

Transition of cesses into GST disallowed – Madras HC

29 October 2020



Summary

The Madras High Court (HC) has, in a recent case, held that the petitioner is **not entitled** to carry forward and set off the transitional credit of unutilised education cess (EC), secondary and higher education cess (SHE cess) and Krishi Kalyan Cess (KKC) against the output liability under the Goods and Services Tax (GST) law.

The HC stated the object of GST law cannot be defeated or interjected by allowing such input credits in respect of cess, whether collected as tax or duty under the then existing laws and therefore, such set off cannot be allowed.

Facts of the case

- The respondent¹ is engaged in provision of technical and call centre services.
- A single-judge bench of the Madras HC had earlier allowed the respondent to utilise and set off the accumulated unutilised amount of EC, SHEC and KKC (all jointly referred to as the cess) against the output GST liability².
- The revenue filed present appeal³ against the said single-judge bench decision.

Madras HC observations and ruling⁴

- **Cess is different from tax or duty:** Cess being specially collected or enforced imposition or impost is slightly different from tax or duty, even though it may be collected in the form of taxes or duty under the parent law.
- **Only specified duties are allowed to be carried forward:** Only the seven specified duties as 'eligible duties' in respect of inputs held in stock and inputs contained in semifinished or finished goods held in stock on the appointed date, i.e. 1 July 2017, is allowed to be carried forward and adjusted against GST output tax liability. Apparently, EC, SHEC and KKC

¹ M/s Sutherland Global Services Private Limited

² Section 140 of the CGST Act, 2017

³ Writ appeal no. 53 of 2020

⁴ Dated 16 October 2020

are absent from the seven categories specified under the GST law.

- **Court cannot include cesses in eligible duties or taxes:** The court, by any intendment or implication, cannot include the aforesaid three types of cesses under eligible duties and taxes or eligible duties to be carried forward and transitioned.
- **Mere accounting does not confer right to claim credits:** The taking of the input credit in respect of such cesses 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 credit. Therefore, mere accounting entry will not give any vested right to the petitioner to claim such transition and set off against such output GST liability.
- **Claim of unutilised cesses became dead claim:** The unutilised EC, SHEC and KKC in the hands of the petitioner had

become dead CENVAT credit claim in the year 2015 itself with these levies being dropped by the Finance Act 2015. Therefore, there is no question of it being claimed as a right to be carried forward and set off after 1 July 2017 against output GST liability.

- **Cesses were not subsumed under GST:** The three types of cesses 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 them credit under GST cannot arise.
- **Tax department's appeal allowed:** The HC allowed tax department's appeal and held that the petitioner was not entitled to carry forward and set off unutilised EC, SHEC and KKC against GST output liability.

Our comments

Availability of transitional credits in respect of unutilised cesses pertaining to the erstwhile indirect tax regime has been a matter of extensive litigation since beginning.

The single judge bench of the Madras HC had earlier allowed such transitional credits of cesses stating that CENVAT Credit/Input Tax Credit is a 'vested right' accruing to the taxpayers. However, the Division Bench has now reversed this view stating it to be a concession and not a vested right.

In the case of M/s Bharat Heavy Electricals Ltd, the Delhi bench of Customs Excise and Service Tax Appellate Tribunal (CESTAT) had held that there is no provision in the GST law that such credits would lapse and therefore a taxpayer is eligible for the cash refund of the cesses lying as CENVAT credit balance.

Considering the existence of contrary views and major impact on businesses, which have already transitioned such cesses, the matter can attain finality only in the apex court.

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