



NITYA
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NITYA Legal Precedents

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PART A: WRIT PETITIONS

1. Transition of credit of Cesses pertaining to erstwhile regime into GST regime

Vide our update titled **NITYA's Insight | Issue 45 | Judgement Update | High Court allows transition of various cesses (like education cess) to GST regime** ([click here](#)), we apprised you regarding decision of Single bench of Madras High Court in case of **Sutherland Global Services Private Limited v. AC, CGST, 2019-VIL-536-MAD**. In this ruling, the Court allowed transition of credit of Cesses namely Education Cess ('EC'), Secondary and Higher Education Cess ('SHEC') and Krishi Kalyan Cess ('KKC') (cumulatively referred to as 'Cesses') under Section 140(8) of the Central Goods and Services Tax Act, 2017 ('CGST Act'). These Cesses were levied under erstwhile laws.

The revenue filed an appeal before Division Bench ('DB') of the High Court. The DB has now reversed decision of Single Member and disallowed transition of credit of Cesses and *inter-alia* held as under:

- Taking credit of Cesses in books of accounts did not give vested right to transition credit of such Cesses. Such credit is in nature of concession and facility, not a vested right. Character of levy of Cesses differs from duties and taxes.
- Levy of Cesses was discontinued and their credit became dead claim in 2015.
- Cesses did not subsume into GST. Therefore, credit of Cesses cannot be transitioned under GST.
- Explanation 1 and Explanation 2 to Section 140 do not specifically cover credit of Cesses. Therefore, on combined reading of these Explanations along with Explanation 3 to Section 140, credit of Cesses cannot be transitioned to GST.
- By virtue of CGST Act and amendments made therein, in the year 2018, there is implied lapsing of credit of Cesses.
- Credit of Cesses was not permitted to be cross-utilized, therefore, the same cannot be transitioned for setting off against output GST liability. It will amount to permitting cross utilization of Cesses.
- A harmonious reading of various sub-sections of Section 140 along with three Explanations therein, lead to purposeful interpretation that credit cannot be transitioned.

Assistant Commissioner v. Sutherland Global Services (2020-VIL-500-MAD)

NITYA Comments: *In our view, this ruling is incorrect for following reasons:*

- Credit is vested right and not concession. For transition of credits, it is irrelevant to determine nature of such credits.*
- Merely because Cesses were abolished, does not mean that validly availed credit of such Cesses became a dead claim.*

- c. *There is no concept of implied lapsing of credit. The Supreme Court in case of **Eicher Motors Limited v UOI, 1999-VIL-04-SC-CE**, held that credit can lapse only based on express provision in law.*
- d. *Specific subsumation of a levy under GST is not pre-condition for transitioning of credit of such levy.*
- e. *On commencement of GST regime, Cenvat credit or VAT credit (Excise Duty, Service Tax, NCCD) became Input Tax Credit ('ITC') under GST laws. It is incorrect to say that credit of Cesses will be cross-utilized if it is transitioned.*
- f. *The Court proceeded on the basis that Explanation 1 and Explanation 2 are applicable to Section 140(1) of the CGST Act. Notably, Explanation 1 and Explanation 2 were never made effective to Section 140(1) of the CGST Act.*
- g. *The Court initially stated that taxing statute should be interpreted strictly while later it applied harmonious reading to Explanation 1 to 3. Such harmonious reading cannot be applied in this case. The definition of Cenvat credit under Explanation to Section 142 was not being considered while giving this ruling. Explanation 1 and 2 to Section 140 of CGST Act cannot apply to Section 140(1) and (8) of CGST Act.*
- h. *Under Section 73 and 74 of CGST Act, notice for recovery can be issued for ITC wrongly availed or utilized. The same does not cover credit of Cesses or any other Transitioned Credit. Therefore, there is no provision for recovery of Transitional Credits. Similarly, there is no provision for levy of interest on Transitioned Credits.*

PART B: ADVANCE RULINGS

1. Proportionate ITC on inputs, input services and capital goods.

The Applicant was engaged in business of supply of edible oils and started new business vertical of generation and distribution of electricity. In new business vertical, the Applicant was supplying electricity to third parties without payment of GST and Renewable Energy Certificate ('REC') on payment of GST.

The question before the Authority for Advance Ruling ('AAR') was whether the Applicant is eligible to claim proportionate ITC on inputs, input services and capital goods whose cost was capitalized in books of accounts.

The AAR observed that goods which are capitalized in books of accounts, qualify as capital goods. Thus, the Applicant is entitled to claim proportionate ITC under Rule 43 of the Central Goods and Services Tax Rules, 2017 ('CGST Rules')

For input services, the AAR observed that cost of services cannot be capitalized in books of accounts. Further, inputs which are not capitalized in the books of accounts, cannot be considered as capital goods. Accordingly, proportionate ITC on input and input services is available under Rule 42 of the CGST Rules.

The AAR also observed that for computing eligible ITC under Rule 42 and 43, total turnover shall include turnover of edible oil, electricity and REC.

Kumaran Oil Mill, 2020-VIL-285-AAR (TN)

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