Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad

REGIONAL BENCH-COURT NO. 3

EXCISE Appeal No. 10498 of 2022 - DB

(Arising out of OIA-CCESA-SRT-APPEAL-PV-103-2021-22 dated 31/03/2022 passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-I)

HUBERGROUP INDIA PVT LTD **.....Appellant**
Survey No 11 and 13 Village Morkhal
Silvassa, D and N H

VERSUS

Commissioner of C.E. & S.T.-DAMAN **.....Respondent**
3rd Floor...Adarsh Dham Building,
Vapi-Daman Road, Vapi
Opp.Vapi Town Police Station,
Vapi, Gujarat- 396191

WITH

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HUBERGROUP INDIA PVT LTD **.....Appellant**
Unir Ii Survey No 8/1/2/P 9/P 10/3 10/4 Village Morkhal
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Vapi, Gujarat- 396191

APPEARANCE:
Shri S Suriyanarayanan, Advocate for the Appellant
Shri Rajesh R Kurup, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C L MAHAR

Final Order No. 11984-11985/2024

DATE OF HEARING: 11.07.2024
DATE OF DECISION: 11.09.2024

RAMESH NAIR

The issue involved in the present case is that whether the appellant is entitled for cash refund against the accumulated and unutilized Cenvat credit of Education Cess and Secondary & Higher Education Cess in the

light of Section 142 (3) of CGST Act, 2017 read with Section 11 B of Central Excise Act, 1944.

2. Shri S. Suriyanarayanan, Learned Counsel appearing on behalf of the appellant at the outset submits that the issue is no longer res-integra in the light of the following judgments on the identical issue:-

- USV Private LTD Vs. Commissioner – 2023 (2)TMI 230-CESTAT Ahmedabad
- Schlumberger Asia Services Ltd Vs. Commissioner – 2021 (5) TMI-954- CESTAT Chandigarh
- Emami Cement Ltd Vs. Commissioner 2022 (3) TMI 1254-CESTAT New Delhi
- Hindustan Zinc Ltd Vs. Commissioner 2022 (2) TMI 246- CESTAT New Delhi
- International seaport Dredging Private Ltd. Vs. Commissioner -2022 (6) TMI 822- CESTAT Chennai
- Bharat Heavy Electricals Ltd Vs. Commissioner -2019 (4) TMI 1896-CESTAT New Delhi

3. Shri Rajesh R Kurup, Learned Superintendent (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order.

4. On careful consideration of the submission made by both the sides and perusal of record, we find that the Revenue has denied the refund claim on the ground that since the levy of Education Cess and Secondary & Higher Education Cess had been abolished, the appellant was not supposed to retain the credit and carry forward the same. We find that the abolition of Education Cess does not affect the accumulated Cenvat credit which was availed during the time when the Cenvat credit on Education Cess and Secondary & Higher Education Cess was legally available to the appellant. The both the lower authorities have misunderstood the abolishing of education cess, the levy of duty and the availment of Cenvat credit are on different yardstick. Therefore, merely because the levy of education cess

was abolished, it can not disentitle an assessee from availment of Cenvat credit on Education Cess and Secondary & Higher Education Cess. Therefore, the accumulation of the Cenvat credit in respect of Education Cess and Secondary & Higher Education Cess was absolutely legal and correct. Consequently they are eligible for refund of the same as provided under Section 142 (3) of the CGST Act, 2017 read with Section 11B of Central Excise Act, 1944.

4.1 As regard the time bar issue, as per special provision under section 142 (3) the provision of time bar is not applicable in the case of cash refund of accumulated Cenvat credit. Therefore, the ground of time bar itself is irrelevant and on that basis refund is not time bar. Having said so the provision of unjust enrichment is very much applicable to which the sanctioning authority can test the aspect of unjust enrichment at the time of processing the refund claim. The issue of refund of accumulated Education Cess and Secondary & Higher Education Cess has been considered in the case of USV Private LTD (Supra) wherein this Tribunal has taken the following view:-

> *"4. I have carefully considered the submissions made by both the sides and perused the record. I find that the question to be decided is, first, whether the appellant is entitled for the refund of Cenvat credit of education cess and higher education cess and consequently entitled for cash refund in case if unable to utilize the said Cenvat credit under GST regime and second, whether the refund is time-barred. I find that the appellant have heavily relied upon various High Court decisions according to which refund was allowed considering Rule 5 of Cenvat Credit Rules, 2004. It is not disputed that the appellant are not in a position to utilize Cenvat credit of Education Cess and Secondary and Higher Education Cess due to introduction of GST with effect from 01.07.2017.*
>
> *5. As regards the admissibility of Cenvat credit of Education Cess and Secondary and Higher Education Cess, Rule 3 clearly provides the Cenvat credit to be allowed in respect of Education Cess and Secondary and Higher Education Cess for ease of reference, Rule 3 of Cenvat Credit Rules is reproduced below:-*
>
> ***Rule 3. CENVAT credit. -***

(1) A manufacturer or producer of final products or a provider of taxable service shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of -

(i) the duty of excise specified in the First Schedule to the Excise Tariff Act, leviable under the Excise Act;

(ii) the duty of excise specified in the Second Schedule to the Excise Tariff Act, leviable under the Excise Act;

(iii) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act,1978 (40 of 1978);

(iv) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);

(v) the National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001 (14 of 2001);

(vi) the Education Cess on excisable goods leviable under section 91 read with section 93 of the Finance (No.2) Act, 2004 (23 of 2004);

(via) the Secondary and Higher Education Cess on excisable goods leviable under section 136 read with section 138 of the Finance Act, 2007 (22 of 2007);

(vii) the additional duty leviable under section 3 of the Customs Tariff Act, equivalent to the duty of excise specified under clauses (i), (ii), (iii), (iv), (v) (vi) and (via);

(viia) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act,

Provided that a provider of taxable service shall not be eligible to take credit of such additional duty;

(viii) the additional duty of excise leviable under section 157 of the Finance Act, 2003 (32 of 2003);

(ix) the service tax leviable under section 66 of the Finance Act;

(x) the Education Cess on taxable services leviable under section 91 read with section 95 of the Finance (No.2) Act, 2004 (23 of 2004); and

(xa) the Secondary and Higher Education Cess on taxable services leviable under section 136 read with section 140 of the Finance Act, 2007 (22 of 2007); and

(xi) the additional duty of excise leviable under section 85 of Finance Act, 2005 (18 of 2005)

From the above Rule, under clause (vi) and (via), the credit of Education Cess and Secondary and Higher Education Cess is clearly allowed. Therefore, the appellant is legally entitled for Cenvat of Education Cess and Secondary and Higher Education Cess. Hence, on this count refund cannot be denied.

6. As regards limitation, in the judgments cited by the learned Counsel, the Hon'ble High Court also considered limitation and held that in case of refund of accumulated unutilized credit, limitation shall not apply. Relevant judgments are reproduced below:-

(a) Slovak India Trading Company Pvt. Limited (Karnataka High Court)(supra):

*"**4**. Admitted facts would reveal of a claim of cash refund and admitted facts would reveal of rejection at the hands of the Assistant Commissioner and also the appellate authority. The Tribunal has chosen to allow the claim application on the ground that refund cannot be rejected when the assessee goes out of Modvat scheme or when the Company is closed. The argument is that there is no provision for refund in terms of Rule 5 of Cenvat Credit Rules, 2002. Rule 5 reads as under:*

*"**Rule 5. Refund of CENVAT Credit**: When any inputs are used in the final products which are cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate products cleared for export, the CENVAT credit in respect of the inputs so used shall be allowed to be utilized by the manufacturer towards payment of duty of excise on any final products cleared for home consumption or for export on payment of duty and where for any reason such adjustment is not possible, the manufacturer shall be allowed refund of such amount subject to such safeguards, conditions and limitations as may be specified by the Central Government by notification:*

Provided that no refund of credit shall be allowed if the manufacturer avails of drawback allowed under the Customs and Central Excise Duties Drawback Rules, 1995, or claims a rebate of duty under the Central Excise Rules, 2002, in respect of such duty."

5. There is no express prohibition in terms of Rule 5. Even otherwise, it refers to a manufacturer as we see from Rule 5 itself. Admittedly, in the case on hand, there is no manufacture in the light of closure of the Company. Therefore, Rule 5 is not available for the purpose of rejection as rightly ruled by the Tribunal. The Tribunal has noticed that various case laws in which similar claims were allowed. The Tribunal, in our view, is fully justified in ordering refund particularly in the light of the closure of the factory and in the light of the assessee coming out of the Modvat Scheme. In these circumstances, we answer all the three questions as framed in para 17 against the Revenue and in favour of the assessee.

6. Ordered accordingly. No costs."

The above decision of Hon'ble Karnataka High Court has been upheld by the Hon'ble Supreme Court reported at 2008 (223) ELT A170 (SC).

(b) In the case of Shalu Synthetics Private Limited (supra) this Tribunal relying upon the above cited judgment of Hon'ble Karnataka High Court in the case of Slovak India Trading Company Pvt. Limited passed the following decision :

*"**10**. The above said two judgments of the Hon'ble High Courts squarely cover the issue in favour of the appellant. It is to be noted that as against the above-said judgments of the Hon'ble High Courts,*

the ld. Departmental Representative seeks to rely upon the decision of this Bench in the case of M/s. Jai Elastics Pvt. Ltd. (supra). I have perused the said order produced by the ld. Departmental Representative and note that the said order of the Tribunal relies on the decision of the Larger Bench of the Tribunal in the case of Steel Strips v. CCE, Ludhiana (supra). With utmost respect to the Bench, I find that the judgment of the Hon'ble High Court of Karnataka in the case of Union of India v. Slovak India Trading Co. Pvt. Ltd. (supra) was cited before the Larger Bench and it was taken note of, but no reasonings have been recorded as to why the said judgment of the Hon'ble High Court of Karnataka was not applicable in the similar/identical situations. In my view, the judgments of the Hon'ble High Court of Bombay and Karnataka will have to be followed by the Tribunal in an identical/similar situation. In the case in hand, I find that the issue involved is identical to the issue which was before the Hon'ble High Court of Bombay and Karnataka.

***11.** In view of foregoing, judicial discipline requires that the Tribunal follows the decisions of the Hon'ble High Court in preference of the Larger Bench order; I set aside the impugned order and allow the appeal filed by the appellant with consequential relief."*

(c) Considering the ratio of judgment by Hon'ble Karnataka High Court in the case of Slovak India Trading Company Pvt. Limited the Hon'ble Rajasthan High Court in the case of Luvkush Textiles passed the following decision :

*"**10**. In view of the fact that after the cristilization of the claim on account of the Cenvet credit in favour of the assessee, assessee was entitled for the refund of Rs. 63,001/- from the Revenue which is not in dispute. It is also a fact that manufacturing unit of assessee had been closed and the concern of the assessee is not in production any more. Therefore, in view of Rule 5 which is reproduced as under :-*

*"**Rule 5. Refund of CENVAT credit**. - Where any inputs are used in the final products which are cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate products cleared for export, the Cenvat credit in respect of the inputs so used shall be allowed to be utilized by the manufacturer towards payment of duty of excise on any final products cleared for home consumption or for export on payment of duty and where for any reason such adjustment is not possible, the manufacturer shall be allowed refund of such amount subject to such safeguards, conditions and limitations as may be specified by the Central Government by notification:*

Provided that no refund of credit shall be allowed if the manufacturer avails of drawback allowed under the Customs and Central Excise Duties Drawback Rules, 1995, or claims a rebate of duty under the Central Excise Rules, 2002, in respect of such duty."

***11**. As far as the provisions under Rule 5 is concerned the words used are that "manufacturer shall be allowed refund of such amount subject to such safeguards". The provision, therefore, only speaks about a refund of amount and, therefore, clearly does not prohibit for payment of a refund amount in any form including cash.*

***12**. The assessee is entitled for refund amount which is due to him after the proper adjudication of its claim scheme and the only question which remains for consideration is that when the manufacturing unit of the assessee is closed, the benefit which is*

otherwise available to him is required to be paid and the Revenue cannot deny the benefit of the same.

***13**. In Commissioner of Central Excise, Ranchi v. Ashok Arc, the High Court of Jharkhand 2006 (193) E.L.T. 399 (Jhar.) = 2007 (7) S.T.R. 365 (Jhar.) has held as under :-*

4. In this petition, the Revenue has raised the following question for reference :

"Whether the learned Tribunal has gravely erred in allowing the Appeal and directing the authority to refund the pre-deposit amount in cash when the same has been deposited through RG 23A Pt.-II i.e. MODVAT account and under the provisions of Central Excise Rules, 1944 no such refund in cash is permissible?

5. On hearing the parties, we find that the aforesaid issue was raised by the Revenue before the CEGA Tribunal, which answered the same in favour of the respondent by the impugned order dated 30th April, 2002. The stand of the learned Counsel for the Revenue that the amount should have been adjusted in RG-23A Part-II account can not be accepted, there being no such RG-23 Part-II account available in respect of the finished goods. Similar issue was decided by Andhra Pradesh High Court in the case of Deccan Sales Corporation, as noticed by the CEGA Tribunal and, in fact, no credit account is being maintained by the respondent on account of raising of exemption limit. As the respondent will not be in a position to utilise the credit, the CEGA Tribunal has rightly held that the Revenue should refund the amount to the respondent in cash. There being no substantial question of law, raised for reference, we are not inclined to ask the Tribunal to refer any issue."

***14**. Similarly the Karnataka High Court in the case of the Union of India (UOI) represented by the Commissioner of Central Excise v. Slovak India Trading Company Private Limited has held as under :-*

4. Admitted facts would reveal of a claim of cash refund and admitted facts would reveal of rejection at the hands of the Assistant Commissioner and also the appellate authority. The Tribunal has chosen to allow the claim application on the ground that refund cannot be rejected when the assessee goes out of Modvat scheme or when the Company is closed. The argument is that there is no provision for refund in terms of Rule 5 of Cenvat Credit Rules, 2002. Rule 5 reads as under?

***Rule 5. Refund of CENVAT Credit.** - When any inputs are used in the final products which are cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate products cleared for export, the CENVAT credit in respect of the inputs so used shall be allowed to be utilized by the manufacturer towards payment of duty of excise on any final products cleared for home consumption or for export on payment of duty and where for any reason such adjustment is not possible, the manufacturer shall be allowed refund of such amount subject to such safeguards, conditions and limitations as may be specified by the Central Government by notification :*

Provided that no refund of credit shall be allowed if the manufacturer avails of drawback allowed under the Customs and Central Excise Duties Drawback Rules, 1995, or claims a rebate of duty under the Central Excise Rules, 2002, in respect of such duty.

5. There is no express prohibition in terms of Rule 5. Even otherwise, it refers to a manufacturer as we see from Rule 5 itself. Admittedly, in the case on hand, there is no manufacture in the light of closure of the Company. Therefore, Rule 5 is not available for the purpose of rejection as rightly ruled by the Tribunal. The Tribunal has noticed various case laws in which similar claims were allowed. The Tribunal, in our view, is fully justified in ordering refund particularly in the light of the closure of the factory and in the light of the assessee coming out of the Modvat Scheme. In these circumstances, we answer all the three questions as framed in para 17 against the Revenue and in favour of the assessee.

***15**. The order of the Karnataka High Court has further been confirmed by the Hon'ble Supreme Court in the SLP mentioned in the above paragraph. Taking into consideration, the Rule 5 of the Cenvat Credit Rules, 2002, we are of the view that the Tribunal was not correct while relying upon the judgment of the Larger Bench in Gauri Plasticulture (P) Ltd. as Rule 5 in no way prohibits the payment of the refund amount in cash and more particularly when after a proper adjudication of matter an amount of Rs. 63,001/- is said to have been sanctioned in favour of assessee (appellant) and the factum of their manufacturing unit having been closed, we are of the considered opinion that the present appeal deserves acceptance, the same is, therefore, allowed. The refund amount due to the appellant is required to be paid in cash by the Revenue. The respondents are directed to pay the same within a period of two months from today.*

16. Accordingly, the question is answered in favour of assessee and against the Revenue."

(d) The Rajasthan High Court considering the issue in the case of Welcure Drugs & Pharmaceuticals Limited (supra) passed the following judgment:-

*"**9**. We have heard counsel for the parties.*

***10.** Before proceeding with the matter, it will not be out of place to reproduce Rule 5 of the Central Excise Act which reads as under :*

***"Rule 5. Refund of CENVAT credit.** - Where any inputs are used in the final products which are cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate products cleared for export, the CENVAT credit in respect of the inputs so used shall be allowed to be utilized by the manufacturer towards payment of duty of excise on any final products cleared for home consumption or for export on payment of duty and where for any reason such adjustment is not possible, the manufacturer shall be allowed refund of such amount subject to such safeguards, conditions and limitations as may be specified by the Central Government by notification :*

Provided that no refund of credit shall be allowed if the manufacturer avails of drawback allowed under the Customs and Central Excise Duties Drawback Rules, 1995, or claims a rebate of duty under the Central Excise Rules, 2002, in respect of such duty."

***11**. In our considered opinion, in view of the observations made by the Karnataka High Court in Slovak India Trading Co.'s case (supra) and also in Collector of Central Excise, Pune's case (supra) by the Supreme Court, which reads as under :*

17. It is clear from these Rules, as we read them, that a manufacturer obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgement thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. There is no provision in the Rules which provides for a reversal of the credit by the excise authorities except where it has been illegally or irregularly taken, in which event it stands cancelled or, if utilised, has to be paid for. We are here really concerned with credit that has been validly taken, and its benefit is available to the manufacturer without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw material in its excisable product. The credit is, ther efore, indefeasible. It should also be noted that there is no co-relation of the raw material and the final product; that is to say, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be taken against the excise duty on a final product manufactured on the very day that it becomes available.

18. It is therefore, that in the case of Eicher Motors Ltd. v. Union of India - [1999 (106) E.L.T. 3] this Court said that a credit under the Modvat scheme was "as good as paid".

***12**. Four different High Courts have also taken the view against which the SLP was preferred and earlier also the Tribunal granted refund against which the SLP was not preferred. In that view of the matter, the principle of estoppel applies as once the department has accepted the view taken by the Tribunal it will not be appropriate to challenge the same by choosing the present assessee.*

***13**. In our considered opinion, the judicial discipline is required to be maintained. The Tribunal cannot distinguish the High Court judgments. They are bound by the High Court judgments even jurisdictional High Court and at the most they can refer it back prior to distinguish on facts but no authority has been made. Full Bench decision of the Tribunal has to be followed.*

***14**. Hence, we answer the issue in favour of assessee against the department.*

***15**. The appeal is allowed. The view of Karnataka High Court which has been confirmed by the Supreme Court is required to be approved and the same is approved."*

7. In view of the above judgments, it is observed that the issue is no longer res-integra. Accordingly the appellant is entitled for cash refund of accumulated and unutilized Cenvat credit of Education Cess and Secondary and Higher Education Cess. The impugned order is set-aside and the appeal is allowed with consequential relief."

4.2 On the Identical issue in another case at CESTAT Chandigarh in the case of Schlumberger Asia Services Ltd (Supra) Tribunal also taken the same view as under:-

"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."

4.3 The principal Bench of the CESTAT Delhi in the case of Emami Cement Ltd & NU VISTA LTD (Supra) also taken the similar view as under:-

"10. It is not in dispute that prior to 01.03.2015 cess was leviable on manufactured goods, in addition to excise duty and the appellant had availed credit under the provisions of the Credit Rules on cess paid on procurement of goods and services. It is also not in dispute that by a notification dated 01.03.2015, levy of cess was exempted. The closing balance of credit of cess as on 28.02.2015, therefore, could not be utilized by the appellant and it was carried forward by him in the central excise returns.

11. The submission of learned counsel for the appellant is that refund of credit of cess cannot be denied merely on the ground that such credit which could not be utilised prior to GST regime would stand lapsed. In this connection, learned counsel placed reliance upon the decision of the Tribunal in Slovak India Trading.

12. The Tribunal, in the aforesaid decision rendered in Slovak India Trading held that refund has to be made when an assessee goes out of the Modvat Scheme or when the Company is closed.

13. The appeal filed by the Department before the Karnataka High Court to assail the aforesaid decision of the Tribunal was dismissed and the relevant portion of the judgment is reproduced below:

> *"5. ******* The Tribunal has noticed that various case laws in which similar claims were allowed. The Tribunal, in our view, is fully justified in ordering refund particularly in the light of the closure of the factory and in the light of the assessee coming out of the Modvat Scheme. In these circumstances, we answer all the three questions as framed in para 17 against the Revenue and in favour of the assessee."*

14. The Supreme Court also dismissed the appeal filed by the Department to assail the aforesaid order of the Karnataka High Court and the order is reproduced below:

> *"Delay condoned.*
>
> *The Tribunal while allowing the appeal filed by the respondent assessee has relied upon the following decisions:*
>
> *1. Eicher Tractors v. CCE, Hyderabad, 2002 (147) E.L.T. 457 (Tri.-Del.)*
>
> *2. Shree Prakash Textiles (Guj.) Ltd.v. CCE, Ahmedaba, 2004 (169) E.L.T. 162 (Tri. – Mumbai)*
>
> *3. CCE, Ahmedabad v. Babu Textile Industries, 2003 (158) E.L.T. 215 (Tri.-Mumbai); and*
>
> *4. CCE, Ahmedabad v. Arcoy Industries, 2004 (170) E.L.T. 507 (Tri.-Mumbai).*
>
> *of the Tribunal in which it has been held that the assessee is entitled to refund of the amount deposited if the assessee has gone out of the Modvat Scheme or their unit is closed. Aggrieved against the order of the Tribunal, revenue filed C.E.A. No. 5/2006 in the High Court of Karnataka at Bangalore. The High Court by its impugned order has affirmed the order of the tribunal and dismissed C.E.A. No. 5/2006 filed by the revenue.*
>
> *Learned ASG appearing for the Union of India fairly concedes that those decisions of the Tribunal, which were relied upon by the Tribunal, have not been appealed against.*
>
> *In view of the concession made by the learned ASG, this special leave petition is dismissed."*

15. It is, therefore, clear from the aforesaid decision rendered in Slovak India Trading by the Tribunal, the Karnataka High Court and the Supreme Court that refund has to be granted when either the there is a closure of the factory or when an assessee goes out of the Modvat scheme.

16. In Bharat Heavy Electricals, a Division Bench of the Tribunal examined whether credits create a vested right and do not extinguish with the change of law and held that change of law cannot be a ground for divesting an assessee from this valuable right and in this connection, the Tribunal placed reliance upon the decision of the Karnataka High Court in Slovak India Trading. The observations of the Tribunal are as follows:

> *"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." (emphasis supplied)*

17. In Schlumberger Asia Services, the Tribunal followed the aforesaid decision of the Tribunal in Bharat Heavy Electricals.

18. In Kirloskar Toyota, the Tribunal while examining whether refund claim of accumulated balance of unutilised credit of cess available in the books, can be refunded under section 11B of the Central Excise Act 1944 [the Excise Act] and held, in view of the aforesaid Division Bench decision of the Tribunal in Bharat Heavy Electricals, as also the decisions of the Supreme Court and the Karnataka High Court in Slovak India Trading that an assessee is entitled to refund of unutilised credit of cess after the introduction of GST. The relevant observations of the Tribunal are as follows:

> *"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.*

******

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-inOriginal 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."*

(emphasis supplied)

19. In Nichiplast India, a learned Member of the Tribunal observed as follows:

"12. Having considered the rival contentions, following the rulings of Karnataka High Court as confirmed by the Hon"ble Supreme Court, I hold that the appellant is entitled to refund of the amount of Cenvat Credit lying in their Cenvat Credit account on closure of business. I further direct that the appellant is entitled to interest as per Rules, as per section 11BB of Central Excise Act, i.e. three months after the date of application till the date of grant of refund. Appeal Allowed."

20. In Shree Krishna Paper Mills, the Punjab and Haryana High Court examined whether refund could be ordered of unutilised credit on closure of the unit and held, in view of the earlier decision of the Punjab and Haryana High Court in Rama Industries Ltd. vs. CCE, Chandigarh [2009-TIOL-100-HC-P&H-CX] and the decision of the Karnataka High Court in Slovak India, that refund should be granted. The observations of the Punjab and Haryana High Court are as follows:

"8. We further find that this court in Rama Industries (Supra) relying upon judgment of Karnataka High Court in the case of Union of India Vs Slovak India Trading Co. Pvt. Ltd. 2006 (201) ELT 559 (Kar) has sanctioned refund of unutilised Cenvat Credit on the closure of factory. Rajasthan High Court in the case of Lav Kush Textiles Vs CCE, Jaipur 2017 (353) ELT 417 (Raj), Welcure Drugs & Pharmaceuticals Ltd. Vs CCE 2018 (15) GSTL 257 (Raj) has formed similar view. High Courts have held that judicial discipline is required to be maintained; Tribunal cannot distinguish High Court judgments and is bound by High Court judgments. However, larger bench of Bombay High Court in the case of Gauri Plasticulture (Supra) has formed a different opinion.

*It is true that judgment cited by counsel for the Revenue has been delivered by a bench of three judges of Bombay High Court, nonetheless, as per judicial discipline we cannot ignore judgment of this Court and take contrary view. We do not find any fault in the judgment of this Court in the case of Rama Industries as well judgments delivered by Rajasthan and Karnataka High Court, thus we do not deem it fit to disagree with judgment of this court and refer the matter to larger bench.******"*

21. Shri O.P. Bisht, learned authorised representative appearing for the Department has, however, placed reliance upon the decision of a learned Member of the Tribunal in Bharat Heavy Electricals Ltd., wherein it has been held as follows:

"4. Learned departmental representative draws the attention of the bench to the judgment of the Larger Bench of the Hon"ble High Court of Bombay in the case of Gauri Plasticulture Pvt Ltd [2019-TIOL-1248-HC-MUM-CX-LB] on this issue in which questions framed by the Hon"ble Larger Bench were as follows:

"(a) Whether cash refund is permissible in terms of clause (c) to the proviso to section 11B(2) of the Central Excise Act, 1944 where an assessee is unable to utilize credit on inputs?

(b) Whether by exercising power under Section 11B of the said Act of 1944, a refund of un-utilised amount of Cenvat Credit on account of the closure of manufacturing activities can be granted?

(c) Whether what is observed in the order dated 25th January 2007 passed by the Apex Court in Petition for Special Leave to Appeal (Civil) No. CC 467 of 2007 (Union of India vs Slovak India Trading Company Pvt Ltd.) can be read as a declaration of law under Article 141 of the Constitution of India?"

and they were answered as follows:

"40. As a result of the above discussion, we answer the questions of law framed above as (a) and (b) in the negative. They have to be

answered against the assessee and in favour of the Revenue. Questions (a) and (b) having been answered accordingly, needless to state that the order of the Hon"ble Supreme Court in the case of Slovak India (supra) cannot be read as a declaration of law under Article 141 of the Constitution of India."

5. Per contra, learned counsel for the appellant relies on the judgment of the Hon"ble High Court of Madras in the case of Sutherland Global Services Pvt Ltd [2019 (11) TMI 278 – Madras HC] to assert that the accumulated credit of EC, SHEC & KKC does not lapse on switchover to the GST regime and could be carried forward as credit under GST.

6. I have carefully considered the judgments relied upon by the both sides. The judgment of the Larger Bench of the Hon"ble High Court of Bombay was precisely on the point as to whether the assessee can get cash refund of Cenvat credit which they were not able to utilize and it was answered in negative. The Hon"ble High Court of Madras was examining a different issue as to whether the precision of the credit of EC, SHEC & KKC into the new GST regime was permissible or otherwise. The Hon"ble High Court of Madras has not dealt with the issue of cash refund of unutilized Cenvat credit which is the question in dispute. In view of the above, I find that there is no legal provision under which the assessee"s appeal could be entertained."

22. The aforesaid decision of a learned Member is contrary to the Division Bench judgment of the Tribunal in Bharat Heavy Electricals and was also distinguished by the Tribunal in Kirloskar Toyota.

23. Learned authorised representative of the Department also placed reliance upon the decision of the Rajasthan High Court in Banswara Syntex Ltd. The Rajasthan High Court observed as follows:

"22. Even while amending the Rules of 2004 and substituting the proviso to Rule 3(7)(b) of the Rules of 2004, despite dispensing with the Education Cess and Secondary and Higher Secondary Education Cess, the Central Government has not thought it appropriate to provide for refund of the amount of such Cess, lying unutilised. In this view of the matter, in our considered view, the rule making authority has consciously not provided for refund of Cenvat credit.

23. It is noteworthy that an assessee is entitled to take Cenvat credit in respect of the inputs, immediately on their arrival in his factory or premises as provided in Rule 4 of the Cenvat Credit Rules, 2004. Hence, it is the Cenvat Credit Rules, 2004, which bestows upon an assessee, a right to claim credit of duty or cess paid on its inputs or input services. Such right accrues, fructifies and crystallizes on the date of procurement of the goods or services, but the same is available only to the extent of availing credit of such tax, in accordance with the existing conditions and provisions prevailing on that date.

24. In other words, Cenvat credit lying in an assessee"s account creates an infallible and indefeasible right, which in the present case is indispensable and undeniable; however, to the extent of making payment of the corresponding cess, if any, payable on or after that date, as categorically stipulated in 1st and 2nd proviso to Rule 3(7)(b) of the Cenvat Credit Rules, 2004.

25. Since the Cenvat Credit Rules, the repository of rights of an assessee to avail credit of the duty or other sums paid on inputs does

not entail or even envisage refund of such credit in cash and encashment cannot be claimed as a matter of course. It can also not be asserted that an assessee is entitled to or has an ingrained or vested right to claim refund of Education Cess and Secondary and Higher Secondary Education Cess or any other duty paid in accordance with the law dehors the Cenvat Credit Rules, 2004. Provisions as enacted in the form of Section 11B of the Act of 1944 or other provisions are of little avail to the assessee, as they do not even provide for availment of credit of the duty, much less refund or its payment in cash.

26. The judgment in case of SRD Nutrients Private Limited (supra) cited by Learned Counsel for the appellant - assessee has no bearing on the issue at hands, as the facts on record and question posed for consideration before us are entirely different from the facts and issues, which were involved in the case before Hon'ble the Supreme Court. The said judgment of Hon"ble the Apex Court simply lays down that Education Cess as well as Secondary and Higher Secondary Education Cess are a part of Excise duty. This position of law perhaps cannot be disputed, even the authorities below have not denied claim of refund on such count; they have rather treated the Education Cess and Secondary and Higher Secondary Education Cess to be a duty under the Act of 1944, even while rejecting the assessee"s claim.

27. In view of the discussion foregoing, we are of the considered opinion that the Tribunal has committed no error of law in holding that the appellant cannot claim cash refund or encashment of the unutilized and unavailed amount of Education Cess and Secondary and Higher Secondary Education Cess, lying in its credit."

24. It is, therefore, seen that there are conflicting decisions of the Karnataka High Court and the Punjab and Haryana High Court on the one hand and the Rajasthan High Court on the other hand. The decision of the Karnataka High Court in Slovak India was affirmed by the Supreme Court. It would, therefore, be appropriate to follow the view taken by the Karnataka High Court and the Punjab and Haryana High Court.

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."*

In view of the above decisions on the issue in hand and our observation made herein above, the issue is no longer res-integra. Accordingly, we hold that the appellant is entitled for the cash refund of accumulated Education Cess and Secondary & Higher Education Cess lying in their Cenvat account subject to verification of the claim in accordance with law.

5. The Impugned orders are set aside. Appeals are allowed.

(Pronounced in the open court on 11.09.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C L MAHAR)
MEMBER (TECHNICAL)

Raksha