THE MAHARASHTRA APPELLATE AUTHORITY FOR ADVANCE RULING FOR GOODS AND SERVICES TAX

(Constituted under Section 99 of the Maharashtra Goods and Services Tax Act, 2017)

ORDER NO. MAH/AAAR/SS-RJ/03/2018-19 **Date- 03.08.2018**

BEFORE THE BENCH OF

(1) Smt. Sungita Sharma, MEMBER
(2) Shri Rajiv Jalota, MEMBER

GSTIN Number	27AAACG1376N2ZB
Legal Name of Appellant	KANSAI NEROLAC PAINTS LIMITED
Registered Address	Nerolac House, Ganpatrao Kadam Marg, Lower Parel, Mumbai City, Maharashtra, 400013
Details of appeal	Appeal No. MAH/AAAR/06/2018-19 dated 11.05.2018 against Advance Ruling No. GST-ARA-18/2017-18/B-25 dated 05.04. 2018
Concerned officer/Jurisdictional Officer	D.C. GST, LTU 4, Mumbai

PROCEEDINGS

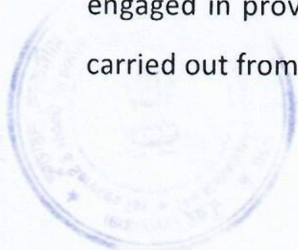
(Under Section 101 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017)

At the outset, we would like to make it clear that the provisions of both the CGST Act and the MGST Act are the same except for certain provisions. Therefore, unless a mention is specifically made to such dissimilar provisions, a reference to the CGST Act would also mean a reference to the same provisions under the MGST Act.

The present appeal has been filed under Section 100 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017 [hereinafter referred to as "the CGST Act and MGST Act"] by M/s Kansai Nerolac Paints Limited (herein after referred to as the "Appellant") against the Advance Ruling No. GST-ARA-18/2017-18/B-25 dated 5 April, 2018.

BRIEF FACTS OF THE CASE

A. M/s Kansai Nerolac Paints Limited are engaged in business of manufacture of paints and engaged in provision of works contract service as well. The works contract services are carried out from the company's Head Office.



B. The appellant filed an application for advance ruling u/s 98 of the CGST Ac2017 and the MGST Act 2017 raising the question as to whether the accumulated credit by way of Krishi Kalyan Cess (KKC) as appeared in the service tax return of Input Service Distributor (ISD) on June 30, 2017 which is carried forward in the electronic credit ledger maintained by the company under CGST Act , 2017 will be considered as admissible input tax credit.

C. It was decided by the ARA through order (No GST-ARA-18/2017-18/B-25 dt 5.4.2018) that KKC as appeared in the service tax return of Input Service Distributor (ISD) on June 30, 2017 which is carried forward in the electronic ledger maintained by the Appellant under CGST Act, 2017, will not be considered as admissible input tax credit.

D. The appellant has therefore filed an appeal against the said order under section 100 of the CGST Act 2017/MGST Act 2017.

GROUNDS OF APPEAL

1. The impugned Ruling is patently against law, unjust, erroneous and passed with complete non application of mind. The same merits to be quashed on this ground alone.

2. KKC is levied as per section 161 of the Finance Act, 2016. Section 161(5) of the Finance Act specified that for levy and collection of KKC, Chapter V of Finance Act, 1994 (Service Tax) will be applicable. Entry 92C of Union List I of Indian Constitution empowers legislature to levy service tax, as provided under Chapter V of Finance Act, 1994. 101st amendment of constitution deletes Entry 92C of union List 1, in view of implementation of Goods and Service Tax. It implies like service tax KKC is also subsumed in Goods and Service Tax. In other words CGST liability as accrued under CGST Act, 2017 contains liability on account of KKC as well. CENVAT Credit Rules 2004 (CCR) provides KKC liability could be set off with KKC credit only. CGST liability subsumed KKC liability in view of 101st amendment of constitution. Therefore migrated KKC credit will be admissible to set off with CGST liability. Advance Ruling authority has denied aforesaid submission of the appellant without stating any reason for the same.

3. Section 140(1) of CGST Act, 2017 (Act) allows a registered person to carry forward the CENVAT credit as captured in return for the period ended June 30, 2017 to electronic credit ledger provided the said credit is admissible under the Act. CCR has recognized KKC as CENVAT credit and Section 16 and Section 17 of the Act, which determines admissibility of input tax credit have put no restriction in admission of KKC as CENVAT credit under the aforesaid provision of the Act. Therefore KKC credit will also be considered as admissible CENVAT credit as per proviso (1) to section 140(1) read with section 16 and section 17 of the Act. Advance Ruling authority has denied aforesaid submission of the appellant without stating any reason for the same.

4. Advance Ruling Authority relies on the decision of Hon. Delhi High Court in case of Cellular Operators Association of India to negate the claim of the appellant without understanding the facts and the legal background of both the cases which completely different. Delhi High Court denied cross utilization of unutilized EC and SHE (being withdrawn) against excise duty and service tax liability as because these cesses have not been subsumed and there was no provision in the law to cross utilized the unutilized EC and SHE cess with excise duty and service tax. In the case of appellant, Section 161(5) of the Finance Act, 2016 brought KKC under Chapter V of Finance Act, 1994 and 101st amendment of constitution subsumed Chapter V of Finance Act, 1994 on introduction of Goods and Service Tax. Moreover section 140(10 of CGST Act,2017 allows unutilized CENVAT credit (KKC qualified as CENVAT credit in view of Rule 3(a) of CCR) to carry forward to electronic ledger without questioning the allow ability of the same under the earlier tax regime. The only condition is that the same should be admissible under the new tax regime. Therefore, the decision of Delhi High Court on which Advance Ruling Authority has relied upon is not applicable in the case of appellant.

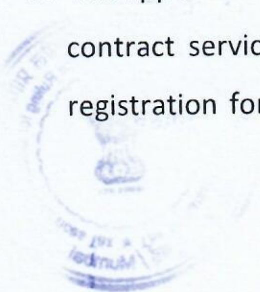
5. Advance Ruling Authority relies on the answer given by CBEC in response to FAQ to negate the claim of the appellant without understanding the legal provision. Moreover answer given by CBEC in response to FAQ does not have any legal binding on the Appellant.

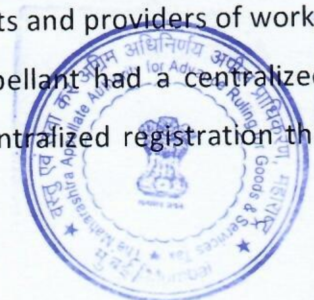
PERSONAL HEARING

6. The case was heard on 18.07.2018. It was contended by the appellant that the Advance Ruling Authority did not discuss their grounds properly. It was stated by them that KKC is a CENVAT credit and it got accumulated because the dealer had no KKC liability. According to them, the Delhi High Court judgment quoted by the ARA is not applicable as it was in the case of Education Cess and Secondary and Higher Secondary Education cess and also it was regarding excise duty or service tax. As per their contention, KKC is subsumed in CGST Act and it does not have any independent identity as KKC. Therefore, it should be allowed as credit under the transitional provision. He further referred to section 140(1) of the CGST Act and contended that it does not say anything about cross utilization as in the earlier Act. He stated that it was only under the earlier pre GST regime that KKC was allowed to be utilized only against KKC. However, there is no such condition in the present Act. He also referred to section 140(2) of the CGST Act which speaks about carry forward of CENVAT credit in the case of capital goods. The proviso to the said section specifically lays down that CENVAT credit in the case of capital goods would be allowed to carry forward only if it is admissible as CENVAT credit under the existing law. No such condition is present u/s. 140(1). He further averred that the ARA has not discussed any of the above grounds. He referred to the Delhi High Court judgment in the case of Cellular Operator (cited supra) and stated that the High Court held that there is no vested right in the case of adjustment of EC and SHE. He claimed that there is no vested right in this case and they are not claiming any vested right. A plain reading of section 140(1) clearly indicates that the law allowed CENVAT Credit. He further stated that the FAQ in the case of SBC should not be relied on as it referred to SBC and not to KKC. He also stated that the Frequently Asked Question (FAQ) in the case of KKC is not binding. He referred to the case of Ratan Industries where it was held that a Circular contrary to the provision of law cannot be binding. He therefore prayed that the KKC allowed to be carried forward and should be admissible as Input Tax Credit.

DISCUSSION AND FINDINGS

7. The appellant is engaged in the business of manufacture of paints and providers of works contract services as well. Under the pre GST regime the appellant had a centralized registration for head office, factory and office. Apart from centralized registration the





appellant also had separate registration as ISD to distribute the eligible CENVAT credit. According to Rule II(m) of the CENVAT credit Rules, 2004, the appellant received CENVAT credit at head office which also included KKC, which the appellant could not distribute to its factory as the KKC could be utilized only against the KKC liability. As a result, there was accumulation of KKC credit in the service tax ISD return. The issue is the admissibility of the KKC credit transitioned by the appellant.

8. We have gone through the grounds of appeal as well as all the contention raised by him during the hearing. The ARA in order dt.5th April, 2018 has opined that accumulated credit which was carried forward will not be allowed as admissible credit towards Input Tax Credit. We agree with the observation of the ARA on the basis of the following reasons.

9. Though the ARA states that the CGST Act does not have the definition of the words 'CENVAT credit', it is seen that the Explanation provided at the end of the Transitional provisions (Chapter XX) does give the scope of the term 'CENVAT credit'. The Explanation is reproduced below:-

   Explanation- For the purposes of this Chapter, the expressions 'capital goods'. 'Central Value Added Tax (CENVAT) credit', 'first stage dealer'. 'second stage dealer', or 'manufacture' shall have the same meaning as respectively assigned to them in the Central Excise Act , 1944 or the rules made thereunder.

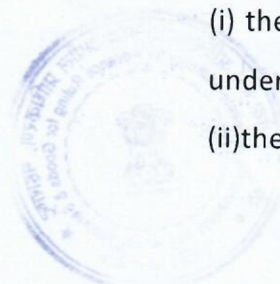
10. This brings us to the definition of the CENVAT Credit Rules, 2004. The said rules of 2004 gives the list of duties and cesses which are admissible to the manufacturer and other producers or provider of taxable services as CENVAT credit. The said rule is reproduced for the sake of clarity below:-

    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)

11. It is clear from the above list that no reference is made to the KKC until Notification No.28/2016/Central Excise (N.T.) 26 May, 2016 came into effect. , the Central Government made the following rules which came into effect from 01.06.2016. These rules were intended to amend the CENVAT Credit Rules, 2004. By the said amendment rule 1(a) was inserted. This rule is reproduced below:-

"(1a) : Provider of output service shall be allowed to take CENVAT credit of the Krishi Kalyan Cess taxable service leviable u/s.161 of the Finance Act, 2016 (28 of 2016).

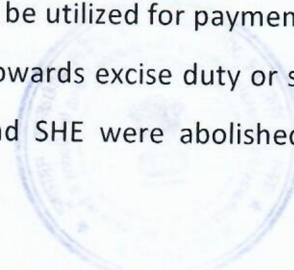
12. The CENVAT credit was available in respect of KKC. However, we need to see the following amendments, too, as were brought by the aforesaid Notification No. 28/2016 - Central Excise (N.T.), the 26th May, 2016 -

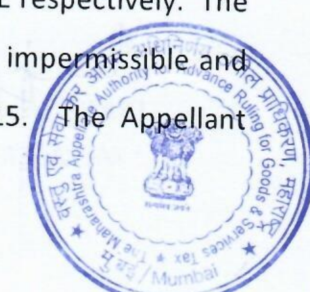
    i. in sub-rule (4), after the ninth proviso, the following proviso was inserted -
    "Provided also that the Cenvat credit of any duty specified in sub-rule (1) shall not be utilised for payment of Krishi Kalyan Cess leviable under section 161 of the Finance Act, 2016 (28 of 2016);";

    ii. in sub-rule (7), after clause (c), the following clause was inserted -
    "(d) Cenvat credit in respect of Krishi Kalyan Cess on taxable services leviable under section 161 of the Finance Act, 2016 (28 of 2016) shall be utilised only towards payment of Krishi Kalyan Cess on taxable services leviable under section 161 of the Finance Act, 2016 (28 of 2016)";

13. From a reading of the above it is clear that KKC could be utilized towards payment of KKC only. The KKC cannot be adjusted or cross utilized against the payment of excise duty or service tax. It was made expressly clear that CENVAT credit of input duty specified in the sub rule above i.e. excise duty, additional excise duty cannot be utilized for payment of KKC. Similarly the CENVAT credit in respect of KKC cannot be utilized for payment of excise duty or service tax. It could be utilized only for payment of KKC. Thus the CENVAT rules made an exception in respect of credit of KKC.

14. The ARA has relied upon the judgment of Delhi High Court in the case of Cellular Operators Association of India v. UOI (W.P. (Civil) No.7837 of 2016 dt.15.02.2018). The Association had filed a Writ Petition for direction that credit accumulated on account of Education Cess and Secondary and Higher Secondary Education Cess should be allowed to utilized for the payment of service tax/excise liability. Under the CENVAT credit rules 2004, credit of EC and SHE could be utilized for payment of EC and CHE respectively. The cross utilization of EC and SHE towards excise duty or service tax was impermissible and not permitted. Later on EC and SHE were abolished from 1.3.2015. The Appellant





claimed that they have a vested right to avail benefit of any unutilized amount of EC and SHE. It was also the contention that EC and SHE was subsumed in the Central Excise Duty and therefore the amount lying in the credit towards EC and SHE should be allowed for availing CENVAT credit as both become a part of excise duty or service tax. It was observed by the Delhi High Court that " *It is no doubt true that the two cesses, in the present case, were in the nature of taxes and not fee, but it would be incorrect and improper to treat the two cesses as excise duty or service tax. They were specific cesses for the objective and purpose specified ....* " and further observed that that EC and SHE did not subsume in the excise duty or service tax accordingly dismissed the said writ petition . Noticeably the two cesses and the excise duty and service tax was always treated as different and separate and cross utilization was never permitted. Thus, the Delhi High Court judgment made it clear that cess and duty are separate levies and cannot be equated. In the present case KKC cannot be treated as excise duty or service tax. It is to be utilized for payment of KKC only.

15. The Frequently Asked Question (FAQ) issued by the Central Board of Excise and Customs of Indirect Taxes (C.B.E.C.) have clarified that ITC of KKC cannot be carried forward under GST.

16. In view of the above deliberation, we pass the following order.

ORDER

In view of the above discussions and in terms of Section 101(1) of the CGST Act 2017 and MGST Act 2017, we hold that-

The accumulated credit by way of Krishi Kalyan Cess (KKC) as appeared in the Service tax return of Input Service Distributor (ISD) on June 30, 2017 which is carried forward in the electronic credit ledger maintained by the Appellant under CGST Act 2017, shall not be allowed to be taken as admissible input tax credit. Accordingly the order of AAR stands confirmed in terms of the above order.

The appeal filed by M/s. KNPL stands dismissed with above order.

(RAJIV JALOTA)
MEMBER

(SUNGITA SHARMA)
MEMBER