**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL**
**NEW DELHI**

**PRINCIPAL BENCH – COURT NO.3**

**Excise Appeal No. 50090 of 2024**

(Arising out of Order-in-Appeal No. 49(RLM)CE/JPR/2023 dated 06.10.2023 passed by Commissioner (Appeals), Customs, Central Excise & CGST, Jaipur)

**M/s. KEI INDUSTRIES LTD.**
(SP-919, 920 & 922, Phase-III, RIICO Industrial Area, Bhiwadi, Dist. Alwar)

**Appellant**

*VERSUS*

**COMMISSIONER OF CENTRAL GOODS & SERVICE TAX & CENTRAL EXCISE-ALWAR**
(A-Block, Surya Nagar, Alwar, Rajasthan-301001)

**Respondent**

## APPEARANCE:

MS. Priyanka Goel, Advocate for the Appellant
Shri Z. U. Alvi, Advocate (Intervener)
Shri A. K. Prasad and Ms. Surabhi Sinha, Advocates (Interveners)
Shri Rakesh Agarwal, Shri S. K. Ray and Shri V. J. Saharan, Authorized Representatives for the Respondent

**CORAM:**
**HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)**
**HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)**
**HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)**

**INTERIM ORDER NO. 08/2025**

Date of Hearing : 09/09/2025
Date of Pronouncement : 20.11.2025

## ORDER [PER R. MURALIDHAR]

The issue and questions framed by the appellant KEI in their submissions is :

a) Whether after abolition of Education Cess in 2015, same could be transited to GST Regime in 2017 in view of decision of M/s Nu-Vista Ltd or as decided in the matter of M/s NMDC Ltd.?

b) Whether filing of claim of refund after 2017 will be affected by limitation?

2. The relevant facts of the case are that the Appellants KEI have availed CENVAT credit of duty/tax on inputs and input services used in such manufacture of final products. They had filed a refund application for the closing balance of Education Cess and Secondary & Higher education cess lying as on June 30, 2017, which could not be transitioned as input credit under GST regime, on various grounds mentioned in their refund application. The said amount was initially carried forward by the Appellants as transition credit under GST regime by filing Form TRAN-1 and subsequently reversed on being pointed out by the Audit Team that the same is not permissible. The Appellants in support of their claim for refund under Section 11B of the Central Excise Act had furnished requisite documents along with such refund application. The Appellants submitted that they had duly availed CENVAT Credit **of** EC, SHEC, and Krishi Kalyan Cess ("KKC"), legitimately paid on inputs/services prior to their abolition in 2015. As on June 30, 2017, closing balances of credit of such cesses were available in the CENVAT account of Appellants. However, Section 140 Central Goods and Services Tax Act, 2017 ("the CGST Act") did not permit carry-forward of these credits into Form TRAN-1. Consequently, refund claims were filed under Section 142(3) CGST Act read with Section 11B of Central Excise Act, 1944 on October 11, 2021 for INR 7,42,108/- for FY 2015-16. After the rejection of the refund claim by the lower authorities, the appellants are before the Tribunal.

3. The Ld Counsel Ms Priyanka Goel, appearing for the appellant, makes the following submissions in defence of their case for refund :

3.1 As per her, repeal of law cannot extinguish accrued credit – similarly, in the present case, cess balances cannot lapse.

3.2 The jurisprudence on the nature of CENVAT/Modvat credit has consistently recognized it as a substantive and vested right of the taxpayer. Once credit is validly availed under the law, it crystallises into a property right which cannot be taken away by implication or by repeal of a rule, unless there exists an express statutory mandate for its lapse. The Hon'ble Supreme Court in the landmark case of ***Eicher Motors Ltd. v. Union of India [(1999) 2 SCC 361 : 1999 (106) ELT 3 (SC)*** laid down this very principle while dealing with the lapsing provision introduced under Rule 57F(4A) of the Centra Excise Rules. The Hon'ble Supreme Court categorically held that Cenvat / Modvat credit, once validly earned, becomes an indefeasible right of the assessee and cannot be taken away by subsequent changes in law, unless there is an express statutory provision mandating its lapse. She specifically relies relevant Para Numbers 5 and 6 of this order.

3.3 As per the Ld Counsel, the Court observed that even though Rule 57F(4A) of the Central Excise Rules was deleted, the accumulated credit already standing in the assessee's account did not automatically lapse. The vested right of credit, once crystallised upon receipt of inputs, could not be extinguished merely because the Rule under which such credit was taken was later withdrawn.

3.4 Applying the same principle to the present case:

- The Appellant had validly availed Education Cess, Secondary and Higher Education Cess, and Krishi Kalyan Cess credit on inputs and input services prior to 01.07.2017.

- Merely because Section 140 of the CGST Act, 2017 excluded transition of these balances, the vested rights already accrued cannot be deemed to have lapsed.

- Just as in *Eicher Motors* the repeal of the Rule did not wipe out the credit, in the instant case, the repeal of the earlier regime and exclusion of cesses from transitional provisions does not, in absence of express lapse provision, extinguish the balances.

- Section 142(3) of the CGST Act further reinforces this position by expressly providing that all pending refund claims of CENVAT credit shall be disposed of under existing law and "*any amount eventually accruing shall be paid in cash*."

3.5 Thus, by the direct ratio of *Eicher Motors*, the accumulated balances of EC, SHEC, and KKC standing as on 30.06.2017, though not transferable to GST, remain vested rights of the Appellant and must be refunded in cash.

3.6 She also relies on other judicial precedent affirming such refund where utilisation is barred**.** In ***Slovak India Trading Co. v. CCE [2006 (201) E.L.T. 559 (Kar.)****, affirmed by* ***Union of India v.***

***Slovak India Trading Co. Pvt. Ltd. - 2008 (223) E.L.T. A170 (S.C.),*** wherein it was held that unutilised credit of cess/duty cannot be allowed to lapse and must be refunded when no further utilisation is possible,

3.7 This ratio has been consistently followed in ***Nu Vista Ltd., BHEL Bhopal***, and other CESTAT decisions, which supports the appellant's case.

3.8 The Appellants had duly followed the procedure and conditions prescribed in complying with the obligations under CENVAT Credit Rules, 2004, in taking credit of input and had also complied with for payment of duty/CENVAT credit in their periodical returns, the relevant one, which was filed for the month of June, 2017 with the department. In terms of legal provisions prescribing the procedure for transitional credit under Section 142(9)(*b*) of the CGST Act, when the same is unable to be utilized for further payment of duty/tax, the Appellants had applied for refund claim in October 2021 for balances as on June 2017.

3.9 The issue of limitation was never raised in **Nu-Vista (supra)** or **NMDC (supra)** decisions and refund claims post-GST were governed by Section 142(3) of the CGST Act, which does not impose the time bar of Section 11B of the Central Excise Act.

3.10 It is pertinent to note that Section 142(3) of the CGST Act prescribes no limitation period for refund of pre-GST credits.

3.11 The provisions of Sections 142(3) and 142(9)(*b*) of the CGST Act, is a transitional arrangement wherein it has been specifically provided that such provisions apply as a *non-obstanate* clause whereby such provisions will have overriding effect, if anything to the contrary is contained under the provisions of existing law *i.e.,* Central Excise Act, except for the provisions of subsection (2) of section 11B ibid. Section 142(3) thus overrides limitation under Section 11B.

3.12 Thus, all the conditions of the requirements of Section 11B ibid as it remained under the existing law, other than those relating to clause contained in Section 11B(2) ibid would apply, only if they are not contradictory to the provisions of Section 142(9)(*b*) of the CGST Act, in dealing with refund of 'CENVAT credit'.

3.13 The proviso (*c*) to Section 11B(2) ibid, cannot be read to state that refund of such excess CENVAT credit has not been provided under Rule 5 of the CCR, as the entire arrangement of refund of excess CENVAT credit is arising as a transitional arrangement by moving from Excise duty/Service Tax regime to GST regime.

3.14 The legal position stands fortified by judicial precedents. In **Tata Steel BSL Ltd. v. Commissioner of CGST & Central Excise, Raigad (Final Order No. A/85154/2025-WZB dated 11.02.2025),** the Hon’ble CESTAT, Mumbai, categorically held that Sections 142(3) and 142(9)(b) of the CGST Act specifically provide for cash refund of any amount of CENVAT credit as a transitional arrangement.

4. In the rejoinder filed subsequently, Ms Priyaka Goel, Ld counsel for KEI made the following further submissions :

4.1 Hon'ble Bombay High Court in the case of **Combitic Global Caplet Pvt. Ltd. v. Union of India in Writ Petition No.729 of 2021 with W.P. No.1228 of 2021 [(2024) 20 Centax 144 (Bom.)]**, have held that Subsection (3) of Section 142 of the CGST Act very clearly says any amount eventually accruing shall be paid in cash and directed the departmental authorities/sanctioning authority for refunding the amount of duty refundable to the petitioner in cash instead of credit in CENVAT account.:

4.2 The SM Bench of Mumbai Tribunal, in the case of **Toyota Kirloskar Motor Pvt. Ltd. Vs Pr. Commissioner of Central Tax, Pune GST-I (2025) 27 Centax 121 (Tri.-Bom)** has held that the Edu Cess, SHE Cess and KK Cess held as closing balance as on 30.6.2017, are required to be granted by way of cash refund in terms of Section 142 (3) of the CGST Act 2017.

5. In view of the above submissions, the Ld counsel prays that the impugned order may be set aside and appeal may be allowed holding that the appellant is eligible for the refund

6. On behalf of intervenor J.K. Lakshmi Cement Ltd (Lakshmi Cements for short), Sri A K Prasad, the Ld Advocate made the following submissions :

6.1 The Division Bench of CESTAT, New Delhi, was faced with apparently two contradictory orders of CESTAT as follows, namely:

(i) **New Vista Ltd** – Final Order No. 50284/2022 dated 28-03-2024 (Appeal No. E/52318/2019) ; and

(ii) **NMDC Ltd** – Final Order No. 55722/2024 dated 02-05-2024 (Appeal No. E/50793/2021).

6.2 In both the above cases the issue was whether Education Cess (EC) and Secondary and Higher Education Cess (SHE) not transferred, under section 140(1) of the CGST Act, 2017, to the electronic credit ledger maintained under GST on transition from the Central Excise and Service Tax era to the GST era w.e.f. 01-07-2017, could be allowed as refund in cash under section 142(3) of the CGST Act, 2017. In the case of **Nu Vista Ltd** the Division Bench of CESTAT, Delhi held that refund of ED and SHE was available to assessee in cash under section 142(3) of the CGST Act, 2017. However, in the case of **NMDC Ltd** another Division Bench of CESTAT, New Delhi held to the contrary.

6.3 It is submitted that the CESTAT order in the case of **NMDC Ltd** is based on an erroneous interpretation of the transitional provisions contained in section 140 of the CGST Act, 2017. In para 5.6 of the order in the case of NMDC Ltd it has been held that as per Explanation-3 inserted in section 140 of the CGST Act, 2017, retrospectively w.e.f. 01-07-2017, the expression "*eligible duties and taxes"* exclude all types of cesses particularly ED and SHE. It is submitted that the expression "*eligible duties and taxes*" finds mention only in sub section (5) of

section 140 of the CGST Act. Though through the Central Goods and Service Tax (Amendment) Act, 2018, the definition of "eligible duties and taxes" as per Explanation 2 to section 140 was proposed to apply to sub section (1) of section 140 also, but this amendment was never notified, that is, it never came into operation.

6.4 KEI Industries Ltd as well as the present interveners (M/s. J.K. Lakshmi Cement Ltd) have sought transition of the ED and SHE to the electronic credit ledger under the provisions of sub section (1) of section 140 of the CGST Act, 2017. They have shown ED and SHE in the returns filed under Central Excise law for the month of June, 2017. The relevant ER-1 return had appropriate columns to reflect the ED as well as the SHE. The ED and SHE were introduced by the Finance Act of 2004 and 2007, respectively, and were to be levied and collected as duties of excise.

6.5 It is also to be noted that though both the Cesses were discontinued in the year 2015 there was no provision for their lapsing as has been provided in other types of cases under Rule 11(3)(ii) of the Cenvat Credit Rules, 2004. Limited cross utilization was allowed vide notification No.12/2015-CE(NT) dated 30-04-2015. Since all the excise duty including the cesses reflected in balance in the return of the Appellants as of June 2017 were all *eligible duties* and as per sub section (1) of section 140 of the CGST Act, 2017, the transition of all such duties should have been allowed in the Appellants' electronic credit ledger maintained under GST law. A point was raised during the hearing that "eligible duties" as defined in Explanation 1 to section 140

excludes all Cesses. The definition of "eligible duties" appearing in Explanation-1 cannot apply to sub section (1) of section 140 under which the Appellants were seeking transition of the Central Excise duty and Cesses. As per the Amendment Act, 2018 the reference to sub section (1) of section 140 was inserted in Explanation-1 but this was never notified or brought into effect.

6.6 This is exactly what has been held by the Bombay High Court in the case of **Godrej and Boyce Manufacturing Co. Ltd vs. UOI** and others **(2021-TIOL-2112-HC-MUM-GST).** Once it is held that sub section (1) of section 140 permitted transition of Cesses also to the electronic credit ledger maintained under GST law, this transition should have been allowed by the department. Because of Board's guidelines formulated vide **Circular No. 267/8/2018-CX8 dated 14-03-2018,** a check list was communicated to the field formulation as to what credit was to be allowed under TRAN-1 and what was not to be allowed.

6.7 It is submitted that this refund was to be allowed in cash notwithstanding anything to the contrary contained in Central Excise law except the provisions of sub section (2) of section 11B of the Central Excise Act, 1944. Sub section (2) of section 11B of the Central Excise Act, 1944 relate to 'unjust enrichment'. The provision relating to time-bar is provided under Sub-section (1) of section 11B. The provision relating to refund of Cenvat credit is provided in Rule 5 of the Cenvat Credit Rules, 2004. Thus, for such refunds the bar relating to time bar and restrictions of Rule 5 of the Cenvat Credit Rules, 2004, will not apply. In other words, the credit of ED and SHE, legally taken

under the existing law (i.e. Central Excise & Service Tax), should have been allowed to be transited to the electronic credit ledger under GST, failing which cash refund should have been allowed without restriction of any time bar under section 11B or the restriction imposed under rule 5 of the Cenvat Credit Rules, 2004.

6.8 In view of the above, the decision of the Division Bench of the CESTAT in the case of Nu Vista appears to be the correct one and the decision of the Division Bench in the case of NMDC Ltd does not appear to be based on the correct appreciation of law.

6.9 The learned Authorised Representative has also relied extensively on the decision of the Kerala High Court in the case of **Muthoot Finance Ltd Vs. UOI – 2024 (10) TMI 1658 (Ker-High Court).** It is submitted that this judgment does not discuss the provisions of section 140(1) read with section 142(3) of the CGST Act, 2017 under which the Appellants have sought refund of the Cesses.

7. In view of the above submissions, the Ld Counsel for the intervenor Lakshmi Cements, prays that the decision of **Nu Vista** may be held as the correct decision for the issue on hand.

8. Sri Z U Alvi appeared on behalf of the intervenor BHEL. After adopting the stand taken by the main appellant and the intervenor for Laxmi Cements, he places reliance on the following case law :

1. CCE Vs Ashok Ark. 2006(193) ELT 399 (Jhar)

2. U.O.I. Vs Slovak India Training Co Pvt Ltd. ELT-559(Kar)
3. U.O.I. Vs Slovak India Trading Co Pvt Ltd. 2008(223) ELT A 170(S.C.)
4. CCE Vs Motherson Sumi Electric Wire 2012 (278) ELT – 177 (KAR)
5. CCE Vs Jain Vanguard Polybutlene Ltd. 2010(256) ELT-523 (Bom)
6. CCE Vs Jain Vanguard 2015 (326) ELT A 86 (S.C.)
7. C.C.E & SR Vs Apex Drugs Intermediate 2015 (322) ELT- 834(A.P
8. Gauri Platiculture Pvt Ltd V/s CCE 2018 (360)ELT- 967 (Bom)
9. Welcure Drugs & Pharmaceuticals Vs CCE 2018(15) G.S.T.L 257(Raj)
10. Gauri Plasticulture Vs CCE 2019(30) GSTL 224 (BOM)
11. Rama Industries Ltd. Vs CCE, MANU/PH/0307/2009
12. Commissioner CGST Vs Shri Krishna Paper Mills
13. Lav Kush Textiles V/s Commissioner of Central Excise, Jaipur-II MANU/RH/0979/2017
14. Lav Kush Textiles V/s Commissioner of Central Excise, Jaipur-II MANU/RH/0979/2017

9. In view of the above submissions, the Ld Counsel also takes the stand that **Nu Vista** should be taken as the correct decision in respect of the present issue.

10. The Ld A R Sri Rakesh Agarwal, appearing on behalf of the Respondent Revenue, made the following submissions :

10.1 The Tribunal's decision in NDMC Ltd was on merits considering the legality and scope of Section 142 (3) of CGST Act. While the Tribunal's decision in **Nu Vista** is predominately based on the vested rights arguments considering the judgment of **Slovak India** and earlier decisions of the Tribunal in cases of **BHEL, Schlumberger Asia Services and Kirloskar Toyata**, which were also based on the

germane of vested rights of cenvat credit, but without any legal findings on the eligibility of refund of cenvat credit of education cess under Section 142 (3) of CGST Act.

10.2 The provisions of Section 140 and 142 of CGST Act are mutually exclusive and not inter-related. Section 140 relates to the transition of those credit in balance on the day of transition to GST, which are *eligible as ITC* under CGST Act. Section 142 (3) is an independent provision enabling claim of refund, which were hitherto *eligible* under erstwhile law of Central Excise/Service Tax, but could not be claimed due to introduction of GST. This provision of 142 (3) in no manner establish inter-relationship with Section 140 in any manner. The refund under Section 142 (3) is not subject to outcome of non-transition of credit under Section 140.

10.3 Since the issue is of refund of cenvat credit of education cess under Section 142 (3) in accordance with the erstwhile law, any examination of the provisions of the Section 140 is non-contextual and irrelevant. Further, it was never the claim of the appellant that cenvat credit of education cess is eligible as ITC under CGST Act for being eligible for transition of credit of education cess under Section 140.

10.4 The intervenor’s counsel’s relied upon judgment of Bombay High Court in case of **Godrej & Boycee Mfg. Co Ltd** is out of context, being solely relatable to the issue of transitional credit under Section 140 of CGST Act, and no way relatable to the refund under Section 142(3).

Thus, no reliance can be considered of this judgment in the present case before the larger bench.

10.5 To be eligible for refund of cenvat credit under Section 142 (3) of the CGST Act, 2017, the following are the pre-conditions of refund in cash:

(*a*) Sub-section (3) deals with claim for refund filed *before, on or after the appointed day*.

(*b*) Refund application should be for refund of any amount of Cenvat credit, duty, tax, interest or any other amount paid under the existing law.

(*c*) Such application is to be disposed of in accordance with the provisions of existing law.

(*d*) If any amount eventually accrues the same is to be refunded 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.

(*e*) It also provides that where any claim for refund of Cenvat credit is fully or even partially rejected, the amount so rejected shall lapse.

(*f*) The second proviso provides that no refund shall be allowed of any amount of Cenvat credit where the balance of the said

amount as on the appointed day has been carried forward under the CGST Act.

10.6 Thus, Section 142(3) of CGST Act clearly provides that refund application with respect of any amount relating to Cenvat credit under the existing law is to be disposed of in accordance with the provisions of existing law, by following all ingredients of Section 11B. Further, the 'notwithstanding' clause used in that section is effectively relates to grant refund in cash only meaning that eventually again the refund should not be granted as re-credit, which was being granted in case of refund of cenvat credit, and not to forego all provisions of Section 11B. Refund under the existing law of Service Tax as well as Central Excise Act, 1944 are governed by Section 11B of the Central Excise Act, 1944.

10.7 Rule 5 of the Cenvat Credit Rules, made under this Central Excise Act, provides refund of cenvat credit only when the inputs are used in relation to export, which is not the case here

10.8 The **Bombay High Court** in **GAURI PLASTICULTURE P. LTD** after taking cognizance of transitional provisions under Rule 11 of the Cenvat Credit Rules has held that transitional provision does not enable us to hold that the amount of unutilised Cenvat credit can be refunded in cash.

10.9 The Section 142(3) does not confer a new right which never existed under the old regime except to the manner of giving relief by refund in cash if the person is found entitled in terms of the existing

law. Section 142(3) does not create any new right on any person but it saves the existing right which existed on the appointed day.

10.10 The education cess and secondary education cess levied vide Finance Act 2004 and 2007 were operated through Section 93 & 138 of the said Acts. The CENVAT Credit on both the education cess were allowed to be utilized for payment of both education cess on the final product. No cross utilization of Cenvat Credit of both Education Cess was allowed.

10.11 As submitted above, the balance credit of education cess lapsed in terms of Rule 11 of CCR, and a special window provided subsequently for *allowing cross utilization only for such inputs or input services which were received on or after 01.03.2015*. This further establishes the fact of lapsing the credit and allowing cross utilization only for such inputs or input services received on or after 01.03.2015.

10.12 Considering the above legal propositions, there remains no doubt that Section 142 (3) was not to revive lapsed and dead claim, specifically when such levy was extinguished in 2015 and in absence of any machinery provision available for claim of refund.

10.13 The following judgments have specifically rejected claim of refund of cenvat credit of education cess under Section 142 (3) of CGST Act:

**(a)** The Kerala High Court in case of **MUTHOOT FINANCE LIMITED** Versus **UNION OF INDIA {2024 (10) TMI 1658} on 18.10.2024**

held that it is also apparent that the appellant did not seek a refund of the unutilised credit in 2015 or 2017, because the statutory rules in force then did not provide for are fund of unutilised credit of cess.

**(b)** The Madras High Court in case of **ASSISTANT COMMISSIONER OF CGST AND CENTRAL EXCISE, CHENNAI** *Versus* **SUTHERLAND GLOBAL SERVICES PVT. LTD. {(2023) 6 Centax 99 (Mad.)** held that the credit of such Education Cess and Secondary and Higher Education Cess, became a *dead claim* in the year 2015 itself and therefore, there was no question of allowing a carry forward and set-off after a gap of two years against the output GST Liability with effect from 1-7-2017.

**(c)** The Delhi High Court in case of **CELLULAR OPERATORS ASSOCIATION OF INDIA** *Versus* **UNION OF INDIA {2018 (14) G.S.T.L. 522 (Del.)} on 15.02.2018** in para 9, 10, 11, 12 and 13 of its judgement held that Education cesses were specific cesses for the objective and purpose specified and refused the request of the appellant to merge the closing balance of cesses with the available Cenvat Credit.

**(d)** The Rajasthan High Court in the case of **BANSWARA SYNTEX LTD.** *Versus* **COMMR. OF C. EX. & SERVICE TAX, UDAIPUR {2019 (365) E.L.T. 773 (Raj.)} on 24.08.2019** was specific to the issue involved. In para 18, 19, 21 and 25, it was held that since the Cenvat Credit Rules, the repository of rights of an assessee to avail credit of the duty or other sums paid on inputs does not entail or even envisage refund of such credit in cash and encashment cannot be claimed as a matter of course.

**(e)** The Three Judges Bench of the Bombay High Court in case of **GAURI PLASTICULTURE P. LTD.** *Versus* **COMMISSIONER OF C. EX., INDORE {2019 (30) G.S.T.L. 224} on 14.06.2019** on the specific question**: "***Whether cash refund is permissible in terms of clause (c) to the proviso to section 11B(2) of the Central Excise Act, 1944 where an assessee is unable to utilize credit on inputs?"* has held in para 16, 21, 22, 23, 27, 28, 39 and 40 that Transitional provision under Rule 11 of the Cenvat Credit Rules does not enable us to hold that the amount of unutilised Cenvat credit can be refunded in cash.

10.14 In the following cases, the Tribunal Decisions in favour of Revenue holding that cash refund under Section 142 (3) is not permissible for Cesses.

- **ARAGEN LIFE SCIENCES LTD** *Versus* **COMMISSIONER OF CENTRAL TAX SECUNDERABAD {2024-TIOL-1126-CESTAT-HYD}** on 30.04.2024

- **TECUMESH PRODUCTS INDIA PVT. LTD** *Versus* **COMMISSIONER OF CENTRAL TAX, HYDERABAD {Final Order No. A/30018/2023}** on 17.03.2023

- **LUPIN LTD** *Versus* **COMMISSIONER OF CENTRAL TAX & CUSTOMS (APPEALS), GUNTUR. {Final Order No. A/30019/2023}** on 16.03.2023

- **SUVIKRAM PLASTEX PVT. LTD.** *Versus* **COMMR. OF CENTRAL TAX, BENGALURU NORTH WEST {2021 (54) G.S.T.L. 286 (Tri. - Bang.)}** on 18.08.2021

- **COMMISSIONER, TIRUPATI** *Versus* **RANI PLASTIC PIPE INDUSTRIES {2020 (6) TMI 356}** on 12.06.2020

- **MYLAN LABORATORIES** *Versus* **COMMISSIONER OF CENTRAL TAX AND CUSTOMS, GUNTUR {2020-TIOL-576-CESTAT-HYD}** on 25.02.2020

- **BHARAT HEAVY ELECTRICALS LTD.** *Versus* **COMMR. OF C.T., SECUNDERABAD-GST {2020 (41) G.S.T.L. 465 (Tri. - Hyd.)}** on 23.12.2019
- **UNITED SEAMLESS TUBULAR PVT. LTD.** *Versus* **CCT, RANGAREDDY GST {2019 (4) TMI 433} on 04.04.2019**

10.15 . In the light of plethora of judgment of the High Courts holding ineligibility of refund of cenvat credit of education cess under provisions of Section 142 (3) of the CGST Act, 2017 without any conflicting decision of the High Courts in favour of the assessee; and further in light of various decisions of the Tribunals in the favour of the revenue. Thus, the reference may accordingly be decided in favour of revenue following the decision of Tribunal in NMDC Ltd, holding that no refund of cenvat credit of education cess under provisions of Section 142 (3) of the CGST Act, 2017 can be granted.

11. In view of the above submissions, the Ld AR prays that the decision of NMDC on the issue may be held as the correct one.

12. Heard the appellants KEI Industries Ltd [KEI for short], interveners Sri Laxmi Cements and BHEL. Considered their oral and written submissions,

13. It is not disputed that the appellants were carrying the balance of the Edu Cess [ED for Cess], SHE Cess, Krishi Kalyan Cess [KKC], in their last filed Returns [ER1 / ST3] for the month of June 2017. These amounts have been initially transitioned to GST by way of TRAN1 form.

14. The relevant portion of TRAN1 Form, reads as under :

5. Amount of tax credit carried forward in the return filed under existing laws:

(a) Amount of Cenvat credit carried forward to electronic credit ledger as central tax
(Section 140(1) and Section 140(4)(a))

| Sl. no. | Registration no. under existing law (Central Excise and Service Tax) | Tax period to which the last return filed under the existing law pertains | Date of filing of the return specified in Column no. 3 | Balance cenvat credit carried forward in the said last return | Cenvat Credit admissible as ITC of central tax in accordance with transitional provisions |
|---|---|---|---|---|---|
| 1 | 2 | 3 | 4 | 5 | 6 |
| | | | | | |
| | **Total** | | | | |

15. From the above Table, it can be observed that the Column 5 and 6 speak of Cenvat Credit without any reference to Excise Duty, EC, SHE Cess, KKC etc. Therefore, it appears that the appellants have added the Excise Duty + EC + SHE Cess + KKC and the consolidated amount was reflected at Col 5 and 6. Upon finding the mismatch between the Return figures as on account of Cenvat credit [bare Excise Duty and bare Service Tax] as on 30.6.2017 with the figures shown at Col 5 and 6 of the TRAN 1, the Dept., asked the appellant to reverse the amount pertaining to EC+SHE Cess+KKC. The appellant did so and also filed the Refund claim on 11.10.2021.

16. From the above factual details, it is clear that the appellant on their own had opted for transition of Cesses to GST in terms of Section 140 (1) by showing the consolidated amount at Col 5 and 6 of the TRAN 1 Form.

17. Section 140 (1) and the Explanations given, reads as under:

"(1) A registered person, other than a person opting to pay tax under section 10 shall be entitled to take in his electronic credit ledger, the amount of Cenvat credit of eligible duties carried forward in the return relating to the period ending with the day immediately preceding the appointed day, furnished by him under the existing law, within such time and in such manner as may be prescribed."

Provided that the registered *person shall not be allowed to take credit* in the following circumstances, namely :-

| | | |
|---|---|---|
| (i) | | *where the said amount of credit is not admissible as input tax credit under this Act*; or |
| (ii) | | where he has not furnished all the returns required under the existing law for the period of six months immediately preceding the appointed date; or |
| (iii) | | where the said amount of credit relates to goods manufactured and cleared under such exemption notifications as are notified by the Government. |

***Explanation 1.*** - For the purposes of [2][sub-sections (1), (3), (4)] and (6), the expression *"eligible duties"* means -

| | | |
|---|---|---|
| (i) | | the additional duty of excise leviable under section 3 of the *Additional Duties* of Excise (Goods of Special Importance) *Act, 1957;* |
| (ii) | | the additional duty leviable under sub-section (1) of section 3 of |

| | | |
|---|---|---|
| | | the *Customs Tariff Act, 1975;* |
| (iii) | | the additional duty leviable under sub-section (5) of section 3 of the *Customs Tariff Act, 1975;* |
| (iv) | | [……] *(Omitted ibid)* |
| (v) | | the duty of excise specified in the First Schedule to the *Central Excise Tariff Act, 1985 (5 of 1986);* |
| (vi) | | the duty of excise specified in the Second Schedule to the *Central Excise Tariff Act, 1985;* and |
| (vii) | | the *National Calamity Contingent Duty leviable* under section *136 of the Finance Act, 2001* (14 of 2001), |

in respect of *inputs held in stock and inputs contained in semi-finished or finished goods* held in stock on the appointed day.

***Explanation 2.*** - For the purposes of [3][sub-sections (1) and (5), the expression *"eligible duties and taxes"* means -

| | | |
|---|---|---|
| (i) | | the additional duty of excise leviable under section 3 of the *Additional Duties of Excise* (Goods of Special Importance) *Act, 1957;* |
| (ii) | | the additional duty leviable under sub-section (1) of section 3 of the *Customs Tariff Act, 1975;* |
| (iii) | | the additional duty leviable under sub-section (5) of section 3 of the *Customs Tariff Act, 1975;* |
| (iv) | | [...] |
| (v) | | the duty of excise specified in the First Schedule to the *Central Excise Tariff Act, 1985;* |

| | | |
|---|---|---|
| (vi) | | the duty of excise specified in the Second Schedule to the *Central Excise Tariff Act, 1985;* |
| (vii) | | the *National Calamity Contingent Duty* leviable under section *136 of the Finance Act, 2001*; and |
| (viii) | | the service tax leviable under section *66B of the Finance Act, 1994,* |

in respect of *inputs and input services* received on or after the appointed day.

***Explanation 3.*** - For removal of doubts, it is hereby clarified that the expression *"eligible duties and taxes" excludes any cess which has not been specified in Explanation 1 or Explanation 2 and any cess which is collected as additional* duty of customs under sub-section (1) of section 3 of the Customs Tariff Act, 1975 (51 of 1975)].

18. The relevant portion of the ER 1 Return showing the opening and closing balance of the Cenvat Credit under various heads is extracted below :

[1][6. Details of CENVAT credit taken and utilized.-

| Sl. No. | Details of credit | CENVAT (Rs.) | AED (TTA) (Rs.) | NCCD (Rs.) | ADE levied under section 85 of Finance Act, 2005 (Rs.) | Additional duty of customs levied under section 3(5) of the Customs Tariff Act, 1975 (Rs.) | Education Cess on excisable goods (Rs.) | Secondary and Higher Education Cess on Excisable goods (Rs.) | Service Tax (Rs.) | Education Cess on taxable services (Rs.) | Secondary and Higher Education Cess on Taxable services (Rs.) |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | (1) | (2) | (3) | (4) | (5) | (6) | (7) | (8) | (9) | (10) | (11) |
| 1. | Opening balance | | | | | | | | | | |
| 2. | Credit taken on inputs on invoices issued by manufacturers | | | | | | | | | | |
| 3. | Credit taken on inputs on invoices issued by Ist or IInd stage dealers | | | | | | | | | | |

19. The Board issued **Circular No. 267/8/2018-CX8 dated 14-03-2018** and a check list was communicated to the field formation as to what credit was to be allowed under TRAN-1 and what was not to be allowed. As per para 4.1.1 of the said Circular, transition of Education Cess as well as Secondary and Higher Education Cess was not permitted. The relevant portion is extracted below :

> **4.Checks for Table 5(a):**
>
> **4.1.1 Check 1**: Verify that the credit has been taken against closing balance of CENVAT credit in ER-1/2/3 or ST-3. Credit can be taken only where the last return was filed and credit taken in Table 5(a) should not be more than closing balance of credit in ER-1/2/3 or ST-3 minus the education / secondary education cess / KKC/ SBC.

20. One more **Circular No. 87/06/2019-GST Dated 2nd January, 2019** was issued. The relevant portion is given below:

Attention is invited to sub-section (a) of section 28 of the CGST (Amendment) Act, 2018 (No. 31 of 2018) which provides that section 140(1) of the CGST Act, 2017 be amended with retrospective effect to allow transition of CENVAT credit under the existing law viz. Central Excise and Service Tax law, only in respect of "eligible duties". In this regard, doubts have been expressed as to whether the expression "eligible duties" would include CENVAT credit of Service Tax within its scope or not.

3.2 Thus, expression "eligible duties" in section 140(1) which are allowed to be transitioned would cover within its fold the duties which are listed as "eligible duties " at Sl. No. (i) to (vii) of Explanation 1, and "eligible duties and taxes" at Sl. No. (i) to (viii) of explanation 2 to section 140, since the expression "eligible duties and taxes" has not been used elsewhere in the Act.

5. *No transition of credit of cesses, including cess which is collected as additional duty* of customs under sub-section (1) of section 3 of the Customs Tariff Act, 1975, *would be allowed in terms of Explanation 3 to section 140,* inserted vide sub-section (d) of section 28 of CGST (Amendment) Act, 2018 which shall become effective from the date the same is notified giving it retrospective effect.

21. A harmonious reading of Section 140 (1) and the Explanations 1 to 3, read with the two Circulars and the format of E R 1 Return and the Clause 5 (a) of the TRAN1 would clarify that the TRAN1 has only one Column for 'Cenvat Credit'. As per the Cenvat details reflected in the Form ER 1 [reproduced at Para 18 above], Cenvat Credit means the figures which are shown at column (2) and (9) of the ER 1 Return. Therefore, the amounts shown in these columns as closing balance of 'Cenvat Credit' would be eligible for transitioning. The other columns (3), (4), (5), (6) (7), (8), (10) and (11) are primarily excluded from being transitioned. However, by way of Explanation 1 and Explanation 2 [amended retrospectively - the Sl Nos. (i) (viii)], the amounts shown at columns (3) (4) (5) and (6) of the E R 1 Return would be treated as '*eligible duties'* for transitioning. The net effect is that Column (7) – pertaining to Education Cess (goods) and Column (8) pertaining to SHE Cess

(goods) and Column (10) Education Cess (Service) and Column (11) SHE cess (Service), are clearly excluded from the ambit of 'eligible duties and taxes'. Therefore, the emphasis laid by the intervener Laxmi Cements about non-notifying of the exclusion of Cesses under Explanation 3, though the second Circular No. 87/06/2019-GST Dated 2nd January, 2019 at Para 5 states that the same stands *'inserted'*, may not carry the case of the intervener any further. We take the view that since Explanation 1 and 2 have clearly specified the '*inclusive list of duties and taxes'* that can be transitioned, by way excluding the Education Cess and SHE cess under these Explanations 1 and 2, would on its own would be sufficient to move them from the ambit of 'eligible duties and taxes', without having to go into the issue as to whether the exclusion in terms of Explanation 3 for Section 140 (5) was notified or not.

22. Approaching the eligibility for transitioning of Cesses from another angle, we find that proviso to Section 140 (1) reads as under:

> Provided that the registered *person shall not be allowed to take credit* in the following circumstances, namely :-
>
> *(i) Where the said amount of credit is not admissible as input tax credit under this Act*

23. With the Education Cess and SHE Cess, KKC getting subsumed within Excise Duty and Service Tax way back in 2015, with no similar Cess imposed under the CGST Act, it leaves no scope to view that the Ceses would be treated as being eligible as Input Tax Credit [ITC]

under the GST regime. Therefore, we take the view that even on this ground, the Education Cess and SHE Cess and KKC could not have been transitioned.

24. Now we take up the next portion of the issue, ie., the refund claim filed towards the reversal made for the Education Cess, SHE cess and the KKC.

25. The chronological details of abolition / exemption of Cesses is as per the following Table :

| **S. No.** | **Name of the Cess** | **Date of Abolition / Exemption** |
|---|---|---|
| 1. | Education Cess on taxable services | 01.06.2015 |
| 2. | Secondary & Higher Education Cess on taxable services | 01.06.2015 |
| 3. | Education Cess on excisable goods | Exempted with effect Abolished with effect (Amendment) Act, 2017. |
| 4. | Secondary & Higher Education Cess on excisable goods | Exempted with effect Abolished with effect (Amendment) Act, 2017. |
| 5 | The Finance Act, 2016 – Infrastructure Cess and Krishi Kalyan Cess | Abolished with effect (Amendment) Act |

26. One sample Notification issued towards exemption of Education Cess is reproduced below :

**NOTIFICATION**

**No.14/2015-Central Excise**

New Delhi, dated the 1st March, 2015

> G.S.R. (E). – In exercise of the powers conferred by sub-section (1) of **section 5A of the Central Excise Act, 1944 (1 of 1944**), read with sections 91 and 93 of the Finance (No. 2) Act, 2004 (23 of 2004), the Central Government being satisfied that it is necessary in the public interest so to do, hereby exempts all goods falling within the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), from the whole of the Education Cess leviable thereon under section 93 of the said Finance Act.

27. A careful reading of Rule 3 (7) of the Cenvat Credit Rules 2004 with the provisos thereto, would clarify that the Education Cess and SHE Cess, while they were eligible to be taken as Cenvat Credit, they were specifically to be used for discharge of the Education Cess and SHE cess only for the finished goods cleared / service provided. Similar provision has been specified for utilization of KKC only for discharge of KKC. The cross-utilization of the Education Cess and SHE cess and KKC with the normal Excise Duty Credit and Service Tax Credit is clearly prohibited, except for the brief initial exemption period, as admitted to by both the sides.

28. Therefore, when the Education Cess and SHE Cess on goods became fully exempt in view of Notifications issued under Section 5A of the CEA 1944, the utilization of the existing Education Cess and SHE Cess left as the closing balance as on 1.3.2015 also got fully blocked. Similar is the situation in respect of services being fully exempt from payment of Education Cess, SHE Cess and KKC whereafter the closing balance as on 1.6.2015 fully got blocked.

29. The appellants have vehemently argued about the '*indefeasible nature*' of the Cenvat Credit and such credit being the '*Vested Right'*. For this they have heavily relied on the decisions of **Eicher Motors** and **Slovak India** decisions of the Hon'ble High Courts and Supreme Court. Even as we begin to analyse the applicability of these judgements to the present issue on hand, it is pertinent to note that the *'Vested Right',* if any, got conferred on the appellants on 1.3.2015 and 1.6.2015, the notified date after which they could not utilize the available balance of Education Cess and SHE Cess. But the present appellants did not press for the refund of such blocked credits. Rather they were simply carrying forward the balance from 1.3.2015 till 30.6.2017 [for more than 2 years] in the Returns filed by them.

30. Immediately after 1.3.2015 / 1.6.2015 after the blockage of the Cesses, they had the following options :

(a) File for refund of the blocked amounts of Education Cess and SHE cess; or

(b) Seek permission to Merge the Education Cess and SHE cess and KKC with the Cenvat Credit of Excise Duty / Service Tax and start utilizing the same.

31. We note that in the present case, the present appellants did not seek recourse to any of the above two options during the earlier Central Excise / Service Tax regime for the next two years.

32. But there were some assesses who were aggrieved by such blockage and had taken up this issue and had canvassed for both the remedies under (a) and (b) above, with their jurisdictional authorities. After their requests were turned down, in the due course, the matter travelled to the High Courts.

33. We take up the outcome in some of these cases :

**2018 (14) G.S.T.L. 522 (Del.)**
**CELLULAR OPERATORS ASSOCIATION OF INDIA**
*Versus* **UNION OF INDIA**

**3.** Under the CENVAT Credit Rules, 2004 (CCR, for short), credit of EC and SHE was admissible and could be utilised for payment of EC and SHE respectively. In other words, CENVAT credit on EC and SHE on inputs, capital goods and input services could be utilised and availed of for payment of EC and SHE on manufactured goods and output services. Input EC and SHE credit had the effect of preventing cascading effect on EC and SHE payable down the line. It is an accepted and admitted case that benefit of EC and SHE on inputs, etc. could not have been utilised for payment of excise duty Service Tax on the output, i.e., manufactured goods or taxable services. Thus, cross utilisation of EC and SHE towards excise duty or Service Tax was impermissible and not permitted.

**4.** EC and SHE were abolished and were not payable on excisable goods with effect from 1st March, 2015 vide Notification Nos. 14/2015-C.E. and 15/2015-C.E. both dated 1st March, 2015. EC and SHE were also abolished and ceased to be payable on taxable services when Section 95 of Finance Act (No. 2) 2004 and Section 140 of Finance Act, 2007 were omitted by Finance Act, 2015. The omission was to take effect from 1st June, 2015 vide Notification No. 14/2015-S.T., dated 19th May, 2015. As a result, levy of EC and SHE on excisable goods was withdrawn with effect from 1st March, 2015 and in respect of taxable services with effect from 1st June, 2015. The

petitioners do not have any grievance against the withdrawal or abolition of levy of EC and SHE.

The contention is that EC and SHE, which were earlier imposed and then withdrawn from 1st March, 2015 and 1st June, 2015 for excisable goods and taxable services respectively, had been subsumed and included in the excise duty and Service Tax, and therefore, the amount lying in the credit towards EC and SHE should be available for availing CENVAT credit. This was not a case of abolition of EC and SHE, but the cesses were added and became part of the Excise Duty or Service Tax. Reliance is placed on the dictionary definition of the term "subsumed", which means to include, absorb in something else or incorporated into something larger or more general. Therefore under law, unutilised EC and SHE should be allowed to be utilised for payment of basic excise duty in excisable goods and Service Tax on taxable service, for otherwise the action would be clearly arbitrary, capricious and tantamount to lapsing of credit accrued on the input, though higher excise duty or Service Tax was payable on the output. The petitioners, it is asserted, have a vested right to claim benefit of utilization of the unutilized credit. Reliance is placed upon the judgment of the Supreme Court in *Eicher Motors Limited and Another* v. *Union of India and Others*, (1999) 2 SCC 361 = 1999 (106) E.L.T. 3 (S.C.) and *Samtel India Limited* v. *Commissioner of Central Excise, Jaipur*, (2003) 11 SCC 324 = 2003 (155) E.L.T. 14 (S.C.).

**8.** The respondents have contested the petition on several grounds and, *inter alia*, asserted that credit of EC and SHE towards payment of excise duty or Service Tax is not a vested right. The effect of the legislation withdrawing EC and SHE was to abolish the cess, though while presenting the Bill, etc. and giving reasons for increase in the excise duty and Service Tax, it was stated that EC and SHE would not be henceforth levied and would get subsumed in the higher rate of tax. Cross-utilization of EC and SHE credit was never permitted and allowed under the earlier provisions. The two notifications incorporating provisos (3) to (8) to Rule 3, sub-rule (7) in clause (b) have a very limited application as they apply to cases of excise duty where capital goods or inputs or input services on which EC and SHE had been paid were received by the purchaser/manufacturer of the final product on or after 1st day of March, 2015 or were manufactured after 1st day of March, 2015. In case of Service Tax, credit of EC and SHE was given

where inputs or capital goods were received by the provider of output services on or after 1st day of June, 2015 or where credit of EC and SHE paid on input service in respect of invoice, bill, challan or Service Tax certificate or transportation of goods by levy was received by the provider of output service on or after 1st day of June, 2015. Credit of balance fifty per cent of EC and SHE paid on capital goods received in the factory of a manufacturer of final product in the financial year 2014-15 for payment of excise duty and Service Tax was also provided. These, as elucidated and explained, were new benefits and concessions granted, as cross utilization was earlier not permitted and allowed. Any new concession or benefit given, would not in law on stand-alone basis, confer a legal right to claim vested right to a concession or benefit which has not been granted. Of course, this amended provisions can be relied as a secondary fact to support the main argument that EC and SHE were subsumed.

**9.** The first aspect to be examined is the statutory effect of withdrawal of EC and SHE on excisable goods and taxable services with effect from 1st March, 2015 and 1st June, 2015 respectively, pursuant to the Finance Act, 2015. By Notification No. 14/2015-CE, dated 1st March, 2015, the Central Government in public interest had granted exemption to all goods falling in the First Schedule to the Central Excise Tariff Act, 1885 from whole of EC leviable thereon under Section 93 of the Finance (No. 2) Act, 2004. Similarly, vide Notification No. 15/2015-C.E., dated 1st March, 2015, the Central Government in public interest had exempted all goods falling in the First Schedule to the Central Excise Tariff Act, 1985 from whole of SHE leviable under Section 138 of the Finance Act, 2007. In respect of taxable services, the Finance Act, 2015 had omitted Section 95 of the Finance (No. 2) Act, 2004, which imposed EC on taxable services, vide Section 153 and Section 140 of Finance Act, 2007 and SHE on taxable services vide Section 159, with effect from the date as notified by the Central Government in the Official Gazette. These exemptions and omissions were given effect from 1st March, 2015 for excisable goods and 1st June, 2015 for taxable services, as mentioned earlier.

**10.** Omission of a provision signifies deletion of that provision and is normally not treated as different from repeal. The repeal/omission in the present case was not made retrospectively, but applied prospectively.

Manufacturers and output service providers were entitled to take benefit of EC and SHE credit on the EC and SHE payable on manufactured goods and output services on or before the cut off date, i.e., 1st March, 2015 in case of manufactured goods and 1st June, 2015 in case of taxable services. They have not been allowed to take credit after the said two dates for the simple reason that EC and SHE ceased to be applicable and were no longer payable after the said dates. The provisos added to Rule 3, sub-rule (7) in clause (b) are really in the nature of concessions confined to a limited and narrow set of cases and are not of general application. Noticeably, they expand the scope and give benefit of utilization of accumulated EC and SHE against payment of excise duty and Service Tax, which was not the position prior to 1st March, 2015 and 1st June, 2015, respectively. It is also easily apparent as to why the said benefit or concession was granted. These cases certainly fall in a distinct and separate class. The said classification would not fall foul of vice of discrimination. Article 14 is not offended. In fact, the petitioners do not challenge and question the provisos, *albeit* seek additional benefit and concession beyond those granted, even though they were never available earlier.

11……Pertinently, no statement or assertion was made that the benefit of unutilized EC and SHE credit would be given against excise duty and Service Tax. The use of the words “subsumed” with reference to the two cesses could well indicate that there would not be an increased tax burden being put on the payers or the consumers, as EC and SHE were being withdrawn. Noticeably, the two cesses and the excise duty and the Service Tax were always treated as different and separate and cross-utilization was never permitted.

**12.** 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. A Constitution Bench of five Judges in *Hingir-Rampur Coal Company Limited and Others* v. *State of Orissa and Others*, (1961) 2 SCR 537 had elucidated that a cess can be in the form of a tax or a fee, though both are compulsory extraction of money. In case of a fee, there is an element of *quid pro quo*, while in tax this is not required, even if the tax being collected is used to constitute a specific fund, which does not

become part of the Consolidated Fund, and its application can be regulated and confined to its purpose.

**16.** The decision in the case of *Eicher Motors Limited and Another* (supra) is distinguishable, for in the said case, what was subject matter of challenge was Rule 57F(4A), which had stipulated that unutilized credit as on 16th March, 1995 lying with the manufacturers of tractors under Heading 87.01 or motor vehicles 87.02 and 87.04 or chassis of tractors or motor vehicles under Heading 87.06 shall lapse and shall not be allowed to be utilized for payment of duty on excisable goods. The proviso, however, had stipulated that nothing shall apply to the credit of duty, if any, in respect of inputs lying in stock or contained in finished products lying in stock as on 16th March, 1995, thereby creating an anomalous situation. Credit of tax paid on inputs and even finished products was available, but not in respect of the sold products. This was clearly taking away a vested right in the form of an amendment to the Rule. There was lapse of credit, which could not be utilized, though the tax/duty had not been withdrawn. The Supreme Court noticed that the credit attributable to inputs had already been used in manufacture of final products that had been cleared, and this alone was sought to be lapsed, notwithstanding the fact that the right had become absolute. On a holistic reading of the entire scheme, it was observed that when acts have been done by the parties concerned on the strength of the Rules, incidence following thereto must take place in accordance with the scheme or the Rules, otherwise it would affect the rights of the assessees. Further, right had accrued on the date when the assessee had paid tax on the raw materials or inputs and the same would continue till the facility available thereto got worked out or until the goods existed. As noticed above, tax/duty had not been withdrawn. Lastly and more importantly, Section 37 of the Central Excise Tariff Act, 1985 (sic) did not enable the authorities to make the Rule impugned therein. The legal ratio in *Eicher Motors Limited and Another* (supra) was followed in *Samtel India Limited* (supra) wherein amended Rule 57F(17) of the Central Excise Rules, 1944 was challenged. The Rules had postulated lapsing of credit in case of manufactured goods falling under sub-heading 8540.12, though the proviso had provided for credit of duty in respect of inputs lying in stock or contained in finished goods lying in stocks. It was held that the said scheme of credit of input tax, in view of amended provision, could not be made applicable to goods which had

already come into existence and under which the assessee had claimed credit facility. As noticed above, in the present case, credit of EC and SHE could be only allowed against EC and SHE and could not be cross-utilized against the excise duty or Service Tax. In fact, what the petitioners seek is an amendment of the scheme to allow them to take cross-utilization of the unutilized EC and SHE upon the two cesses being withdrawn against excise duty and Service Tax, though this was not the position even earlier. Both EC and SHE were withdrawn and abolished. They ceased to be payable. In these circumstances, it is not possible to accept the contention that a vested right or claim existed and legal issue is covered against the respondents by the decision in *Eicher Motors Limited and Another* (supra) and *Samtel India Limited* (supra). The said decisions are distinguishable and inapplicable.

**18.** For the aforesaid reasons, we do not find any merit in the present writ petition and the same is dismissed. However, in the facts of the case, there would not be any order as to costs.

**2019 (365) E.L.T. 773 (Raj.) [24-09-2018]**

**BANSWARA SYNTEX LTD.**

**Vs. COMMR. OF C. EX. & SERVICE TAX, UDAIPUR**

**3.** On the fateful day i.e. on 1-3-2015, the appellant had an accumulated balance of Rs. 7,08,993/- comprising Education Cess of Rs. 4,74,725/- and Secondary and Higher Secondary Education Cess of Rs. 2,34,208/- in its Cenvat credit account. Consequent to the very rescission of the Education Cess and Secondary and Higher Secondary Education Cess, the concerning credit lying in the Cenvat credit, paid on the inputs, input services and capital goods became unutilisable or unrealisable for the assessee.

**4.** Faced with such situation, the appellant filed a claim for refund of Rs. 7,08,933/- on 1-12-2015 under Section 11B of the Act of 1944.

**5.** The adjudicating authority rejected appellant's refund claim vide order dated 2-3-2016, observing that the statutory provisions neither provide for sanction of refund in cash nor do they permit an assessee to utilize the accumulated Cenvat credit of Education Cess and Secondary & Higher

Secondary Education Cess paid on inputs or input services against payment of Excise duty etc.

**14.** An appraisal of the above quoted statutory provisions and law relating thereto makes it clear that Section 11B of the Act of 1944 provides for refund of the duty of Excise, if such duty has been erroneously or wrongly paid; subject, however, to certain conditions and restrictions, including that the incidence thereof has not been passed on to the customer. After ensuring that there is no unjust enrichment and following the procedure prescribed in such provision, the adjudicating authority can either refund such amount to the assessee in cash or can order for crediting the amount in the fund, as the case may be.

**18.** A close and conjoint reading of the aforesaid provision makes it abundantly clear that an assessee is required to pay duty provided in the Schedule-I and Schedule-II to the Central Excise & Tariff Act and he can claim refund of such duty by making an application under Section 11B of the Act of 1944, if the same has been erroneously paid or illegally recovered subject; of course, to the procedure and conditions contained therein.

**19.** The Act of 1944 does not contain any provision for refund of the Excise Duty or other levies payable under the Act, until and unless the same are proved to have been erroneously paid or recovered with a further proof that its burden has not been passed on to the customers.

**22.** Even while amending the Rules of 2004 and substituting the proviso to Rule 3(7)(b) of the Rules of 2004, despite dispensing with the Education Cess and Secondary and Higher Secondary Education Cess, the Central Government has not thought it appropriate to provide for refund of the amount of such Cess, lying unutilised. In this view of the matter, in our considered view, the rule making authority has consciously not provided for refund of Cenvat credit.

**27.** In view of the discussion foregoing, we are of the considered opinion that the Tribunal has committed no error of law in holding that the appellant cannot claim cash refund or encashment of the unutilized and unavailed

amount of Education Cess and Secondary and Higher Secondary Education Cess, lying in its credit.

34. Thus, we observe that in case of **Cellular Operators Association Of India Versus Union Of India**, the appellants sought permission for cross-utilization of the blocked Education Cess and SHE Cess [referred as option (b) specified above], which was held as untenable by the Hon'ble Delhi High Court.

35. In case of **BANSWARA SYNTEX LTD. *Versus* COMMR. OF C. EX. & SERVICE TAX, UDAIPUR**, the appellants sought refund of the blocked Education Cess and SHE Cess [referred as option (a) specified above]. The Rajasthan High Court has clearly held that there was no scope to entertain the refund claim under Section 11B of the CEA 1944.

36. Therefore, we observe that both the likely remedies (a) and (b) discussed above got negated by the detailed orders in the judgements cited supra. Accordingly, it gets clarified that even prior to 01.07.2017, i.e., even before the onset of the present GST regime, the blocked Cesses were held as *lapsed*. Hence, on account of these judgements, we refuse to subscribe to the views of the appellants that had the 'vested right' / 'indefeasible right' even prior to 1.7.2017.

37. We now take up the issue decided in the case of **U.O.I. Vs Slovak India Training Co Pvt Ltd. ELT-559(Kar) and U.O.I. Vs Slovak India Trading Co Pvt Ltd. 2008(223) ELT A 170(S.C.),** which have been

heavily relied on by the appellants and in some of the decisions arrived at by the Tribunals while deciding the present issue.

38. The issue pertained to eligibility or otherwise of cash refund for the Cenvat Credit lying as closing balance, when the assessee's unit was ceased to operate [being fully closed]. The refund was claimed in terms of Rule 5 of the CCR 2004. The High Court of Karnataka held that assessee would be eligible to get the cash refund. On appeal, the Hon'ble Supreme Court upheld this decision.

39. After a few years, the decision of Karnataka HC was doubted and the matter was referred to a Three Judges Bench of the Bombay High Court. This Three Judges Bench of Bombay High Court in the case of **Gauri Plasticulture Vs CCE 2019(30) GSTL 224 (BOM)**, has held as under:

> The Division Bench referred the following questions for opinion of this Larger Bench :-
>
> "(a) Whether cash refund is permissible in terms of clause (c) to the proviso to section 11B(2) of the Central Excise Act, 1944 where an assessee is unable to utilize credit on inputs?
>
> (b) Whether by exercising power under Section 11B of the said Act of 1944, a refund of unutilised amount of Cenvat Credit on account of the closure of manufacturing activities can be granted?
>
> (c) Whether what is observed in the order dated 25th January, 2007 passed by the Apex Court in Petition for Special Leave to Appeal (Civil) No. CC 467 of 2007 (*Union of India* v. *Slovak India Trading Company Pvt. Ltd.*)

can be read as a declaration of law under Article 141 of the Constitution of India?"

**9.** The argument of Mr. M.H. Patil Learned Advocate appearing on behalf of the appellant in Central Excise Appeal No. 13 of 2007 and respondents in Central Excise Appeal Nos. 257 of 2007 and 28 of 2008 is that if one peruses Section 11B carefully, then, cash refund of accumulated credit lying un-utilised on account of closure of factory/stopping of activity/inability to use, is admissible. He invites our attention to Rule 5 of the Cenvat Credit Rules, 2004 to urge that this permits the unutilised credit to be claimed and the language thereof is, therefore, construed accordingly. Our attention is also invited to sub-rule (2) of Rule 11 to urge that a refund claim can always be made in the event the conditions laid down therein are set out. Thus, our attention is invited to Rule 5, Rule 11 and Rule 3 of the Cenvat Credit Rules, 2004 in this behalf. The Counsel would submit that the Cenvat credit is allowed as set out in Rule 3 and we must, therefore, construe the language of these provisions accordingly. He also invites our attention to the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 in this behalf. Mr. Patil would urge that the consistent view of the Tribunal and in number of cases further denotes that such a claim cannot be denied.

**10.** Our attention is invited to the judgment of the CESTAT, Bengaluru in the case of *Slovak India Trading Private Limited* v. *Commissioner of Central Excise (Bengaluru)* - 2006 (205) E.L.T. 956 z to urge that the appellant in that case claimed refund on unutilised Cenvat credit in their account as on the date of the closure of their factory. The Commissioner (Appeals) took a view that there is no provision under Rule 5 of the Cenvat Credit Rules to grant cash refund. The argument was that this order was not legal and proper for the reasons set out by the Tribunal. The South Zonal Bench of the CESTAT referred to the view taken by the CESTAT, Delhi and Mumbai to hold that refund claimed is eligible to the assessee and refund has to be made in cash when the assessee goes out of the erstwhile Modvat Scheme or their unit is closed. The view is taken because of the consistent approach of the Tribunal. The consistent approach was that such refund claims are logical and a refund has to be made in cash when the assessee goes out of the Modvat Scheme or the company is closed. Thus, appeal of *Slovak* was allowed.

**11.** The Union of India, aggrieved and dissatisfied with this view of the Tribunal, preferred an appeal, namely, Central Excise Appeal No. 5 of 2006 before the High Court of Karnataka at Bengaluru. In the judgment reported in 2006 (201) E.L.T. 559, the Division Bench of the Karnataka High Court took a view that there is no express prohibition in Rule 5. Once there is a manufacture referred to in Rule 5 and in the case on hand, there is no manufacture or closure in the light of closure of the company, then, Rule 5 is not available for the purpose of rejection of the claim. The claims have been allowed on the basis of closure of the factory and in the light of the assessee going out of Modvat scheme. With this conclusion, the appeals of the Revenue were dismissed.

**12.** Aggrieved and dissatisfied with this judgment and order of the High Court of Karnataka, the Revenue carried the matter to the Hon'ble Supreme Court and the Hon'ble Supreme Court came to the conclusion that the Tribunal at Bengaluru relied upon the order of coordinate Benches of the Tribunal and against which, no appeals were preferred by the Revenue. The Learned Additional Solicitor General appeared on behalf of the Union of India and fairly conceded to the position that those decisions of the Tribunal have not been appealed against. In view of this concession of the Learned Additional Solicitor General, the Revenue's appeals were dismissed.

**13.** Mr. Patil would submit that in the case of *Jain Vanguard Polybutylene Ltd.* (supra), the Tribunal at Mumbai followed the view taken in the case of *Slovak India Trading Company Pvt Ltd.* (supra) and concluded that the refund of unutilised credit on account of closure of factory was permissible. It, therefore, allowed the appeal of Jain Vanguard/the assessee and reversed the view of the Commissioner (Appeals).

**18.** On the other hand, Mr. Jetly appearing for the Revenue would submit that the referring order has rightly noted the controversy In the referring order, this Court has found that the attempt is to claim something which the law does not permit to be claimed at all. If the law does not permit something, no provision therein should construed to hold that it is also not prohibited. It not being prohibited, the provision has been erroneously

construed as permitting the refund. This would amount to rewriting the provisions or reading into them something which they themselves do not provide. In these circumstances, according to Mr. Jetly, we must proceed to answer the questions referred accordingly. He submits that this Court should hold that a refund of unutilised amount of Cenvat Credit on account of closure of manufacturing activities or inability to utilise input credit is not permitted. The order passed by the Hon'ble Supreme Court in *Slovak India* (supra) cannot be a declaration of law. It appears that the Revenue has brought to the notice of the Division Bench, the view of the larger Bench of the CESTAT in the case of *Steel Strips Ltd.* v. *Commissioner of Central Excise, Ludhiana* - 2011 (269) E.L.T. 257 (Tri.). The Revenue relied upon this judgment while urging that the claim of refund is not a matter of right unless vested by law. The plea of injustice or hardship cannot be raised to claim refund in the absence of statutory mandate. No equity or good conscience influence fiscal Courts without the same being embedded to statutory provisions. Thus, strict compliance with law in matters of refund is a pre-requisite. This larger Bench judgment in the case of *Steel Strips (supra),* according to the Revenue, expressly refers to all prior views of the Tribunal and answers the questions, accordingly. It also decides the issue of merger, which was pressed into service. Hence, the attention of this Court is invited to the view taken in this matter and though it is claimed that an appeal has been admitted against this larger Bench order by the High Court of Punjab and Haryana, still, now there is at least a certainty. Now the Tribunal's view is that refund of unutilised Cenvat Credit on closure of unit was not admissible in the absence of express statutory mandate or provision of law.

**22.** In the case at hand, we are considering a claim of refund of duty. Section 11B(1) clearly says that a person claiming refund has to make an application for refund of such duty before the expiry of the period prescribed and in such form and manner. The application has to be accompanied by such documentary or other evidence as the applicant may furnish to establish that the amount of duty of excise, in relation to which such refund is claimed, was collected from or paid by him and incidence of such duty had not been passed by him to any other person. The later provision enabling the claiming of refund is now worded differently. We have reproduced it and now it is only when the proviso is

attracted that the amount of refund can be paid over to the applicant or else it has to be credited to the fund. Even earlier, the amount used to be credited to the fund, but the proviso says that instead of being credited to the fund, it can be paid to the applicant if such amount in this case is relatable to refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made. The crucial words are that "the 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". If the excisable goods are not used as inputs in accordance with the rules made, to our mind, there is no question of any refund. Our view gets support and reinforcement from the language of the rules themselves. Mr. Patil relies upon Rule 5 of the Cenvat Credit Rules, 2004. That Rule reads as under :-

> ***"RULE 5. Refund of Cenvat credit. -*** *Where any input or input service is used in the final products which is cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate products cleared for export, or used in providing output service which is exported, the CENVAT credit in respect of the input or input service so used shall be allowed to be utilized by the manufacturer or provider of output service towards payment of,*
>
> *(i) duty of excise on any final products cleared for home consumption or for export on payment of duty; or*
>
> *(ii) service tax on output service,*
>
> *and where for any reason such adjustment is not possible, the manufacturer shall be allowed refund of such amount subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification :*
>
> *Provided that no refund of credit shall be allowed if the manufacturer or provider of output service avails of drawback allowed under the Customs and Central Excise Duties Drawback Rules, 1995, or claims a rebate of duty under the Central Excise Rules, 2002, in respect of such duty :*
> *Provided further that no credit of the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, as amended by clause 72 of the Finance Bill, 2005, the clause which has, by virtue of the declaration made in the said Finance Bill, under the Provisional Collection of Taxes Act, 1931, the force of law, shall be utilised for payment of service tax on any output service.*
>
> *Explanation : For the purposes of this rule, the words 'output service which are exported' means any output service in respect of which*

*payment is received in India in convertible foreign exchange and the same is not repatriated from, or sent outside, India.*

*Provided that the CENVAT credit or inputs shall not be denied to job worker referred to in rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule."*

**23.** Thus, a perusal of this rule indicates that where any input or input service is used in the final product, which is cleared for export etc. or used in the intermediate product cleared for export or used for providing output service which is exported, then, the Cenvat credit in respect of the input or input service so used shall be allowed to be utilised by the manufacturer or provider of output service towards payment of duty of excise on any final product cleared for home consumption or for export on payment of duty or service tax on output service. Whether for any reason, such adjustment is not possible, the manufacturer shall be allowed refund of such amount subject to such safeguards, conditions and limitation as may be specified by the Central Government by a notification.

**27.** The attempt made to rely upon the transitional provision, particularly Rule 11 carries the case no further. Rule 11 of the Cenvat Credit Rules, 2004 reads as under :-

***"Rule 11. Transitional provision. -*** *(1) Any amount of credit earned by a manufacturer under the CENVAT Credit Rules, 2002, as they existed prior to the 10th day of September, 2004 or by a provider of output service under the Service Tax Credit Rules, 2002, as they existed prior to the 10th day of September, 2004, and remaining unutilized on that day shall be allowed as CENVAT credit to such manufacturer or provider of output service under these rules, and be allowed to be utilized in accordance with these rules.*

*(2) A manufacturer who opts for exemption from the whole of the duty of excise leviable on goods manufactured by him under a notification based on the value of quantity of clearances in a financial year, and who has been taking CENVAT credit on inputs or input services before such option is exercised, shall be required to pay an amount equivalent to the CENVAT credit, if any, allowed to him in respect of inputs lying in stock or in process or contained in final products lying in stock on the date when such option is exercised and after deducting the said amount from the balance, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any excisable goods, whether cleared for home consumption or for export.*

**28.** It is evident from a reading of the transitional provision that any amount of credit earned by a manufacturer under the Cenvat Credit Rules, 2002, as they existed prior to the 10th September, 2004 or by a provider of output service under the Service Tax Credit Rules, 2002 as they existed prior to 10th September, 2004 and remaining unutilised on that day shall be allowed as Cenvat credit to such manufacturer or provider of output service under these rules, and be allowed to be utilised in accordance with these rules. This is how the transitional provision enables carrying forward of the unutilised Cenvat credit. That is a distinct contingency altogether. That transitional provision does not enable us to hold that the amount of unutilised Cenvat credit can be refunded in cash.

**29.** We do not think that by taking assistance of this provision, we will be able to hold as contended by Mr. Patil that the Cenvat credit can be refunded even in relation to those inputs which have not been used in the manufacture of the final product or the exported goods. We are called upon to read something in the substantive rule and which is totally absent therein. When Rule 5 follows Rule 4, which is titled as “Conditions for Allowing Cenvat credit”, then, we must understand the scheme in such manner as would make the law workable and consistent. Refund of Cenvat credit in terms of Rule 5 is permissible only when there is a clearance of a final product of a manufacturer or of an intermediate product for export without payment of duty under a bond or letter of undertaking of a service provider, who provides an output service which is exported without payment of tax and by applying the format which is carved out with effect from 1st April, 2012 by the substituted Rule 5.

**30.** Prior to such substitution, we have not seen anything in Rule 5 permitting refund of unutilised credit. We are not dealing with a situation or case of a manufacturer or producer of final products seeks to claim Cenvat credit of the duty paid on inputs lying in stock or in process when the manufactured or produced goods cease to be exempted goods or any goods become excisable (see Rule 3(2) of the Cenvat Credit Rules, 2004). Thus, refund of Cenvat credit is permissible where any input is used for the final product which is cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate products cleared for export. In the scheme of the rules, therefore, what is sought by

the assessee is not permissible. Thus, the attempt by the assessee to claim refund of unutilised Cenvat credit cannot be upheld. Merely because the inputs were lying unutilised or were capable of being utilised, but the manufacturing activities came to a stand still on account of closure of the factory would not enable the assessee to claim refund of Cenvat credit. That such credit can be availed of provided the inputs are used and not otherwise is clear from the scheme of the rules to which we have made a detailed reference in the foregoing paragraphs.

**31.** The sheet anchor of Mr. Patil's arguments is the judgment of the earlier Division Bench of this Court and that is based on the view taken by the High Court of Karnataka. The High Court of Karnataka has not discussed the scheme of Cenvat credit in details. The South Zonal Bench of the CESTAT in *Slovak India* (supra) considered the case of refund of unutilised Cenvat credit on account of closure of the factory of the said Slovak India. The Commissioner (Appeals) took the view that there is no provision in Rule 5 of the Cenvat Credit Rules to grant cash refund. After being approached, what the CESTAT observed is that there is a consistent view taken by the Tribunal that such claim is eligible and the assessee can seek refund when it goes out of the Modvat scheme (predecessor of Cenvat) or the unit is closed. This is the reasoning in the Tribunal's order and though the appeal of the Revenue before the High Court of Karnataka at Bengaluru raised several grounds and pleas, the High Court referred to the arguments and in para 4 of its order, reproduced Rule 5 of the Cenvat Credit Rules, 2002. In para 5, the reasoning of the High Court of Karnataka reads thus :-

> *"5. There is no express prohibition in terms of Rule 5. Even otherwise, it refers to a manufacturer as we see from Rule 5 itself. Admittedly, in the case on hand, there is no manufacture in the light of closure of the Company. Therefore, Rule 5 is not available for the purpose of rejection as rightly rules by the Tribunal. The Tribunal has noticed that various case laws in which similar claims were allowed. The Tribunal, in our view, is fully justified in ordering refund particularly in the light of the closure of the factory and in the light of the assessee coming out of the Modvat Scheme. In these circumstances, we answer all the three questions as framed in para 17 against the Revenue and in favour of the assessee."*

**32.** Thus, the High Court of Karnataka took the view that there is no express prohibition in terms of Rule 5 and that rule refers to a

manufacturer. Thus, even if there is no manufacture in the light of the closure of the factory, the assessee being a manufacturer is construed as one coming out of the Modvat scheme but still eligible for cash refund. The factory is closed and the inputs were not used in the manufacture of a final product is, thus, overlooked. So long as the assessee is a manufacturer even if his factory is closed, the input credit was available, is thus the view. Hence, the refund was held to be permissible.

**33.** When the matter was carried to the Hon'ble Supreme Court by the Revenue, the Hon'ble Supreme Court noted the concession of the Learned Additional Solicitor General. That concession is that the views of the Tribunals to the aforesaid effect have not been appealed against by the Revenue/Union of India. Pertinently, there is no concession by the Additional Solicitor General of India on the point of law. Hence, going by this concession on fact, the Special Leave Petition of the Revenue was dismissed. This, by no stretch of imagination, is a confirmation or approval of the view taken by the South Zonal Bench of the Tribunal at Bengaluru or the High Court of Karnataka.

**34.** Pertinently, when the matter was brought before this Court in the case of *Jain Vanguard* (supra), this Court, relying upon the judgment in the case of *Slovak India* (supra) and the order in the Special Leave Petition, dismissed the Revenue's appeal. The aggrieved Revenue, carried the matter to the Hon'ble Supreme Court and the order passed on that Special Leave Petition reads as under :-

> "*Delay condoned.*
>
> *We find no reason to interfere with the impugned order in exercise of our discretion under Article 136 of the Constitution. The Special Leave Petition is, accordingly, dismissed leaving the question of law open*."

**35.** The Special Leave Petition was dismissed, but the question of law was expressly kept open. It is in these circumstances that we are not in agreement with Mr. Patil that the issue or the controversy before us stands concluded against the Revenue. The question of law was still open to be raised and equally examined by us. There is no question of judicial discipline in such matters. The counsel relied upon this principle of judicial

discipline by inviting our attention to the judgment of the Hon'ble Rajasthan High Court in the case of *Welcure Drugs and Pharmaceuticals Ltd.* v. *Commissioner of Central Excise, Jaipur* reported in 2018 (15) G.S.T.L. 257. There, the Hon'ble Rajasthan High Court concluded that the Revenue cannot seek to urge before that High Court that the view taken by four different High Courts approving the order of CESTAT has lost its persuasive value, particularly when the Special Leave Petitions against the view taken by four different High Courts were either not filed or filed but not entertained. Thus, the Tribunals have taken a consistent view and the Revenue could not succeed in having that set aside. It is in these circumstances, the Rajasthan High Court negatived the contention of the Revenue that the Tribunal under the jurisdiction of that High Court could have distinguished the orders and judgments of its Benches. That was found to be contrary to the judicial discipline. It is in these circumstances so also when there was a Larger Bench view of the Tribunal having a binding effect, that the principle of judicial discipline was pressed into service.

**36.** After the view taken in *Steel Strips Ltd.* (supra) and which was also fairly brought to our notice, it is evident that this principle has no application to the facts and circumstances before us.

**39.** The referring order has already discussed in detail as to how the principle of merger cannot be invoked in this case. In the order passed in the case of *Jain Vanguard* (supra), the question of law was expressly kept open. Hence, the earlier view of the Tribunal does not merge with dismissal of the Special Leave Petition in the case of *Slovak India* (supra). Hence, this principle has also no application.

**40.** As a result of the above discussion, we answer the questions of law framed above as (a) and (b) in the negative. They have to be answered against the assessee and in favour of the Revenue. Questions (a) and (b) having been answered accordingly, needless to state that the order of the Hon'ble Supreme Court in the case of *Slovak India* (supra) cannot be read as a declaration of law under Article 141 of the Constitution of India.

40. Thus, we find that the **Slovak India** decision of the Karnataka High Court [affirmed by the Supreme Court] has been distinguished and

overruled by the Three Judges Bench of the Bombay High Court. Therefore, the reliance placed on the **Slovak India** case by the appellants in the present case, seeking the refund of the Education Cess, SHE Cess and KKC, does not come to their rescue in any manner.

41. Now we turn to the case laws cited by both the sides relating to CGST provisions. The case laws relied upon by the appellants and our discussions thereon as as under:

**Combitic Global Caplet Pvt. Ltd. v. Union of India**
**(2024) 20 Centax 144 (Bom.)**

**4.** Petitioner by this petition is challenging an order dated 7th September 2018 passed by respondent no. 2, *i.e.,* Principal Commissioner of RA and Ex-officio Additional Secretary, directing the original authority to allow re-credit of excess duty paid by petitioner in its CENVAT credit account totally amounting to Rs. 10,48,11,734/-. By these petitions, petitioner is also impugning an order dated 16th July 2020 passed by respondent no. 3, *i.e.,* the Commissioner of Central Tax & Central Excise (Appeals), upholding re-credit of rebate amount to CENVAT credit account.

**12.** Sub-Section (3) of Section 142 of the Act very clearly says "any amount eventually accruing shall be paid in cash". In the circumstances, we are of the opinion that respondents ought to have directed the sanctioning authority to refund the amount of duty refundable to petitioner in cash instead of credit in CENVAT account, 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.

42. We find that this case pertains to the refund arising on account of debiting of Cenvat Credit at the time of Export [prior to 01.07.2017] and consequent Rebate / Refund being granted as re-credit by the lower authorities under the present GST regime. After due deliberations, the High Court held that this amount is required to be paid by way of cash under Section 142 (3) of the CGST Act. Therefore, the facts are totally different and hence this decision has no applicability for the issue on hand, which is specifically to the point as to whether the Education Cess, SHE Cess and KKC, reflected as closing balance as on 30.6.2017 can be granted as cash refund or not.

**Godrej and Boyce Manufacturing Co. Ltd**
**vs. UOI and others**
**(2021-TIOL-2112-HC-MUM-GST)**

3. According to the petitioner, the impugned notice proceeds on the footing that the transitional arrangement for taking Input Tax Credit in the cases of CESS such as Education Cess (E Cess), Secondary & Higher Education Cess (SHE Cess) and Krishi Kalyan Cess (KK Cess) has been taken away by a retrospective amendment. However, the petitioner claims that not only on the date of its issuance but even on the date this writ petition was presented, the amendment(s) referred to in the impugned notice had not come into force and, therefore, the impugned notice has been issued on an untenable legal premise; hence, it is without jurisdiction.

8. It would not be incorrect to infer that but for the introduction of Explanation 3 to Section 140 of the CGST Act by Section 28 of the Amending Act, the impugned show-cause notice may not have seen the light of the day. A pointed reference is made to Explanation 3 wherein it has been expressed that ‘eligible duties and taxes’ excludes any CESS which has not been included in Explanations 1 and 2 of Section 140 of the CGST Act; also a reference is made to Explanations 1 and 2 that the same do not

include Education Cess, Higher Secondary Education Cess and Personal Account Amounts within the ambit of the ‘eligible duties and taxes’.

13. Although it is true, as contended by Mr. Jetly, that the respondent no.3 does not lack the jurisdiction to issue a notice of the nature impugned herein provided the circumstances therefor do exist, the question that has arisen for our consideration is whether issuance of the show-cause notice is vitiated for an approach which is based on an erroneous legal premise. An error in assumption of jurisdiction might also render a notice/an order ultra vires and bad. Perusal of the impugned show-cause notice would reveal assumption of jurisdiction by the respondent no.3 based on introduction of Explanation 3 to Section 140 of the CGST Act read with Explanations 1 and 2 thereof without showing application of mind as to whether the amended Explanations 1 and 2 have been made operational or not as well as whether Explanation 3 would at all apply to sub-section (1) of Section 140 of the CGST Act. There could have been little reason for us to interfere if assumption of jurisdiction by the respondent no.3 on the ground appearing from the impugned show-cause notice were shown to be defensible with reference those provisions of law, which have become operational by due exercise of power in terms of sub-section (2) of Section 1 of the Amending Act. Even otherwise, it has not been shown to us that upon introduction of Explanation 3 of Section 140 of the CGST Act read with partly un-amended Explanations 1 and 2 thereof, the respondent no.3 did have the jurisdiction to issue the impugned show-cause notice.

14. For the reasons as aforesaid, we hold that the present case is one where the impugned show-cause notice suffers from an error going to the root of the jurisdiction of the respondent no.3 in assuming jurisdiction and is, accordingly, indefensible and liable to be set aside. We order accordingly.

15. It is, however, made clear that if the respondent no.3 has reason to believe that the action proposed in the show-cause notice could be saved even without the amendments in Explanations 1 and 2 to Section 140 of the CGST Act having been brought into force or on grounds other than the one assigned therein, it shall be at liberty to issue a fresh show-cause notice to the petitioner and if such notice is issued, the petitioner will be free to respond to the same and take all possible defences available to it in law.

43. The issue before the High Court was whether the amendment of Section 140 of CGST Act 2017 was notified or not in respect of the Show Cause Notice issued. The appellant had transitioned the Edu Cess and other cesses and was issued SCN demanding reversal of the same. They had approached the High Court being aggrieved by the SCN. The facts in the present case are different. In the present case, the appellants have transitioned the Cesses, have reversed and have claimed the same as refund, which is the issue before us. We have elaborately discussed about the relevancy of Forms like ER 1, TRAN1, Section 140(1), Proviso thereto, and Explantion 1, Explanation 2, the clauses (i) to (viii) specifying the eligible duties / taxes for transitioning and come to our considered decision. We also notice the on the very issue the Madras High Court had already rendered their decision on 16.10.2020 in the case of **Sutherland**, but was not cited by the Revenue before the Bombay High Court, which has rendered their Order on 29.10.2021. Nor the decisions of **Cellular Operators [Delhi High Court – 15.02.2018]** or **Baswara Syntex [Rajasthan High Court-24.09.2018],** on the very issue were cited before the Bombay High Court. Further Para 15 of the Bombay High Court, makes it clear that the Revenue has still been given liberty to modify the Show Cause Notice and issue the same. Therefore, we take the view that the cited decisions of Delhi High Court, Rajasthan High Court, Bombay High Court [Gauri Plasticulture case] and Madras High Court, would have proper applicability in the present case.

44. Now we take up the case laws cited by the Revenue.

**(2023) 6 Centax 99 (Mad.) [16-10-2020]**
**Assistant Commissioner of CGST and Central Excise, Chennai**
*Versus* **Sutherland Global Services Pvt. Ltd.**

**2.** It may be noted that all the aforesaid three types of Cess were imposed by different Finance Acts which are enumerated hereafter and Education Cess and Secondary and Higher Education Cess were also abolished much before the enforcement of GST Regime with effect from *1-7-2017* and during the contemporary period of the levy of the Cess, they were allowed to be set-off or adjusted under CENVAT Credit Rules against the Output Cess Liability only and no cross-utilisation of the Cess was allowed to be set-off against the normal excise duty or customs duty payable by the Assessee, even though the Cess imposed under the Finance Act were collected in the form of Duty or Tax, as the case may be, by reading *mutatis mutandis* the provisions of those parent enactments.

**3.** The fine distinction between Cess, Tax and Duty will also be discussed hereafter. But, by way of introductory remark, it can be stated here that while Cess is collected from the person on whom such liability is fixed to meet a particular kind of expenditure incurred by the Government and its collection and expenditure is dedicated to that particular object or purpose of imposition of Cess. While Tax is a General Revenue, which can be spent by the Government for general public purposes and Duty is imposed on manufacture in the form of Excise Duty or Customs Duty on Imports, under those specified laws, which also go to the General Revenue of the State. Fees is yet another impost which has the basis of *quid pro quo* at its back.

**27.** Firstly, we may state that obviously, there is no intendment or equity about taxation and both the charging provisions as well as the exemption provisions in taxing statutes have to be strictly construed and the Golden Rule of Interpretation of plain language being given plain meaning is the cardinal principle applicable to taxing statutes.

**28.** Cess being a 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 with which the charging provisions of Cess under the same Act or separate Act as they are read and applied *mutatis mutandis,* like Central Excise and Customs Duty Act. Even though the imposition and collection of Cess may be loosely termed as Tax or Duty, the collection of Cess remains distinct, inasmuch as Cess amount collected by the Government is liable to be spent for the avowed and dedicated purpose for which such imposition was made which is usually reflected in the name of the imposition itself like Education Cess, Secondary and Higher Education Cess etc. Mere facility of taking credit of Input Cess paid on Input goods or services just to avoid the cascading effect on the multiple transactions in the series does not militate or alter the character of the imposition of Cess itself. Like any other indirect taxes like Sales Tax, VAT, Excise Duty, etc., the removal of the cascading effect of Taxation in multiple transactions in series is provided by the Legislation to collect such taxes in a reasonable proportion to the value of the transactions, by removing the cascading effect by providing for input tax credit (ITC) system.

**29.** Section 140 of the CGST Act, 2017, with which we are concerned and which provides for transitional arrangement of input tax credit, though comprises of 10 sub-sections and the Explanations 1, 2 and 3 after such 10 sub-sections, are commonly applicable tools of interpretation. The Explanation 1 refers to sub-sections (1), (3), (4) and (6), because these four sub-sections use and employ the term "Eligible Duties" and Explanation 1 confines "Eligible Duties" to 7 specified duties under that Explanation 1, namely Additional Excise Duty under Additional Duties of Excise (Goods of Special Importance) Act, 1957, Additional Duty under Customs and Tariff Act, 1975, Additional Customs Duty on Taxable Articles, Duty of Excise in the First Schedule to the Central Excise Tariff Act, 1985 and National Calamity Contingency Duty under Section 136 of the Finance Act, 2001, etc.

**30.** Therefore, only the seven specified duties as "Eligible Duties" in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed date i.e. 1-7-2017 will be eligible to be carried forward and adjusted against GST Output Tax Liability with reference to Explanation 1. Apparently, Education Cess and Secondary and Higher Education Cess or Krishi Kalyan Cess are absent from the seven categories in Explanation 1. Therefore, on a plain meaning, such three Cesses in

question cannot be inserted in Explanation 1 to cover them for being carried forward with reference to Explanation 1 which applies for specified four sub-sections of Section 140 of the Act.

**31.** Similarly, Explanation 2 refers to sub-sections (1) and (5) of Section 140 even though the words "Eligible Duties and Taxes" jointly are not used in sub-section (1) of Section 140, but are used only in sub-section (5) of Section 140, and again the eight specified "Eligible Duties and Taxes", first seven are repeat of Explanation 1 "Duties" and the eighth one is Service Tax, eligible to be set-off and carry forward under CGST Act, 2017.

**34.** Referring to sub-section (5), which uses the term "Eligible Duties and Taxes" will make this purpose of inserting Explanation 2 in Section 140 clear because sub-section (5) only permits such credit to be taken even after such input services are paid before the appointed date of 1-7-2017, but invoices in respect of them are received after the said appointed day of 1-7-2017 for which a time period of 30 days is prescribed and the said period can still be extended by another 30 days for reasons to be recorded by the Commissioner. Therefore, the Legislature has very carefully specified the duties and taxes in respect of stocks held for which requisite declaration in Form TRAN-1 is submitted as on 30th June, 2017 and also the service tax in respect of services which are input services received before 30th June, 2017 of which invoices may not have been received before that date and therefore, a relaxation of 30 days is provided for them. Therefore, the Court by any intendment or implication cannot include the aforesaid three types of Cesses, with which we are concerned, in the terms of "Eligible Duties and Taxes" or "Eligible Duties" with reference to Explanation 1 and Explanation 2 to be carried forward and transitioned under Section 140 of the Act.

**35.** The Legislature took further care by inserting Explanation 3 which is couched in negative terms and for removal of any doubt, it further clarified that such eligible duties and taxes will exclude an Cess which has not been specified in Explanations 1 and 2. We may point out here itself that for example, National Calamity Contingent Duty imposed in Section 136 of the Finance Act, 2001, though named it as duty was, in fact, a Cess and that fund was created to meet expenditure to manage any national calamity. But, set-off thereof has been specifically allowed by the Legislature possibly

because that levy imposed under the Finance Act, 2001 continued even after GST Regime was in force with effect from 1-7-2017

**36.** But, as noted above, the imposition or levy of Education Cess and Secondary and Higher Education Cess and Krishi Kalyan Cess did not operate after 1-7-2017. Explanation 3, in our opinion, specifying that any kind of Cess will be excluded for the purpose of Section 140, makes the intention of the Legislature very clear and sub-section (8) of Section 140, which was emphasized by the Learned Counsel for the Assessee before us, is not excluded from the effect and operation of Explanation 3, because the exclusion is of any Cess which has not been specified in Explanations 1 and 2, Education Cess and Secondary and Higher Education Cess and Krishi Kalyan Cess are not included in Explanations 1 and 2 at all. Therefore, the exclusion of Education Cess and Secondary and Higher Education Cess for the purpose of carry forward and set-off under Section 140 is specifically provided in Explanation 3, which is clearly applicable to gather the legislative intent, irrespective of piecemeal enforcement of Explanations 1 and 2 by the Legislature. Explanation 3 has its own force and application and does not have a limited application only via the route of Explanation 1 and Explanation 2. The Departmental Circular dated 2-1-2019, quoted above, in our opinion, rightly clarified this position with reference to Explanation 3 to Section 140 of the Act.

**40.** Admittedly, since the cross-utilization of Education Cess and Secondary and Higher Education Cess was not allowed against Excise Duty and other duties under existing law prior to GST Regime and they could be set-off only against the Output Education Cess and Secondary and Higher Education Cess liability, once the levy itself ceased and dropped in 2015, the question of their carry forward and utilization becomes only academic

**42.** We found considerable force in the contention raised on behalf of the Revenue before us that credit of such Education Cess and Secondary and Higher Education Cess which could not be utilised against the Output Education Cess and Secondary and Higher Education Cess Liability, while the said impost was in force prior to Finance Act, 2015, became a dead claim in the year 2015 itself and therefore, there was no question of allowing a

carry forward and set-off after a gap of two years against the Output GST Liability with effect from 1-7-2017.

**45.** Much reliance was placed by the Learned Counsel for the Assessee on the judgment of the Hon'ble Supreme Court in the case of *Eicher Motors* v. *Union of India* [1999 (106) E.L.T. 3 (S.C.)], in which dealing with the case of earlier system of Modvat before Cenvat Rules came into force and Rule 57F(4A) of the Central Excise Rules, 1944 was questioned before the Hon'ble Supreme Court and the Supreme Court struck down Rule 57F(4A) of the Central Excise Rules as being beyond the Rule making powers conferred on the Central Government under Section 37 of the Central Excise Act, 1944, on the ground that a right (of Modvat) accrued to the Assessee on the date when they paid the duty on the raw materials or the inputs and that right would continue until the facility available thereto gets worked out or those goods existed.

**46.** The above judgment, with great respect, is not applicable to the case before us for two reasons. Firstly, there is nothing like Rule 57F(4A) under challenge before us, nor the said judgment of the Supreme Court dealt with a case of Cess, but was dealing with a Modvat credit of Excise Duty itself paid on the inputs which was to be utilized against the Output Excise Duty on the finished goods. That right, obviously so long as Modvat Rules existed, could not be altered as was done in the form of Rule 57F(4A) and which was quashed by the Hon'ble Supreme Court. Here, we are concerned with the imposition of Cess under different enactments like Finance Acts which held the field for a particular period only and even ceased to operate before GST Regime was enforced on 1-7-2017 and the question of their transition as input credit in the new GST Regime is involved before us.

**47.** When the Cess could not be adjusted even against the normal Excise Duty under the CENVAT Rules, the question of applying the ratio of Hon'ble Supreme Court judgment in the case of *Eicher Motors* cannot arise. The said judgment is therefore distinguishable. Moreover, in paragraph 6 of the judgment quoted above, one should mark the words of the Hon'ble Supreme Court that *"the right accrued would be continued until the facility available thereto gets worked out".* Obviously, the adjustment of CENVAT or unutilised Education Cess or Secondary and Higher Education Cess cannot work out because no Output Education Cess and Secondary and Higher Education Cess Liability existed even prior to 1-7-2017, once the levy was dropped by the Finance Act, 2015. So, there was no way to work out the credit of Education

Cess and Secondary and Higher Education Cess even against the Excise Duty on finished goods prior to 1-7-2017 much less against GST Output Liability after 1-7-2017.

**54.** We are supported in our aforesaid view by the aforesaid two judgments also largely because it is clear that CENVAT credit or input tax credit under the GST Regime is a concession and a facility and not a vested right. Even if one were to rank such a right of CENVAT credit on the pedestal of a statutory right, even that right can be curtailed and regulated by conditions for availing such right. It is clear from the Scheme of Section 140 of the GST Act that the transition and carry forward of the input tax credit of the taxes and duties paid under the earlier Indirect Tax Regimes was subject to conditions and specifications given in Section 140 of the Act and unless specifically allowed. Such carry forward or set-off could not be claimed by any implied intention or so called vested right theory. In our opinion, the unutilised Education Cess and Secondary and Higher Education Cess in the hands of the Assessee had become dead CENVAT Credit claim in the year 2015 itself with these levies dropped by the Finance Act, 2015 and therefore, there is no question of it being claimed as a right to be carried forward and set-off after 1-7-2017 against Output GST Liability.

**55.** We may also deal with the judgment of Division Bench of Delhi High Court relied upon by the Revenue in the case of *Cellular Operators Association of India* v. *Union of India* [2018 (14) G.S.T.R. 338] decided on 15-7-2018 and also referred by the Learned Counsel for the Assessee in support of the submission that cross-utilization of Education Cess and Secondary and Higher Education Cess towards Excise Duty and Service Tax was never permitted and the Delhi High Court repelled the challenge of the Cellular Operators Association of India to the Notification dated 29th October, 2015, which was challenged on the ground that the extended benefit of that notification was not given to the Cellular Operators and the credit accumulated on account of Education Cess and Secondary and Higher Education Cess should be allowed to them against the payment of Service Tax leviable and payable on digital Communication Services.

**56.** Distinguishing the decision of Hon'ble Supreme Court in the case of *Eicher Motors Limited*, as we have also found above, the Division Bench of the Delhi High Court in a judgment authored by *Hon'ble Justice Sanjiv Khanna* (As His Lordship then was), it was held that on a holistic reading of

the entire Scheme, the petitioners could not be allowed to take cross-utilization against Excise Duty and the contention that it was a vested right or claim of the Assessee could not be accepted. The Court also found that the decision of the Hon'ble Supreme Court in the case of *Eicher Motors,* was distinguished by Hon'ble Supreme Court itself later on in the case of *Osram Surya (P) Ltd*. v. *Commissioner of Central Excise* [2002 (142) E.L.T. 5 (S.C.)].

**58.** We may also briefly add one more reason as to why we cannot subscribe to the view taken by the Learned Single Judge and affirm it. GST Law, by enactment of respective laws by the Parliament and States and creation of GST Council to subsume the 16 indirect taxes which were in vogue prior to 1-7-2017 was a watershed moment in the taxation reforms in India. The following 16 indirect taxes which were hitherto leviable were subsumed in the new GST Law Regime and Constitutional Amendments were effected for that purpose besides enactment of separate laws by Parliament and States to impose GST on the sales of goods and services like Central Goods and Services Tax Act, 2017, the Integrated Goods and Services Tax Act, 2017, the Union Territory Goods and Services Tax Act, 2017, the Goods and Services (Compensation to States) Act, 2017, etc. by Parliament and respective State Goods and Services Tax Act by different States and Union territories.

| | | |
|---|---|---|
| (1) | | Central Excise Duty |
| (2) | | Additional Excise Duties |
| (3) | | Excise Duty levied under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 |
| (4) | | Service Tax |
| (5) | | Additional Customs Duty commonly known as Countervailing Duty |
| (6) | | Special Additional Duty of Customs |
| (7) | | Central Surcharges and Cess, so far as they relate to the supply of goods and services. |
| (8) | | State Value Added Tax/Sales Tax |
| (9) | | Entertainment Tax (other than the tax levied by the local bodies) |

| | | |
|---|---|---|
| (10) | | Central Sales Tax (levied by the Centre and collected by the States) |
| (11) | | Octroi and Entry Tax |
| (12) | | Purchase Tax |
| (13) | | Luxury Tax |
| (14) | | Taxes on lottery |
| (15) | | Betting and gambling |
| (16) | | State cess and surcharges insofar as they relate to supply of goods and services. |

**59.** The GST Law spared and did not include within its ambit and scope only six commodities which were left out and continued to be covered by the earlier existing laws of Excise Duty and VAT Law and for that purpose, Entry 54 of the State List and Entry 84 of the Union List were also suitably amended by 101st Constitutional Amendment Act. Six items which are not covered by GST are (a) Petroleum Crude, (b) High Speed Diesel, (c) Motor Spirit (commonly known as Petrol), (d) Natural Gas, (e) Aviation Turbine Fuel, and (f) Tobacco and Tobacco products. Except the aforesaid 16 taxes and duties specified in different enactments, no other tax or duty were subsumed under the new GST Regime with effect from 1-7-2017.

**60.** Obviously, the transition of unutilised input tax credit could be allowed only in respect of taxes and duties which were subsumed in the new GST Law. Admittedly, the three types of Cess involved before us, namely 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 them credit under against Output GST Liability cannot arise. The plain scheme and 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.

**61.** For these reasons also, in our opinion, the Learned Single Judge, with great respects, erred in allowing the claim of the Assessee under Section 140

of the CGST Act. The main pitfalls in the reasoning given by the Learned Single Judge are (a) the character of levy in the form of Cess like Education Cess, Secondary and Higher Education Cess and Krishi Kalyan Cess was distinct and stand alone levies and their input credit even under the Cenvat Rules which were applicable *mutatis mutandis* did not permit any such cross input tax credit, much less conferred a vested right, especially after the levy of these Cesses itself was dropped; (b) Explanation 3 to Section 140 could not be applied in a restricted manner only to the specified sub-sections of Section 140 of the Act mentioned in the Explanations 1 and 2 and as a tool of interpretation, Explanation 3 would apply to the entire Section 140 of the Act and since it excluded the Cess of any kind for the purpose of Section 140 of the Act, which is not specified therein, the transition, carry forward or adjustment of unutilised Cess of any kind other than specified Cess, viz. National Calamity Contingent Duty (NCCD), against Output GST liability could not arise.

45. We find that the above judgement of the Madras High Court to be the most comprehensive decision on the very issue of eligibility of refund of Education Cess, SHE Cess and KKC in terms of Section 142 (3). This detailed considered decision was rendered while deciding the Writ Appeal No. 53 of 2020, on 16-10-2020. We take the view that on **Sutherland Madras High Court** decision to be most apposite and applicable to the facts of the present case.

**Muthoot Finance Ltd Vs. UOI**
**2024 (10) TMI 1658 (Ker-High Court)**

The petitioner is a Public Limited Company incorporated under the provisions of the Companies Act, 1956. It is engaged in financing, providing personal and business loans upon the security of gold. For the period from April 2017 to June 2017, the petitioner had filed returns under the provisions of the Finance Act, 1994 disclosing payment of Service Tax of Rs.10,36,39,987/- Education Cess (EC) amounting to Rs.67,69,195/-, Secondary and Higher Education Cess (SHEC) amounting to

Rs.35,18,566/- and Krishi Kalyan Cess (KKC) amounting to Rs.54,65,526/-.

5. Having heard the learned counsel appearing for the petitioner and the learned Standing Counsel appearing for the respondents, I am of the view that the petitioner has not made out any case for the grant of any of the reliefs sought in the writ petition. A reading of the provisions of the CENVAT Rules indicates that the EC, SHEC and KKC can be utilized only for payment of such Cess and not for any other purposes (See the First and Second provisos to Rule 3(7)(b) & Rule 3(7)(d) of the CENVAT Credit Rules, 2004). It is clear that there is no cross-utilization of EC, SHEC and KKC against tax payable on account of Service Tax under the provisions of the Finance Act, of 1994. It is evident from the judgment of the Division Bench of the Madras High Court in Sutherland Global Services Private Limited (supra) that there cannot be any transitioning of Cess paid as EC, SHEC and KKC under the provisions of Section 140 of the CGST Act. The following observations of the Madras High Court are relevant in this regard:-

> *"37. But, as noted above, the imposition or levy of Education Cess and Secondary and Higher Education Cess and Krishi Kalyan Cess did not operate after 01.07.2017. Explanation 3, in our opinion, specifying that any kind of Cess will be excluded for the purpose of Section 140, makes the intention of the Legislature very clear and Sub-section (8) of Section 140, which was emphasized by the learned counsel for the Assessee before us, is not excluded from the effect and operation of Explanation 3, because the exclusion is of any Cess which has not been specified in Explanations 1 and 2, Education Cess and Secondary and Higher Education Cess and Krishi Kalyan Cess are not included in Explanations 1 and 2 at all. Therefore, the exclusion of Education Cess and Secondary and Higher Education Cess for the purpose of carry forward and set off under Section 140 is specifically provided in Explanation 3, which is clearly applicable to gather the legislative intent, irrespective of piecemeal enforcement of Explanations 1 and 2 by the Legislature. Explanation 3 has its own force and application and does not have a limited application only via the route of Explanation 1 and Explanation 2. The Departmental Circular dated 02.01.2019, quoted*

*above, in our opinion, rightly clarified this position with reference to Explanation 3 to Section 140 of the Act*

39.....The "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 such transition and set off against such Output GST Liability."

I am in respectful agreement with the view taken by the Division Bench of the Madras High Court in Sutherland Global Services Private Limited (supra). Therefore, the question of transitioning the EC, SHEC and KKC Credit does not arise for consideration. To be fair to the petitioner, the petitioner has no case that such transitioning is permissible. Coming to the claim of the petitioner for refund, it is to be noted that the EC and SHEC were abolished with effect from 01.03.2015 and 01.06.2015 respectively. With the abolition of such Cess and the provisions of the CENVAT Rules providing that credit of such Cess can be utilised only for payment of the same Cess, the question of permitting the petitioner to utilize the credit does not arise for consideration. It is clear from the judgment of the Supreme Court in Union of India and Others v. VKC Footsteps India Private Limited; (2022) 2 SCC 603 that, a right to refund can be circumscribed by statutory provisions and in the absence of any provision enabling the petitioner to claim the refund of amounts paid as EC, SHEC and KKC (to the extent unutilised) the question of entertaining a claim for refund in the nature of Ext.P4 does not arise for consideration.

7. The contention of the learned counsel appearing for the petitioner that various Tribunals had taken a view contrary to the view taken by this Court and has held that EC, SHEC and KKC paid at the relevant time under the provisions of the Finance Act 1994 can be refunded cannot be accepted. In view of the statutory provisions discussed above, the view taken by various Tribunals does not appear to be in accordance with the statutory provisions.

46. The Kerala High Court in this case has held that the Cesses can be utilized only for payment to Cesses and cross utilization of the same is not permitted. Thereafter, reliance has been placed on Sutherlands judgement of the Madras High Court and the Writ Petition filed by the appellant has been dismissed.

47. To summarize the case laws discussed above, on identical issue :

| **In favour of the appellant / intervenor** | **In favour of Revenue** |
|---|---|
| Toyota Kirslokar – SM – Mumbai Bench | NMDC – DB – Delhi Bench |
| Tata Steel BSL - SM – Mumbai Bench | Tecumseh – SM – Hyd Bench |
| Nu Vista – DB – Delhi Bench | Suvikram Plast – SM - Bangalore |
| Bharat Heavy Electricals Ltd. – DB Delhi Bench | Cellular Operators – DEL HC (not under GST provisions) |
| Godrej Boyce – Bombay HC – Div Bench | BANSWARA SYNTEX – RAJ HC (Not under GST Provisions) |
| | Sutherland – Madras HC – DIV Bench (Under GST Provisions) |
| | Muthoot – Kerala HC - Single |

48. The above cases can be categorized as under :

(1) **(a) Toyota (b) Tata Steel BSL** – SM – holding that the appellant can claim the refund under Section 142(3) of CGST Act 2017.

(2) **BHEL and Nu Vista – DB** – holding that the appellant can claim the refund. Both decisions relied on the case law of Eicher and Slovak

(3) **Godrej Boyce – Bombay** – SCN demanding reversal of Cesses was challenged. High Court has set aside the same. None of the case law favouring the Revenue was cited. HC gave liberty to Revenue to issue SCN afresh if enough ground is found.

(4) **NMDC and Tecumseh – DB** - Analysed Section140 and 142 and considered the decisions of High Courts and held that the refund cannot be granted under Section 142(3)

(5) **Suvikram – SM** – Relied on and followed Sutherland Div Bench decision of Madras High Court and held that refund cannot be granted

(6) **Cellular Operators – Delhi HC** – Analysed the provisions prevailing provisions prior to 1.7.2017 distinguished Eicher Motor relying on Osram Surya (P) Ltd. v. Commissioner of Central Excise [2002 (142) E.L.T. 5 (S.C.)] case and came to a conclusion that there is no 'vested right' or 'indefeasible right' towards the blocked Cesses available to the assessee as on 1.3.2015 and 1.6.2015 and refused to entertain the request of the appellants to merge the cesses with the Excise Duty and

Service Tax so as overcome the financial difficulties on account of blocked cesses.

(7) **Banswara– Rajasthan HC** – Dealt the with provisions prior to 1.7.2017. The appellant filed refund claim under Section 11 B for the blocked Cesses. Dismissed the appeal by upholding the Tribunal's decision that there is no provision under CCR 2004 to claim such refund.

(8) **Sutherland – Division Bench – Madras High Court** – took into consideration the provisions of CCR 2004, Section 140 and 142 of CGST 2017 and set aside the Single Member Decision of the Madras High court and held that the refund cannot be granted for the cesses which got blocked on 1.3.2015 and 1.6.2015, and the cessess became *dead cenvat credit* on these dates

(9) **Muthooth – Single Judge – Kerala High Court** – Considered Sutherland Div Bench and also came to independent conclusion that refund cannot be granted.

49. Now we take up **Nu Vista** [2022] vis-à-vis **NMDC** [2024], both by Division Benches of Delhi, which has resulted in the present LB being constituted to resolve the issue.

**NU VISTA LTD :**

- In Nu Vista Ltd., the appellant placed overwhelming emphasis on **Slovak India Trading Pvt Ltd., Karnataka High Court**, affirmed by the Supreme Court.

- Reliance was also placed on **BHEL - DB** on the same issue and case laws of **Toyota Kirloskar** and others.

- The **BHEL** order itself relied on **Eicher** and **Slovak** cases to come the conclusion that the refund is required to be granted.

- While the Revenue cited **Cellular Operators** decision of Delhi HC, proper canvassing was not made to the effect that **Eicher Motors** was found to inapplicable by the High Court and once cross-utilization is not permitted, the blockage of the Cesses become final with there being no possibility of claiming such amount by way of refund.

- The overturning of the **Slovak India's** case by the Three Judges Bench of Bombay High Court in the case of **Gauri Plasticulture Vs CCE 2019(30) GSTL 224 (BOM),** and non-applicability of Rule 5 of CCR to the facts of the case was not brought to the attention of the Bench.

- Though the Hearing in this case was taken up on 12.11.2021, the decision of the Madras High Court in the case of **Sutherland Div Bench [order pronounced on 16.10.2020]** was not brought to the notice of the Bench.

- In the case of **Nu Vista**, the appellant had not transitioned the Edu Cess SHE Cess and KKC. They had directly filed the refund application. Therefore, the DB had no reason to go into the provisions of Section 140, and hence were not analysed in detail.

- All these factors consequently resulted in the Tribunal allowing the appeal and the refund claim.

**N M D C :**

- In the NMDC case, the appellant had transitioned the Cesses by way of TRAN 1 and SCN was issued to recover the amount involved in such Cesses. The appellant did not put-forth any arguments about the applicability of Eicher , Slovak, Nu Vista and other cases. Their cryptic argument is captured at Para 3 of the Final Order, from wherein the relevant portion is reproduced below :

> 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 prepare 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.

- Therefore, the Bench went into the provisions of Section 140, 142 of the CGST Act 2017. One of the important points made the order is reproduced below :

> 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 of the CGST Act.
>
> Xxxxxxx
>
> 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 Educatiion 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.

50. Therefore, in NMDC case, it has been held that the refund would not be eligible under Section 142 (3) of the CGST Act 2017.

51. Now coming back to the present case, we find that the Appellants have not brought in any case law to the consideration of this Bench [LB] to the effect that prior to 1.7.2017, the Edu Cess and SHE Cess were eligible as refund as against the two discussed High Court judgements [**Cellular – Delhi and Banswara – Rajasthan**] cited by the Revenue. In respect of post GST regime, the Appellant and interveners have brought in decisions of DB and SM of Tribunals, which have overwhelmingly relied on **Slovak, Eicher and Samtel**, cases which are not applicable to the facts of the present case. We find that the ratio laid down in the detailed and considered decision of Madras High Court in the case of **Sutherland**, would be squarely applicable to the facts of the present case.

52. Therefore, we dismiss the appeal filed by the appellant KEI on the grounds discussed above. The petitions of the Intervenors are also answered accordingly, rejecting their prayer for refund to be granted.

53. Now we take up the second issue of whether or not the refund claim filed by the appellant KEI would be hit by time bar or not. The appellant

[KEI] has filed the Refund claim on 11th October 2021, whereas admittedly the blockage of the Cesses took place on 1.3.2015 and 1.6.2015. If they wanted the cash refund, they should have filed the same within one year from these dates, as per the CEA 1944 provisions prevailing at that point of time. The **Banswara Syntex** case shows that there were assesses who took this route. Therefore, their filing of the refund would be time barred by 1.3.2016 / 1.6.2016. It is obvious that with the only provision under Rule 5 of CCR 2004 being clearly inapplicable [applicable only in respect of export of goods] and Section 11B also not clearly in their favour, they chose not to file the refund claim between 2015 to 2017. On the other hand, they have quietly transitioned to TRAN 1 on 1.7.2017, waited for the Revenue to point out the error in 2018 / 2019, reversed the same and now they have filed the refund claim by taking refuge under Section 142 (3) to the effect that the Section 11B time bar provision would not be applicable. We hold that once they did not utilize the normal avenue within the frame-work of CCR 2004 / CEA 1944, they cannot take recourse to the new regime's law to claim immunity from time-bar. This is thoroughly misconceived. We hold that their refund claim is hopelessly time-barred.

54. To summarize our conclusions:

- In view of the cited decisions of **Cellular Operators** and **Banswara Syntex,** we hold that there was no provision under CCR 2004 to either to merge the blocked cesses with Excise Duty

/ Service Tax or to claim the blocked amounts as refund under Section 11B, even prior to 1.7.2017.

- Under the earlier statutory provisions, the Rule 5 of CCR 2004 was specifically applicable to refund accruing on account of export of goods and services which has no applicability to result in any refund of the blocked cesses. Therefore, **Slovak India** case dealing specifically with Rule 5 has no application in the present case.

- The **Slovak India High Court** case has been revisited and overturned by the Three Judge Bench of Bombay High Court in **Gauri Plasticizers case**. Even the **Delhi High Court** in the case of **Cellular Operators** has gone into the applicability of the **Slovak India, Eicher and Samtel** cases and has held that they cannot be applied to the facts of the present case. Even on this ground **Slovak India** case cannot help the appellant to get the refund of cesses.

- We also fully subscribe to the view of the **Madras High Court DB Sutherland** case to the effect that effectively and Edu Cess and SHE Cess have become *dead Cenvat Credit* on 1.3.2015 and 1.6.2015, hence the question of refunding same would not arise.

- When the refund is not eligible *ab initio* in view of the above discussions, the question of granting them under the provisions of CGST Act 2017 cannot arise.

- We have gone through and discussed the Forms ER 1, TRAN 1 and the duties and taxes specified in the inclusive list under Section 140, read with Explanations and the two Board Circulars to come to a conclusion that *ab intio* there was no provision for transitioning of the Cesses in question.

55. In view of the above discussions, we agree with the decision arrived at by the Tribunal in the case of NMDC and hold that no refund can be granted for the blocked Education Cess, SHE Cess and KKC under the provisions of Section 142(3). We also hold that the refund claims, if filed after 1.3.2016 / 1.6.2016 would be time-barred.

56. This Order is being forwarded to the respective Benches of the Tribunal for finalizing the orders.

(Order pronounced in the open court on 20.11.2025)

**(R. Muralidhar)**
**Member (Judicial)**

**(Binu Tamta)**
**Member (Judicial)**

**(P. Anjani Kumar)**
**Member (Technical)**

Pooja