scheme/Cenvat Scheme, portion of unutilized credit should be allowed as refund in view of the following decisions:

- *UOI Vs. Slovak India Trading Co. Pvt. Ltd. – 2006 (201) E.L.T. 559 (Kar.)*
- *Bhavani Textiles Vs. CCE – 2006 (194) E.L.T. 79*
- *CCE Vs. Apex Drugs & Intermediaries Ltd. – 2014 (314) E.L.T. 729*
- *CCE Vs. Jain Vanguard Polybutylene Ltd. – 2010 (256) E.L.T. 523 (Bom.)*
- *Bangalore Cables P. Ltd. Vs. CCE – 2017 (347) E.L.T. 100 (Tri.-Bang.)*
- *Shalu Synthetics Pvt. Ltd. Vs. CCE – 2017 (346) E.L.T. 413 (Tri.-Ahmd.)*
- *Century Rayon Twisting Unit Vs. CCE – 2015 (325) E.L.T. 205 (Tri.-Mum.)*
- *CCE Vs. Kores (India) Ltd. – 2009 (245) E.L.T. 411 (Tri.-Bang.)*

3.2. He further submitted that right to carry forward credit is a right or privilege acquired and accrued under the repealed Central Excise Act, 1944 and it has been saved under Section 174(2)(c) of the CGST Act, 2017 and therefore it cannot be allowed to lapse under Rule 117 as held in the case of ***M/s. Siddharth Enterprises Vs. Nodal Officer – 2019-TIOL-2068-HC-AHM-GST.*** He further submitted that credit of cess is appellant's vested right and had the GST law not introduced, then the appellant would have continued the said credit as assets in its books and with the introduction of new law the credit in the books cannot be made to lapse which will result in loss to the company.

4. On the other hand, the learned DR reiterated the findings of the impugned order and submitted that the cash refund of the unutilized credit of Education Cess and Secondary and Higher

Education Cess cannot be granted under the GST Act. For this submission, he relied upon the decision of the Delhi High court in Writ Petition No. 7837/2016 filed by the Cellular Operator Association of India. He also submitted that the High Court and the Tribunal has dealt with this issue and confirmed the Department's stand in the following cases:

- *Bharat Heavy Electricals Ltd. Vs. Commissioner of C.T, Hyderabad – 2020 (41) G.S.T.L. 465 (Tri.-Hyd.)*
- *M/s. Mylan Laboratories Ltd. Vs. Commissioner of Central Tax & Customs – 2020 (3) TMI 837 – CESTAT Hyderabad*
- *Gauri Plasticulture Pvt. Ltd. – 2019 (6) TMI-820-Bombay High Court*
- *Union of India Vs. Slovak India Trading Company*
- *Banswara Syntex Ltd. Vs. The Commissioner, Central Excise & Service Tax – 2018 (10) TMI 1064 – Rajasthan High Court*
- *Asst. Commissioner Vs. Sutherland Global Services Pvt. Ltd. – 2020 (10) TMI 804 – Madras High Court*

5. In reply to the written submissions filed by the DR, the learned consultant submitted that the Revenue has relied upon the decision in the case of **Bharat Heavy Electricals Ltd.** and the decision of **Mylan Laboratories Ltd.** (cited supra) where refund of Education Cess and Secondary and Higher Education Cess was held not permissible on the basis of Bombay High Court decision in the case of **Gauri Plasticulture Pvt. Ltd.** (cited supra). To counter the submission of the learned DR, the learned consultant submitted that the CESTAT Delhi has allowed the refund of Education Cess and Secondary and Higher Education Cess that could not be transitioned in the GST and the said decision of CESTAT Delhi being rendered by the Division

Bench would prevail over the decision of Tribunal Hyderabad rendered by the Single Member. He also submitted that the decision of CESTAT, Delhi in **Bharat Heavy Electricals Ltd.** allowed refund in the light of decision of Karnataka High Court in the case of **UOI Vs. Slovak India Trading Co. Pvt. Ltd. reported in 2006 (201) E.L.T. 559 (Kar.)** holding that when the assessee has moved out of the Modvat Scheme/Cenvat Scheme, portion of unutilized credit should be allowed as refund whereas Department's reliance on Bombay High Court decision in **Gauri Plasticulture** (cited supra) is not proper as the said decision has not distinguished the decision of Karnataka High Court in **Slovak India Trading Co. Pvt. Ltd.** (cited supra). He further submitted that the decision in Slovak India Trading Co. Pvt. Ltd. being a decision of the jurisdictional High Court would prevail over other decisions as held in the case of **CCE & ST Vs. Andhra Sugars Ltd. – 2015 (319) E.L.T. 297 (A.P.)** and Larger Bench decision of the Tribunal Bangalore in **J.K. Tyre & Industries Ltd. Vs. Asst. Commissioner of Central Excise – 2016 (340) E.L.T. 193 (Tri.-LB).** He also submitted that the Division Bench decision of the Delhi Tribunal on the same issue has neither been rebutted nor distinguished by the Tribunal, Hyderabad in rendering the contrary judgment. He further submitted that the decision of the Rajasthan High Court in the case of **Banswara Syntex Ltd.** relied upon by the learned DR is also not applicable in the present case because the appellant has relied on the relevant extract of Section 142(6)(a) of the CGST Act, 2017 which allows eligible claim of credit to be refunded in cash and the Hon'ble Rajasthan High Court in **Banswara Syntex** (supra) denying refund of accumulated credit has not referred to provision under Section 142(6)(a) that allows refund. Therefore, the said decision is also not applicable to the facts of the present case. He also submitted that the decision of the Madras High Court in the case of **Asst. Commissioner Vs. Sutherland Global Services Pvt. Ltd. – 2020 (10) TMI 804-Madras High Court** was on the issue whether cesses can be transitioned into GST. Whereas the issue in the present case is whether on account of accumulation of unutilized cenvat credit

of Education Cess and Secondary and Higher Education Cess which could not be transitioned into GST under Section 140(1), refund under Section 11B of the Central Excise Act, 1944 is permissible.

6. After considering the submissions of both the parties and perusal of the material on record as well as various judgments relied upon by both the parties cited supra, I find that in the present case the appellant has filed the refund claim of accumulated balance of unutilized credit of Education Cess and Secondary and Higher Education Cess available in their books under Section 11B of the Central Excise Act within a period of one year i.e. on 29/06/2018 from the introduction of GST law. I also find that with the introduction of GST there is a restriction for these cesses to be transitioned into GST by virtue of Section 140(1) of the Act and therefore the appellant did not transfer the said credit of cesses into GST and preferred to file the refund claim under Section 11B of the Central Excise Act. This issue was considered by the Division Bench of the CESTAT, New Delhi in the case of **Bharat Heavy Electricals Ltd**. cited supra and after considering the decision of the Apex Court as well as the High Court of Karnataka in the case of **Slovak India Trading Co. Pvt. Ltd.** has held that the assessee is entitled to refund of an unutilized credit of Education Cess and Higher Education Cess after the introduction of GST. It is pertinent to reproduce the said findings of the Division Bench which is contained in para 4 & 5 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 ths 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 judgment 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 judgment 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. =2006-TIOL-469-KAR-CX and similar other judgments/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."

6.1. Further, I find that the Karnataka High Court in the case of **Slovak India Trading Co. Pvt. Ltd.** (cited supra) has held that when the assessee has moved out of Modvat Scheme/Cenvat Scheme, portion of unutilized credit should be allowed as refund. Since the issue is covered by the decision of the **Slovak India Trading Co. Pvt. Ltd.** (cited supra) and the same being the decision of a jurisdictional High Court would prevail over decision of other High Courts and the Tribunal as held in the case of **CCE & ST Vs. Andhra Sugars Ltd.** cited supra and the Larger Bench decision of the Tribunal, Bangalore in the case of **J.K. Tyre & Industries Ltd. Vs. Asst. Commissioner of Central Excise** wherein the Larger Bench has held that the Tribunal is bound by the decision of the jurisdictional High Court and is not bound by the decision of other High Courts. Further, I find that the two decisions relied upon by the Department in the case of **Bharat Heavy Electricals Ltd. and Mylan Laboratories** both the decisions have been rendered by Single Member of the Tribunal whereas the decision in the case of **Bharat Heavy Electricals Ltd.** has been rendered by Division Bench of CESTAT, New Delhi which would prevail over the decision of the Single Member. Further, I find that the decision of the Hon'ble Madras High Court in the case of **Sutherland Global Services Pvt. Ltd.** is not

applicable in the present case because the said decision was on the issue whether cess can be transitioned into GST or not? Whereas the issue in the present case is whether unutilized cenvat credit of Education Cess and Secondary and Higher Education Cess could be claimed as refund under Section 11B of the Central Excise Act, 1944? Therefore, in view of the contradictory decisions of various High Courts, this Tribunal is bound to follow the decision of the jurisdictional High Court and the jurisdictional High Court has held in the case of **Slovak India Trading Company** (cited supra) which has been relied upon by the Division Bench of the Delhi Tribunal in the case of **Bharat Heavy Electricals Ltd.** has categorically held that refund can be granted of the cesses viz. Education Cess and Higher Education Cess which could not be transitioned into GST. As far as time-bar aspect is concerned, the findings in the impugned order regarding time-bar is beyond the show-cause notice as well as Order-in-Original and the same is not sustainable in law. Hence, by following the ratios of the Division Bench of Delhi Tribunal in **Bharat Heavy Electricals Ltd.** and jurisdictional High Court in **Slovak India Trading Co. Pvt. Ltd.,** I allow the appeal of the appellant.

(Order was pronounced in Open Court on **19/08/2021**)

(S.S GARG)
JUDICIAL MEMBER

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