

# TAX FLASH NEWS

6 November 2019



## Transition of Education cess, Secondary & Higher education cess and Krishi Kalyan Cess into GST is allowed – Madras High Court

In a significant Judgement<sup>1</sup>, Madras High Court has recently held that accumulated credits of cesses<sup>2</sup> cannot be said to have been wiped out unless there is a specific order under which it lapses. Accordingly, transition of accumulated credit of cesses into GST regime is allowed.

### Brief Background

Writ petition was filed by Sutherland Global Services Pvt. Ltd. against a show cause notice (SCN) issued by the revenue authorities, requiring the petitioner to reverse the alleged erroneous transition of credit, pertaining to cesses in to the GST regime.

It was alleged by the revenue authorities, that since the explanation provided in the transition provision of the Central Goods and Services Tax Act, 2017 (CGST Act) i.e. section 140, does not allow transition of cesses, the carry forward of the same into GST, is illegal and accordingly needs to be reversed.

### High Court order

The Hon'ble High Court while passing the order have made following observations –

- There are no notification/circular/instruction, that has expressly provided that the accumulated credit of cesses would lapse
- Having permitted the assessee to carry forward the credit, the authorities cannot now take a stand that such credit is unavailable for use. The provisions of sub-section (1) read with sub-section (8) of section 140, and the explanation thereunder makes it more than clear that all available credit as on the date of transition would be available to an assessee for set-off

- A certain amount of planning and strategizing is undertaken by an assessee bearing in mind the credit and concessions available as well as liabilities imposed by a taxing statute at any given point in time. In strategizing and conducting its business, the assessee would certainly have taken into account that credit was available for set-off against output tax liability. Such credit accumulated has not been stated to have lapsed
- The provision of section 140(1) provides for transfer of all credits and levies, barring those set out in the provision, which is
  - Where the said amount of credit is inadmissible as ITC;
  - Where an assessee has not furnished returns required under the existing law for preceding six months;
  - Where the said credits relates to goods manufactured and cleared under exemption notifications

These are the only three conditions/embargos that bar the transfer of accumulated credit

- Accumulated credits cannot be said to have been wiped out unless there is specific order under which it lapses. Though there may be embargos placed by the statutes and rules, such as the embargo against cross utilisation placed by Rule 3(7)(b) of the CENVAT Credit Rules, the accumulated credit continues in the books of the assessee till specifically wiped out.

<sup>1</sup> TS-938-HC-2019(MAD)-NT

<sup>2</sup> Education Cess, Secondary & Higher Education Cess and Krishi Kalyan Cess

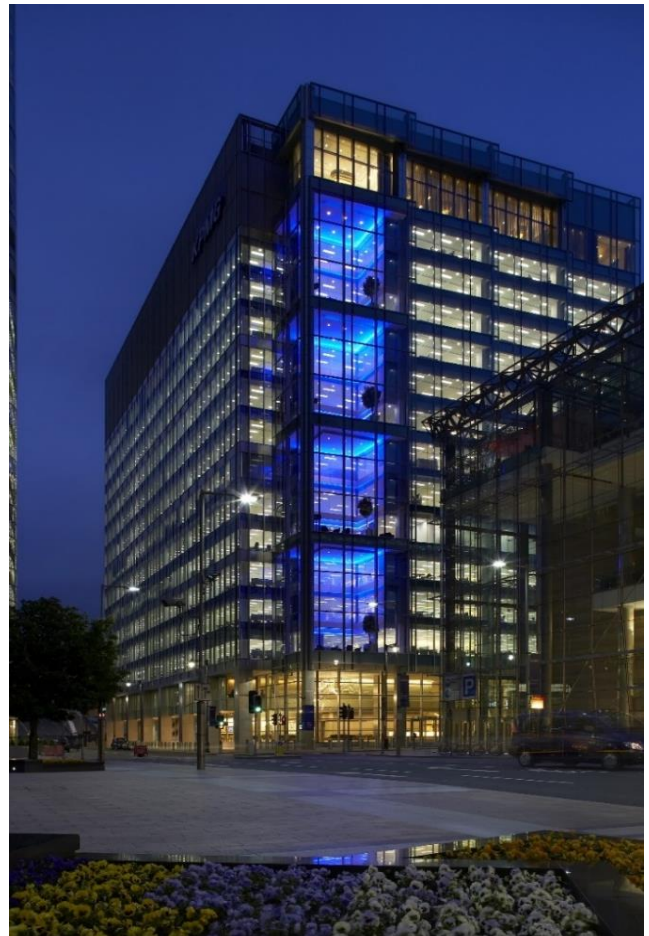
In light of the above discussion, the court held that the contention of the revenue that the accumulated credit of cesses is dead and there is nothing that the assessee could claim as having been carried forward, is rejected. Further, in regard to amendment in CGST Act, which has defined 'eligible duties and taxes' to excludes any cess not specified in explanation (1) and (2) of section 140, Court stated that the same has not yet been notified.

### Our comments

This is a landmark judgement passed by the Madras High Court, allowing transitioning of the credit accumulated on account of cesses. One of the key elements that has been highlighted in the order is with respect to section 140 which was amended by CGST (Amendment) Act, 2018.

By virtue of the said Amendment Act, sub-section (1) of section 140 was amended retrospectively with effect from 1 July 2017, to allow only transitioning of CENVAT credit attributable to "eligible duties", however, the Hon'ble High Court has observed that the corresponding amendment to the definition of "eligible duties" and "eligible duties and taxes", as given in explanation 1 and explanation 2, was not made effective. On such basis, the Hon'ble High Court did not go into the retrospective application of section 140 (1) and has eventually held that the transitioning of cesses should be allowed.

It may further be noted that, against the retrospective amendment restricting the transition of accumulated cesses, writs have been filed before various High Courts.



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