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TAX FLASH NEWS

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Cesses being a 'dead claim' cannot be transitioned into GST – Madras High Court (Division Bench)

Setting aside the order[1] passed by the learned single Judge, the division bench of the Madras High Court has recently held that transition of unutilised input tax credit could be allowed only in respect of taxes and duties which were subsumed in the new GST law. The three types of cesses i.e. Education cess, Secondary and Higher Education cess and Krishi Kalyan Cess were not subsumed in the new GST laws, either by the Parliament or by the States. Therefore, the question of transitioning them into the GST regime and giving credit against the output GST liability cannot arise.

Contention by the Petitioner/Revenue

- The unutilised amount of 'cesses' (i.e. Education cess, Secondary and Higher Education Cess, and Krishi Kalyan cess), are 'dead claim' as the levy have been discontinued and have not been subsumed under the GST law.
- Cesses were collected for a specific and dedicated purpose and the input credit in respect of the same were available to be set-off against the output cess liability and the same was made available only to remove the cascading effect.
- The term duty does not include additional duties such as education cess, secondary and higher education cess, NCCD, etc. unless there is a specific notification or provision which specifically provides for any benefit with regards to additional duty, the benefit that is applicable to basic duty or tax cannot be extended to the additional duty.
- There is a difference between availment of credit and utilisation of credit. The utilisation of availed credit will remain indefeasible only when the facility for working it out or the levy with regards to the output element remain intact. Since the levy of cesses has been discontinued, the utilisation of availed credit against the output liability ceases to exist and thus the contention that the availed credit is an indefeasible right of the taxpayer also ceases to exist.
- The harmonious interpretation of the transition provision under the CGST Act, indicates that the law intended to transition only the eligible duties and taxes of the erstwhile indirect tax regime that were subsumed under GST. Since cesses were not subsumed under GST, the transition of them is not possible.
- The contention of the assessee that absence of the phrase 'CENVAT credit of eligible duties' in sub-section (8) of section 140 would mean even CENVAT credit can be transitioned, is wholly untenable cause all other sub-section have used the phrase 'CENVAT credit of eligible duties' or 'CENVAT credit of eligible duties and taxes'. The absence of the phrase 'eligible duties' in sub-section (8) is nothing but an unintentional oversight by the draftsman and not intentional.
- On harmonious construction of the entire provision under section 140 which deals with transitioning of only subsumed duties and taxes, a liberal interpretation by the respondent to make sub-section (8) as a standalone provision will only lead to absurdity.

Contention by the Respondent/Assessee

- The Assessee has already availed the credit of cesses and thus the right to utilise the same against the output tax liability is a vested and indefeasible right and could not be taken away by the legislature when a switch over was made into the GST regime.
- The words 'eligible duties and tax' were inserted in section 140(1) of the CGST Act, however, no such insertion was made in section 140(8). Sub-section (8) of section 140 independently covers the case

[1] Sutherland Global Services Private Limited [W.A. no. 53 of 2020 dated 16 October 2020]

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of the assessee. The sub-section entitles the assessee to take credit of cesses even after the introduction of GST.

- Cesses were collected in the form of duty and taxes and therefore, even though they were imposed by the Finance Act, the same are liable to be set-off and utilised against the output tax liability.
- Whilst both section 140(1) and section 140(8) uses the same phraseology for the transitioning of unutilised credits, section 140(8) specifically covers dealers having centralised registration, whereas section 140(1) covers all other scenarios. Thus, applying the harmonious interpretation it can be construed that both the sub-section co-exist and have its full play so that no part of the provisions be rendered redundant.

  Explanation to section 143 states that the CENVAT credit shall have the same meaning as assigned to it under the Central Excise Act. CENVAT Credit Rules ('CCR') were framed by virtue of the powers conferred under the Central Excise Act and all the three cesses are treated as CENVAT credit under the CCR. Thus, on a plain construction of section 140(8), credit of cesses is eligible to be transitioned.
- When the legislature introduced the words 'eligible duties' by way of a retrospective amendment in section 140(1), it was deliberately chosen not to amend sub-section (8). Hence, a purpose and intent behind the non-amendment should be imputed and thereby the wisdom of the legislature should be respected.
- CENVAT credit of cesses validly availed by the assessee is a vested and indefeasible right and cannot be taken away without the authority of law.
- National Calamity Contingent Duty, which is a cess and contained restriction on cross-utilisation under the erstwhile regime has been allowed to be transitioned into GST. Thus, the restriction on cross utilisation under the erstwhile regime has no bearing on the issue involved.

High Court order

The Court made the following observation

- Cess being a specially collected or enforced imposition is slightly different from tax or duty, even though it may be collected in the form of taxes or duty under the parent law.
- Whilst explanation 1 to section 140 confines 'eligible duties' to 7 specified duties, explanation 2 confines to 8 specified duties and taxes. First 7 items are repeated in explanation 2 and the eight one in explanation 2 is service tax. Apparently, Education cess, secondary and higher education cess, and Krishi Kalyan cess are absent from the seven categories. Therefore, on plain reading, the said three cesses in question cannot be inserted in explanation 1 to cover them for being carried forward with reference to said explanation.
- Transition of NCCD has been specifically allowed by the legislature possibly because the levy imposed under the Finance Act, 2001 continued even after the introduction of GST.
- The intention of the legislature is very clear from the fact that explanation 3 has specifically excluded any kind of cesses.

  Merely, because the assessee has taken/availed the credit of these cesses after the levy of cess cease to exist, does not 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 such transaction and set-off against such output GST liability.
- CENVAT credit or Input Tax credit is a concession and a facility and not a vested right. Even if one were to rank such a right on the pedestal of a statutory right, even that right can be curtailed and regulated by the conditions for availing such right.

Based on the above observation, the Court held that unutilised cesses in the hands of the assessee had become 'dead claim' and therefore, there is no question of it being claimed as a right to be carried forward and set-off against output GST liability.

Our comments

In its 135-pager judgement, the Hon'ble High Court has pronounced a detailed judgement on the issue of transition of cess credit into the GST regime. The judgement is likely to impact almost all the assessee who have transitioned unutilised cess credit into the GST regime. The judgement has also over-ruled the general understanding that without a lapsing provision right of the taxpayer cannot be lapsed. Further, the Court in its judgement has also pronounced that the tax credit is concession in nature and is not a vested right which contradict various other judgements.

It is pertinent to note that the High Court did not have the occasion to deal with whether refund can be claimed of the cesses as that was not the issue that was pressed before the High Court so the issue remains open and it is likely that the question of refund would be subject to scrutiny by the High Courts.

It would now be prudent to wait on the faith of the various writs on the same issue which is pending before various High Courts. Also, the said judgement is likely to be challenged before the Hon'ble Supreme Court.

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