

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH - COURT NO. II

Excise Appeal No. 50289 of 2022 (SM)

(Arising out of Order-in-Appeal No. DDN/EXCUS/000/APPL/24/2021-22 dated 30.11.2021 passed by the Commissioner, CGST, Dehradun.).

M/s Mahavir Transmission Ltd

Plot No. B-4, a-9 & 11 to 135,
Industrial Area, Vikasnagar,
Dehradun
Uttarakhand-248198

Appellant

VERSUS

**Commissioner of Central Goods And
Service Tax , Dehradun**

E-block, Nehru Colony,
Haridwar Road,
Dehradun, Uttarakhand
248001

Respondent

APPEARANCE:

Mr. Rajesh Gupta, Advocate for the appellant
Shri Divey Sethi, Authorised Representative for the respondent

CORAM:

HON'BLE SHRI ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER No. 50977 / 2022

DATE OF HEARING: 29.08.2022
DATE OF DECISION: 19.10.2022

ANIL CHOUDHARY:

Heard the parties.

2. The issue involved in this appeal is whether the show cause notice has been issued rightly by invoking the extended period of limitation. And secondly, if demand of Rs. 3,27,325/- is rightly made for use of E. Cess & SHE Cess for payment of duty in December 2016.

3. The brief facts are that the appellant is a manufacturer of AC Conductors, which are used in transmission of electricity. As on

28.02.2015, the appellant had a credit balance in the Cenvat Register of Education Cess and Secondary & Higher Education Cess of Rs.3,27,325/-.

4. Under the provisions of Cenvat Credit Rules, Rule 3(7)(b), the appellant/assessee was entitled to use the credit in respect of Education Cess and Secondary & Higher Education Cess for payment of Education Cess on duty or taxable services and similarly, credit of Secondary and Higher Education Cess could be used for payment of such similar cess on excise duty on output service tax.

5. With effect from 01.03.2015, under the Finance Bill/Act, 2015, levy EC. & SHE Cess was exempted on goods. Rule 3 (7)(b) of CCR was substituted as follows:-

“Provided also that the credit of Education Cess and Secondary and Higher Education Cess paid on inputs or capital goods received in the factory of manufacture of final product on or after the 1st day of March, 2015, can be utilized for payment of the duty of excise leviable under the First Schedule to the Excise Tariff Act;

Provided also that the credit of balance fifty per cent Education Cess and Secondary and Higher Education Cess paid on capital goods received in the factory of manufacture of final product in the financial year 2014-2015 can be utilized for payment of the duty of excise specified in the First Schedule to the Excise Tariff Act;

Provided also that the credit of Education Cess and Secondary and Higher Education Cess paid on input services received by the manufacturer of final product on or after the 1st day of March, 2015 can be utilized for payment of the duty of excise specified in the First Schedule to the Excise Tariff Act.”

6. According to the appellant, they had filed their ER-I Return for the month of February on 11.03.2015, wherein they had shown the unutilized portion of Education Cess /S. Higher Education Cess at

Rs.3,27,325/-. The appellant kept carrying forward the said balance and thereafter, utilized the same for payment of excise duty in the month of December, 2016. The appellant have filed return for the month of December on 05.01.2017. Subsequently, there was audit of the appellant by the Department in the month of December, 2017 for the period from April to June, 2016, wherein objection was raised for other matters but no objection was raised for erroneous utilization of the amount of cess in December, 2016. Such audit objections were recorded to be satisfied in the 'Monthly Committee Meeting' held on 17.01.2017. Thereafter, there was subsequent audit of the appellant by Revenue, that was in the year June-July, 2018, and in this audit, Revenue pointed out that the appellant have wrongly utilized the cenvat credit of Education Cess and SHE Cess of Rs.3,27,325/- , which was not available to them under the amended provisions of Cenvat Credit Rules, read with notification. The appellant contested the show cause notice on the ground of invocation of extended period of limitation. However, the Adjudicating Authority confirmed the demand along with interest and equal amount of penalty under Section 11 AC read with Rule 15 of CCR, 2004. Penalty was also imposed of Rs.5,000/- under Rule 15 A of CCR.

7. Being aggrieved, the appellant had preferred appeal before the Commissioner (Appeals), who has been pleased to reject the appeal by the impugned order.

8. Being aggrieved, the appellant have filed the present appeal before this Tribunal.

9. Ld. Counsel for the appellant urges that there is no malafide on the part of the appellant and further, urges that the show cause notice is bad for invocation of extended period of limitation.

10. Ld. Authorised Representative for the Department relies on the impugned order and states that admittedly, the appellant have taken wrong advantage(s) by setting off amount of cess with duty, which was not available to them, and thus, the extended period of limitation has been rightly invoked.

11. Having considered the rival contentions, I find that the Division Bench of this Tribunal have held in the case of **Bharat Heavy Electricals Ltd. Vs. Commissioner, CGST [2020-TIOL-1341-CESTAT- Delhi]** that an assessee is entitled to refund of unutilized cess under the existing law, lying in credit as on 30/06/2017. Division Bench had relied upon the ruling in the case of **Eicher Motors vs. Union of India [1999 (106) ELT 3 (S.C.)]** and also in **Samtel India vs. CCE [2003 (155) ELT 14 (S.C.)]** and also of the Karnataka High Court in the case of **Slovak India Trading Co. Pvt Ltd. [2006 (201) ELT 559. (KKR.)]** Following the ruling of the Division Bench of the Tribunal, Single Member Bench (Tri-Blr) in Kirloskar Toyota Textile Machinery Pvt. Ltd. Vide Final Order No. 20697/2021 dated 19/08/2021, considered refund of unutilized credit of EC. & SHEC on 30/06/2017, it was held that such refund be granted to the assessee as it neither lapses, nor the same was time barred.

12. In the facts of the present case, I find that, had the appellant not utilized the Cenvat credit of EC & SHEC for payment of output tax/duty in December 2016, the same would have become refundable as on

30/06/2017. If the appellant is required to deposit the said amount of Rs. 3,27,325/- in cash, it will become entitled to refund of the duty earlier paid by utilization of credit of EC & SHEC, thus the situation is wholly revenue neutral. In this view of the matter, I allow this appeal and set aside the impugned order. The ground as to limitation is left open. Thus, the appeal is allowed with consequential benefits.

(Order pronounced in the open court on 19.10.2022)

(Anil Choudhary)
Member (Judicial)

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