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**Transition of credit of Cesses | Tussle
between Intent and Law**

Industry is facing a tough time. Government has turned its back (limiting export benefits under MEIS, delaying refunds etc.) and Courts have become pro-revenue (upholding amendments having retrospective effect, rejecting doctrine of promissory estoppel etc.). In nutshell, taxpayers have no clue as to what will happen next!

The entire idea of Indian Government behind overhauling Indirect Tax regime and making it a Good and Simple Tax is suffering a huge blow ever since the beginning. Drafting errors at Government's end have not help its cause. One such example is that of transitioning of credits. While the initial drafting was weak, equally dreadful drafting of retrospective amendments made the matter worse.

In this article, we have focused upon the provisions relating to transition of credit of Cesses under GST and our views on the recent decision of Division Bench of Madras High Court.

Background

Levy of Education Cess and Secondary Higher Education Cess was abolished in 2015, leaving their credits lying unutilized in books and returns of taxpayers. Similarly, taxpayers had credit balance of Krishi Kalyan Cess on advent of GST. Importantly, no amendment was made in law to lapse these credits.

Section 140(1) and 140(8) of the Central Goods and Services Tax Act, 2017 ('CGST Act') allowed decentralized and centralized registrations respectively to transit Cenvat credit lying in returns of erstwhile laws. Legal interpretation suggested no bar in transitioning these credits, while some clarifications suggested the intent to be otherwise. Since it is well settled that clarifications without legal backing are futile, taxpayers transitioned unutilized credit of Cesses to GST regime. At that time, it wasn't known that Government will be hell-bent on disallowing these credits, making all possible efforts for the same.

Government came up with retrospective amendments and Circulars to establish their intent of barring credit of Cesses. They replaced the word 'Cenvat credit' with 'Cenvat credit of eligible duties' and inserted 3 Explanations in Section 140. They ended up notifying only 1 Explanation clarifying that balance 2 will not be notified. The poorly drafted amendments failed in transcribing the intention into literal words and opened the Pandora box for litigation.

Decision of Madras High Court (Single Bench)ⁱ

The Court was dealing with specific case of Section 140(8) which was left untouched by the amendments. In the tussle between *Principle of legislative intent* and *Principle of literal interpretation*, the Single Bench of Madras High Court chose to go by the literal words of Statute. It held that in absence of any provision barring credit of Cesses under erstwhile regime or under GST regime, the transition is valid.

Notably, the Court rightly pointed out that relevant amendments barring transition of credit of Cesses under Section 140(1) of the CGST Act are not notified and hence will not alter eligibility. However, the Court withdrew this para later to stick to its specific case of Section 140(8), which was not amended. This seemed a straight-forward and correct case at that time.

Decision of Madras High Court (Division Bench)ⁱⁱ

Reversing the decision of Single Bench, the Division Bench disallowed transition of credit of Cesses on following grounds:

- Abolishment of levy of Cesses made their credits a dead claim
- Nature of credit of Cesses is of concession and facility and not a vested right

- GST law did not specifically subsume Cesses in its ambit
- All the amendments read with intent of Government results into implied lapsing of credit of Cesses
- Credit of Cesses was never permitted for cross-utilization and their transition would permit that

The Division Bench backed its decision by multiple grounds but many of them seemed to be based on one sided view only and fell short of wholistic research.

Conclusion

While concurring with the principle of legislative intent, authors remain to be of the view that credit is a vested right and any law attacking that right should be read strictly. Nothing should be implied when such right is being infringed. Basis golden rule of interpretation i.e. literal interpretation, the decision remains incorrect. The strict language of law still allows transition of these credits.

At the same point of time, it is also pertinent that while the intent of Government has always been to bar the transition of credit of Cesses, the same is unjust and against the overall scheme of GST which aims at optimizing credits and eliminating cascading effect of taxes.

Having said that, Division Bench's judgment on the issue has definitely fueled the debate of credit of Cesses and left the taxpayers bewildering on whether to accept the loss of credits or wait for Supreme Court's version. Here, it is apt to quote **Henry David Thoreau** - *"Unjust laws exist: shall we be content to obey them, or shall we endeavor to amend them, and obey them until we have succeeded, or shall we transgress them at once?"*

We leave this tough choice on taxpayers. Hopefully, the Government realizes that there will be no winners in long drawn litigations and focus should be on taxpayer friendly administration.



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ⁱ *Sutherland Global Services Private Limited v. AC, 2019-VIL-536-MAD*

ⁱⁱ *AC v. Sutherland Global Services Private Limited, 2020-VIL-500-MAD*