

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Excise Appeal No. 50793 of 2021 [DB]

[Arising out of Order-in-Appeal No. RPR-EXCUS-000-APPL-087-20-21 dated 18.03.2021 passed by the Commissioner of CGST, Central Excise & Customs (Appeals), Raipur]

M/s. NMDC Limited
NMDC Iron and Steel Plant,
Nagarnar, Post Box No. 02,
Jagdarpur, Distt.-Bastar - 494341

...Appellant

VERSUS

Commissioner of C.G.ST. - Raipur
GST Bhawan, Tikrapara,
Raipur, Chhattisgarh - 492001

...Respondent

APPEARANCE:

Shri Vikash Agarwal, Advocate for the Appellant
Shri Rakesh Agarwal, Authorized Representative for the department

CORAM:

HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING: 25.01.2024
DATE OF DECISION: **02.05.2024**

FINAL ORDER No. 55722/2024

DR. RACHNA GUPTA

The appellant has filed the instant refund claim of Cenvat credit availed on Education Cess and Higher Secondary Education Cess carried forward as on the appointed day i.e. 30.06.2017 in terms of Section 142(3) of the CGST Act 2017. The Cenvat credit so claimed for refund was availed on capital goods and input services during the period November 2012 to June 2017. The relevant date, in the instant case, in terms of Section 11B (5)(B)(f) is the day of payment of duty. The department formed an opinion that in terms of Section 142(3) of the CGST Act, 2017, it has particularly been provided that, no refund shall be allowed of any amount of Cenvat credit where the balance of the said amount as

on the appointed day i.e. 30.06.2017 has been carried forward under this Act. In the instant case the entire amount of refund claim has been carried forward on the appointed day by the appellant as per the ER-1 filed and Tran-1 filed. Hence vide Show Cause Notice No. 18-36/2019-20 dated 03.12.2019 the entire refund claim of Rs. 7,97,27,333/- is proposed to be rejected in terms of provisions of Section 11B of Central Excise Act, 1944 read with 142(3) of the Central GST Act 2017. The said proposal has been confirmed vide Order-in-Original No. 04/2019-20 dated 12.02.2020. The appeal thereof has been rejected by Commissioner (Appeals) vide Order-in-Appeal No. 087-20-21 dated 18.03.2021. Being aggrieved the appellant is before this Tribunal.

2. We have heard Shri Vikash Agarwal, learned Advocate for the appellant and Shri Rakesh Agarwal, learned Authorized Representative for the respondent.

3. Learned counsel for the appellant has submitted that impugned order has been passed in violation of principles of natural justice as all intimations for personal hearing were belated being received after the date of hearing. Hence the ex-parte order is prayed to be set aside. The impugned order is also alleged to have been passed without considering the submissions of the appellants. Section 142(3) of CGST Act, 2017 has not been judiciously considered which is squarely applicable to the appellant's case. Appellant prays to subsume the Education Cess and Secondary & Higher Education Cess in Central Excise Duty. Thus the order under challenge has wrongly denied eligibility of appellant for the impugned refund. Section 11B of Central Excise Act, 1944 is wrongly invoked. Order is accordingly prayed to be set aside and

appeal is prayed to be allowed also on the ground that time limit has not been computed from the date of the amendment in Section 140(1) of CGST Act.

4. Learned Departmental Representative submitted that the appellant has availed the aforesaid credit in the ER-1 for the month of June 2017 on 08.07.2017 and the said credit has been carry forwarded in the GST Tran-1 as prescribed under Section 140(1) of CGST Act. Subsequently, CGST (Amendment) Act, effective from 1 February 2019 has denied the credit of Education Cess and Secondary and Higher Education Cess for transition to OST by amending Section 140(1)(a) of CGST Act. Accordingly, the appellant reversed the credit under protest and also intimated the department. Findings in Para 10.2 and 10.3 of the impugned Order-in-Appeal are reiterated. Impressing upon no infirmity therein, the appeal is prayed to be dismissed.

5. Having heard the rival contentions, we observe and hold as follows:

5.1 The moot question to be adjudicated in the present case is: "Whether the cash refund of Cenvat credit of Cess in the form of Education Cess (EC) and Secondary Higher Education Cess (SHEC) is permissible to be refunded as the assessee was unable to utilize the said credit."

For the purpose, foremost, We observe that Cess is commonly employed to connote a tax with a purpose or a tax allocated to a particular thing suggested by the name of the cess. In the present case, it is related to education. Cess is generally for such levy which is for some special administrative expense as shall

be suggested by the name of the cess. Education cess was levied by virtue of Finance Act No. 2 of 2004 in Section 92 to 94 thereof to be charged as a duty of excise with an objective to fulfill commitment of the government to provide a finance universalized quality basic education. Section 93 thereof reads as follows:

93. Education Cess on Excisable Goods

(1) The Education Cess levied under Section 81, in the case of goods specified in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), being goods manufactured or produced, shall be a duty of excise (in this section referred to as the Education Cess on excisable goods), at the rate of two per cent, calculated on the aggregate of all duties of excise (including special duty of 43 excise or any other duty of excise but excluding Education Cess on excisable goods) which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue) under the provisions of the Central Excise Act, 1944 (1 of 1944) or under any other law for the time being in force.

(2) The Education Cess on excisable goods shall be in addition to any other duties of excise chargeable on such goods under the Central Excise Act, 1944 (1 of 1944) or any other law for the time being in force.

(3) The provisions of the Central Excise Act, 1944 (1 of 1944) and the rules made thereunder, including those relating to refunds and exemptions from duties and imposition of penalty shall, as far as may be, apply in relation to the levy and collection of the Education Cess on excisable goods as they apply in relation to the levy and collection of the duties of excise on such goods under the Central Excise Act, 1944 or the rules, as the case may be."

(emphasis supplied)

5.2. The Central Government introduced the secondary and higher education cess at the rate of 1 per cent of the total excise duty under Sections 126 and 128 of the Finance Act, 2007, which are reproduced hereunder:

"126. (1) Without prejudice to the provisions of subsection (12) of section 2, there shall be levied and collected, in accordance with the provisions of this Chapter as surcharge for purposes of the Union, a cess to be called the Secondary and Higher Education Cess, to fulfil the commitment of the Government to provide and finance secondary and higher education.

(2) The Central Government may, after due appropriation made by Parliament by law in this behalf, utilize, such sums of money of the Secondary and Higher Education Cess levied under subsection (12) of section 2 and this Chapter for the purposes specified in subsection (1) as it may consider necessary. X

XXXXX XXXXXX XXXXXX XXXXXX

128. (1) The Secondary and Higher Education Cess levied under section 126, in the case of goods specified in the First Schedule to the Central Excise Tariff Act, 1985, being goods manufactured or produced, shall be a duty of excise (in this section referred to as the Secondary and Higher Education Cess on excisable goods), at the rate of one per cent., calculated on the aggregate of all duties of excise (including special duty of excise or any other duty of excise but excluding Education Cess chargeable under section 93 of the Finance (No. 2) Act, 2004 and Secondary and Higher Education Cess on excisable goods) which are levied and collected by the Central Government in the Ministry of Finance 44 (Department of Revenue), under the provisions of the Central Excise Act, 1944 or under any other law for the time being in force.

(2) The Secondary and Higher Education Cess on excisable goods shall be in addition to any other duties of excise chargeable on such goods, under the Central Excise Act, 1944 or any other law for the time being in force and the Education Cess chargeable under section 93 of the Finance (No. 2) Act, 1944.

(3) The provisions of the Central Excise Act, 1944 and the rules made thereunder, including those relating to refunds and exemptions from duties and imposition of penalty shall, as far as may be, apply in relation to the levy and collection of the Secondary and Higher Education Cess on excisable goods as they apply in relation to the levy and collection of the duties of excise

on such goods under the Central Excise Act, 1944 or the rules made thereunder, as the case may be."

Thus, no doubt the Cess are the part of the excise duty.

We observe that the levy of EC and SHEC was however dropped and deleted by the Finance Act, 2015.

5.3. The second question which arises is:

"Whether the cess are cenvitable."

5.4 The only provision permitting Cenvat credit of excise duty paid is Rule 3 of Cenvat Credit Rules:

Rule 3 of the CENVAT Credit Rules, 2004 (CCR, 2004), provides that a manufacturer or a purchaser of final products or a provider of output service shall be allowed to take Cenvat credit of the duties specified in said Rule 3 of CCR, 2004. Sub-clause (vi) and (via) of the Rule 3(1) of CCR, 2004 reads as follows:

(i) xxxxxx

(ii) xxxxxx

(iii) xxxxxx

(iv) xxxxxx

(v) xxxxxx

(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) xxxxxx

(viii) xxxxxx

(ix) xxxxxx

(ixa) xxxxxx

(ixb) xxxxxx

(x) xxxxxx

(xa) xxxxxx

(xi) xxxxxx

Thus, it is clear that statute makes Education Cess and Secondary and Higher Education Cess as Cenvatable.

5.5. We further observe that sub-rule (vii) of Rule 3 of CENVAT Credit Rules, 2004, specifically provided that CENVAT Credit in respect of Education Cess and Secondary and Higher Education Cess shall be utilised only towards the payment of Education Cess leviable on the taxable services only and not against the normal excise duty. Thus CENVAT Rules, 2004 clearly restricted the utilisation of Education Cess and Higher and Secondary Education Cess on the output tax on goods and services and not against the normal excise duty or service tax liability. It is not disputed even before me that cross utilisation of CENVAT Credit in the form of Education Cess and Secondary and Higher Education Cess against normal service tax and excise duty liability was not allowed.

5.6. Further, We observe that the definition of 'eligible duties and taxes' as per the explanation 3 under Section 140 of the CGST Act, 2017 was amended with retrospective effect from 01.07.2017 whereby it is specified that cesses are excluded from the definition of 'eligible duties and taxes', Thus, the credit is *ab initio* not available for utilization for GST. In view of the above, cesses are not be transitioned through TRAN-1, as per the transitional provisions specified under CGST Act, the credit balances not transitioned to GST regime shall lapse, and, as such, the argument of the appellant the impugned credits never lapse, as there is no provision retaining the same is not sustainable. The appellant

cannot circumvent the said legal provision through the route of 142 (3) of the CGST Act. This section reads as follows:

"(3) Every claim for refund filed by any person before, on or after the appointed day; for refund of any amount of CENVAT credit, duty, tax, interest or any other amount paid under the existing law, shall be disposed of in accordance with the provisions of existing law and an amount eventually accruing to him shall be paid in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944"

The perusal of this provision makes it clear that any claim of refund even under CGST has to be dealt with in terms of the provisions of Central Excise Act, specifically Section 11B(2) thereof.

The provision reads as follows:

(2) If, on receipt of any such application, the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:

Provided that the amount of duty of excise and interest, if any, paid on such duty as determined by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to-

(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant's current account maintained with the Principal Commissioner of Central Excise or Commissioner of Central Excise;

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) the duty of excise and interest, if any, paid on such duty paid by the manufacturer, if he had not passed on the incidence of such duty and Interest, if any, paid on such duty to any other person;

(e) the duty of excise and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any paid on such duty to any other person;

(f) the duty of excise and interest, if any, paid on such duty borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify:

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty and interest, if any, paid on such duty has not been passed on by the persons concerned to any other person.

A bare perusal of this provision denotes that instead of crediting the amount of refund to the fund, it can be paid to the applicant seeking refund, if such amount is relatable, inter alia to refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made or any notification issued under this Act. The word refund is defined in the Explanation and it says that it includes rebate of duty of excise on excisable goods. Thus this section also do not talk about refund of cess after the cess stands omitted.

5.7. Even under transitional provisions of CGST Act, 2017 Section 140 thereof, precisely Section 142(3), it has particularly been provided that, no refund shall be allowed of any amount of Cenvat credit where the balance of the said amount as on the appointed day i.e. 01.07.2017 has been carried forward under this Act. In the instant case the entire amount of refund claim has been carried

forward on the appointed day by the appellant as per the ER-1 filed and Tran-1 filed.

5.8. As the amount of Cenvat credit balance of E. Cess & SHE Cess of Rs.7,97,27,333/- (of which refund had been filed by the appellant) was included in the carried forward amount by the appellant as on the appointed day i.e. 01.07.2017, in terms of Section 142(3) of the CGST Act 2017, refund of the same is not admissible to the appellant. Thus, it is clear that "taking" of the input credit in respect of Education Cess and Secondary and Higher Education Cess in the Electronic Ledger after 2015, after the levy of Cess itself ceased and stopped, does not even permit it to be called an input Cenvat credit and therefore, mere such accounting entry will not give any vested right to the Assessee to claim refund of the said amount. If one carefully compares all Sub-sections of Section 140, one can discern that while all other Sub-sections talk of "entitled to take credit", Sub-section (8) uses the word "allowed to take". The utilisation of such credit, even if taken in Electronic Ledger and notified in Form TRAN-1, does not guarantee any such right of utilisation independent of other parts of Section 140 specially ignoring Explanation 3.

6. In the light of entire above discussion, we hold that there is no error when Commissioner (Appeals) has held that there is no provision in the Cenvat Credit Rules, 2004 or in Central Excise Act, 1944 to allow cash refund of cesses lying in the balance in Cenvat credit. Once it is not allowable, question to refund the same does not arise mere transitioning it to TRAN-1 shall not create any light to what was not allowable.

7. As far as the plea of violation of principles of natural justice are concerned, we observe that appellant had filed the written submissions dated 02.01.2020 before original adjudicating authority. Personal hearing was also attended. There is no denial that notices of hearing were issued by Commissioner (Appeals) as well. Though appellant could not appear before him, without going into the plea by receipt of those notices, we observe that Commissioner (Appeals) has duly considered the appellant's reply dated 03.12.2017 and all the grounds of appeal taken by appellant. Hence we are not in agreement that principles of natural justice have been violated.

8. Coming to the issue of time bar we find no reason to differ from the findings arrived at in the impugned order. We do not therefore wish to differ from the findings of the order under challenge. Same is hereby upheld. Consequent thereto, the appeal is here dismissed.

[Order pronounced in the open court on **02.05.2024**]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)