

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.09.2019

CORAM:

THE HONOURABLE Dr. JUSTICE ANITA SUMANTH

Writ Petition No.4773 of 2018
& WMP Nos.5916 & 13148 of 2018

Sutherland Global Services Private Limited,
45-A Velachery Main Road,
Vijayanagaram, Chennai 600 042.

... Petitioner

vs.

1. Assistant Commissioner CGST and Central Excise,
Guindy Division, 3rd floor, EVR Periyar Maligai,
690, Anna Salai, Nandanam, Chennai-600 035.

2. Commissioner of CGST and Central Excise,
MHU Complex, V Floor, Anna Salai, Nandanam,
Chennai-600 035.

3. Government of Tamil Nadu,
Represented by its Secretary,
State Tax Department,
Fort St. George, Chennai – 600 009.

4. Union of India,
Represented by its Secretary,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi – 110 001.

5. Central Board of Excise and Customs,
815, Nehru Place, Market Road, New Delhi -110 019.

6. The Chairman, GSTN, East Wing, World Mark-1,
4th Floor, Tower B, Aerocity, Indira Gandhi
International Airport, New Delhi-110 037.

... Respondents

Prayer: Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari to quash the letter in C.No.IV/1602.2018-GST Tech dated 14.02.2018 issued by the Assistant Commissioner of GST and Central Excise, Guindy Division and direct the respondents to enable the petitioner to avail and

utilize the Credit pertaining to Education Cess, Secondary and Higher Education Cess and Krishi Kalyan Cess.

For Petitioner : Mr. Raghavan Ramabadrar

For Respondents : Ms.Aparna Nandakumar – R1, 2, 4 and 5
Mr.M.Hariharan, AGP – R3
Mr.V.Sundareswaran, Standing Counsel – R6

ORDER

The petitioner prays for a writ of Certiorari quashing letter dated 14.02.2018 issued by the 1st respondent Assessing Officer. As a consequence thereof the petitioner would be entitled to avail and utilise accumulated credit pertaining to Education Cess (in short 'EC'), Secondary and Higher Education Cess (in short 'SHEC') and Krishi Kalyan Cess (in short KKC').

2.The petitioner is registered as an Assessee under the provisions of the Central Goods and Service Tax Act, 2017 (in short Act) and is a company providing Information Technology enabled services to customers worldwide. It has eight (8) units registered under the Act, five (5) units registered in Special Economic Zones (SEZ), two (2) units in Software Technology Parks of India (STPI) and one (1) unit in a Domestic Tariff Area (DTA).

3.In the era prior to levy of goods and service tax (in short GST) the petitioner was assessed to service tax and was availing CENVAT credit on inputs, capital goods and input services, utilizing the same against payment of service tax liability.

4. Vide Finance Act 2004, Parliament introduced the levy of Education Cess and, vide Finance Act 2007, the levy of Secondary and Higher Education Cess. The CENVAT Credit Rules 2004, (in short Rules) enabled a manufacturer of final

products or a provider of output services to avail CENVAT credit in respect of EC and SHEC against duty levied on excisable goods or taxable services in terms of Rules 3(1)(vi), (via), (x) and (x-a) thereof. The Rules specifically provided that once availed, the utilization thereof shall be only as against payment of EC or SHEC respectively.

5. While this was so, the levy of EC and SHEC on taxable services was abolished vide Finance Act 2015, with effect from 01.06.2017. Notification No.14/2015-CE exempted all goods falling within the first schedule to the Central Excise Tariff Act from the levy of EC and SHEC. In the light of the specific stipulation that EC and SHEC availed could be set of/utilised only against the payment of EC and SHEC respectively, the credit that had been accumulated on this account lay unutilised in the CENVAT account of the petitioner.

6. Vide Finance Act 2016, Krishi Kalyan Cess (in short 'KKC') was levied on taxable services by the Central Government with effect from 01.06.2016 with the avowed object of financing and promoting initiatives, including agriculture or related activities. Notification No.28/2016-CE (MT) dated 26.05.2016 enabled a provider of output services to avail CENVAT credit and utilise the same against KKC liability.

7. The Central Goods and Services Tax Act (CGST) came into effect on 01.07.2017 and the petitioner sought to avail accumulated credit as against its tax liability. Various particulars in regard to the petitioners' claim were sought for by the Assessing Officer vide communication dated 04.01.2018, such as service tax returns for the period April-2016 to September-2016, October-2016 to March-2017 and April-2017 to June-2017, invoices for credit availed by the petitioner for the period 01.07.2016 to 30.06.2017 and CENVAT credit availed for the period 2016-

2017 and 2017-2018 till June 2017, month wise. All details sought for were furnished.

8. The request of the petitioner for carry forward and utilisation of credit was rejected vide impugned order dated 09.02.2018 on the ground that credit could be set-off only as against the specific duties and taxes enumerated in the Explanation to Section 140(1) of the Act r/w 117 of the Rules. According to the Assessing Officer, since the explanation did not cover cesses such as EC, SHEC and KKC, the same could not be carried forward. The petitioner was thus directed to reverse the aforesaid credits. Hence the present writ petition.

9. We are concerned, in this writ petition, with the interpretation of Section 140 of the Act which provides for *Transitional arrangements for input tax credit* and I thus extract the provision in full hereunder:

'140. Transitional arrangements for input tax credit.- (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 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.

(2) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, credit of the unavailed CENVAT credit in respect of capital goods, not carried forward in a return, furnished under the existing law by him, for the period ending with the day immediately preceding the appointed day in such manner as may be prescribed:

Provided that the registered person shall not be allowed to take credit unless the said credit was admissible as CENVAT credit under the existing law and is also admissible as input tax credit under this Act.

Explanation.—For the purposes of this sub-section, the expression "un-availed CENVAT credit" means the amount that remains after subtracting the amount of CENVAT credit already availed in respect of capital goods by the taxable person under the existing law from the aggregate amount of CENVAT credit to which the said person was entitled in respect of the said capital goods under the existing law.

(3) A registered person, who was not liable to be registered under the existing law, or who was engaged in the manufacture of exempted goods or provision of exempted services, or who was providing works contract service and was availing of the benefit of notification No. 26/2012—Service Tax, dated the 20th June, 2012 or a first stage dealer or a second stage dealer or a registered importer or a depot of a manufacturer, shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to the following conditions, namely:—

(i) such inputs or goods are used or intended to be used for making taxable supplies under this Act;

(ii) the said registered person is eligible for input tax credit on such inputs under this Act;

(iii) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of such inputs;

(iv) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day; and

(v) the supplier of services is not eligible for any abatement under this Act:

Provided that where a registered person, other than a manufacturer or a supplier of services, is not in possession of an invoice or any other documents evidencing payment of duty in respect of inputs, then, such registered person shall, subject to such conditions, limitations and safeguards as may be prescribed, including that the said taxable person shall pass on the benefit of such credit by way of reduced prices to the recipient, be allowed to take credit at such rate and in such manner as may be prescribed.

(4) A registered person, who was engaged in the manufacture of taxable as well as exempted goods under the Central Excise Act, 1944 (1 of 1944) or provision of taxable as well as exempted services under Chapter V of the Finance Act, 1994, (32 of 1994), but which are liable to tax under this Act, shall be entitled to take, in his electronic credit ledger,—

(a) the amount of CENVAT credit carried forward in a return furnished under the existing law by him in accordance with the provisions of sub-section (1); and

(b) the amount of CENVAT credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day, relating to such exempted goods or services, in accordance with the provisions of sub-section (3).

(5) A registered person shall be entitled to take, in his electronic credit ledger, credit of eligible duties and taxes in respect of inputs or input services received on or after the appointed day but the duty or tax in respect of which has been paid by the supplier under the existing law, subject to the condition that the invoice or any other duty or tax paying document of the same was recorded in the books of account of such person within a period of thirty days from the appointed day:

Provided that the period of thirty days may, on sufficient cause being shown, be extended by the Commissioner for a further period not exceeding thirty days:

Provided further that said registered person shall furnish a statement, in such manner as may be prescribed, in respect of credit that has been taken under this sub-section.

(6) A registered person, who was either paying tax at a fixed rate or paying a fixed amount in lieu of the tax payable under the existing law shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to the following conditions, namely:-

(i) such inputs or goods are used or intended to be used for making taxable supplies under this Act;

(ii) the said registered person is not paying tax under Section 10;

(iii) the said registered person is eligible for input tax credit on such inputs under this Act;

(iv) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of inputs; and

(v) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day.

(7) Notwithstanding anything to the contrary contained in this Act, the input tax credit on account of any services received prior to the appointed day by an Input Service Distributor shall be eligible for distribution as credit under this Act even if the invoices relating to such services are received on or after the appointed day.

(8) Where a registered person having centralised registration under the existing law has obtained a registration under this Act, such person shall be allowed to take, in his electronic credit ledger, credit of the amount of CENVAT credit carried forward in a return, furnished under the existing law by

him, in respect of the period ending with the day immediately preceding the appointed day in such manner as may be prescribed:

Provided that if the registered person furnishes his return for the period ending with the day immediately preceding the appointed day within three months of the appointed day, such credit shall be allowed subject to the condition that the said return is either an original return or a revised return where the credit has been reduced from that claimed earlier:

Provided further that the registered person shall not be allowed to take credit unless the said amount is admissible as input tax credit under this Act:

Provided also that such credit may be transferred to any of the registered persons having the same Permanent Account Number for which the centralised registration was obtained under the existing law.

(9) Where any CENVAT credit availed for the input services provided under the existing law has been reversed due to non-payment of the consideration within a period of three months, such credit can be reclaimed subject to the condition that the registered person has made the payment of the consideration for that supply of services within a period of three months from the appointed day.

(10) The amount of credit under sub-sections (3), (4) and (6) shall be calculated in such manner as may be prescribed.

Explanation 1.—For the purposes of [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 (58 of 1957);

(ii) the additional duty leviable under sub-section (1) of section 3 of the Customs Tariff Act, 1975 (51 of 1975);

(iii) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, 1975 (51 of 1975);

[***]

(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 (5 of 1986); 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 [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 (58 of 1957);

(ii) the additional duty leviable under sub-section (1) of section 3 of the Customs Tariff Act, 1975 (51 of 1975);

(iii) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, 1975 (51 of 1975);

*[***]*

(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 (5 of 1986);

(vii) the National Calamity Contingent Duty leviable under section 136 of the Finance Act, 2001 (14 of 2001); and

(viii) the service tax leviable under section 66-B of the Finance Act, 1994 (32 of 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).]

10. The scheme of transition of credit as set out under the Act has been referred to by both Mr. Raghavan Ramabadrana, learned counsel appearing for the petitioner as well as Ms. Aparna Nandakumar, learned counsel appearing for the Revenue, in some detail.

11. In the present case, the petitioner followed the procedure for carrying forward CENVAT credit availed under the erstwhile regime, set out in terms of Rule 117 of the Central Goods and Service Tax (CGST) Rules, 2017 (in short Rules). The Rules provide that every person entitled to input tax credit under Section 140 shall submit a declaration electronically in Form GST Tran-1 within 90 days of the appointed date, being 01.07.2017, for carrying forward such credit to be utilised

against turnover from taxable services. The petitioner had a closing balance of a total of Rs.18,80,85,930/- comprising, credit availed on input services directly of an amount of Rs.17,77,77,224/-, EC of an amount of Rs.55,84,569/- and SHEC of an amount of Rs.29,99,337/-. This is the sum total of the closing balance of credit available for being carried forward for utilisation in the new regime.

12. The provisions of Section 140(8) of the Act provide for Centralised Registration in respect of all the petitioners' units, pan India, and this was reflected in the Tran-1 return filed by it. There is no specific provision providing for the lapsing of the credit accumulated in the CENVAT register. The petitioner argues that the provisions of Section 140(8) entitle it to avail utilisation of the credits carried forward in a return relating to the period ending with the day immediately proceeding the appointed day. The provisions of Section 140(1) use the expression '*Central Value Added Tax (CENVAT) credits as having the same meaning as assigned in the Central Excise Act 1944 and connected rules*'. The petitioner points out that for the purpose of the Central Excise Act and Rules, EC, SHEC as well as KKC are 'credits' and thus, in the light of the explanation to Section 140, such credits would also be eligible to be credited, transitioned and utilised.

13. Going further, the proviso to Section 140(1) specifically delineates those circumstances/conditions under which credit availed may not be utilised and there is nothing thereunder, to militate against the availment in question.

14. The provisions of Section 140(8), which set out the credit utilisation among different units of the petitioner, also support its claim as the phrase used therein is 'CENVAT credit' and not 'eligible credit'. In any event, it is pointed out that the Explanation to Section 140 which defines the phrase 'eligible duties and taxes' is specific only to Section 140(5) whereas, the present transition and

utilisation is sought under Section 140(1) and 140(8) of the Act. The petitioner argues that the law has provided for such availment and utilisation, and the statutory provisions cannot be interpreted in such a way as to defeat a legitimate, statutory right.

15. The petitioner relies on the following cases:

- (1) *Union of India v. Ind-Swift Laboratories Ltd.* (2012 (25) STR 184)
- (2) *Eicher Motors Ltd. V. Union of India* ((1999) 106 ELT 3)
- (3) *SML Isuzu Ltd. V. Union of India* ((2016) 340 ELT 643)
- (4) *Commissioner of C. Ex., Bolpur v. Ratan Melting & Wire Industries* ((2008) 231 ELT 22)
- (5) *J.K.Lakshmi Cement Ltd. v. Commercial Tax Officer, Pali* ((2018) 14 GSTL 497)
- (6) *Commissioner of Central Excise, Bhopal v. Minwool Rock Fibres Ltd* ((2012) 278 ELT 581)

16. A counter has been filed by the Revenue reiterating the rationale of the impugned order and stating that the claims of the petitioner for transition of EC, SHEC and KKC are not tenable in law. The Revenue points out that though the right to input tax credit is a statutory right it may not be claimed by the assessee as a vested right and it is only when all conditions under statute are complied with in full that the petitioner may claim utilisation of ITC.

17. In the present case, the scheme of Section 140 nowhere provides for utilisation of EC, SHEC and KKC. The learned counsel for the Revenue points out that with the abolishing of EC, SHEC and KKC in 2015 and 2016 respectively, the levy as well as availment of credit in regard to the aforesaid cesses has been removed from the sweep of the Act. To a pointed query from the Bench as to why the assessee was permitted to carry forward the credit manually in CENVAT

register, the Revenue would only state, while admitting the aforesaid as a fact, that that by itself would not be a determinating factor as to the proper utilisation of the credit. The Revenue relies on the following cases:

(1) *M/s.Osram Surya P. Ltd. v. Commissioner of Central Excise, Indore*

(2) *Union of India (UOI) and Ors. v. Uttam Steel Ltd.* reported in (2015) (4) ABR 505)

(3) *Jayam and Co. v. Assistant Commissioner and Ors.* reported in AIR 2016 SC 4443)

(4) *ALD Automotive Pvt. Ltd. v. The Commercial Tax Officer and Ors.* reported in AIR 2018 SC 5235

(5) *Cellular Operators Association of India and Others v. Union of India and another*

(6) *JCB India Limited v. Union of India and Others*

18. Having heard the rival contentions, I am of the view that the claim of the petitioner is liable to be accepted. Goods and Service Tax was introduced with much fanfare in 2017 with discussions preceding the enactment nearly from 2009 onwards. The scheme of Goods and Service Tax (GST) was to provide a comprehensive indirect tax levy subsuming various indirect tax enactments that had been in force prior thereto. Empowered committees were set up to deliberate extensively on the various details of the GST model to be implemented after taking into account the views of the State and Central Governments. The first discussion paper on GST in India set out the salient features that were incorporated in the report of the Thirteenth Finance Commission issued in December 2009. Prior to enumerating the Central and the State taxes to be integrated with GST the outline

*'Thirteenth Finance Commission
2010-2015
Volume I : Report
December 2009*

.....

The Model GST

Outline of the Model GST

5.25. Keeping in mind the recommendations of the task force, we outline the design and modalities of a model GST law. Such a model GST would not distinguish between goods and services. It should be levied at a single positive rate on all goods and services. Exports should be zero-rated. Tax compliance costs should be low and tax credits should be available seamlessly across tax jurisdictions. The other design and operational modalities of a model GST are outlined below....."

19. The taxes that had been subsumed were many and included among others, Central excise, Additional excise, Additional Customs Duty, all Central and State surcharges and cesses, Value Added Tax, Central Sales Tax, Entry Tax, Luxury Tax, Taxes on lottery, Entertainment Tax, Purchase Tax, State Excise Duties, Stamp Duty, Taxes on vehicles, Tax on goods and passengers, Taxes and duties on electricity as well as service tax. While integrating the taxes, the intention of the Government was evidently to provide a seamless model for transitioning of all credits hitherto availed of by an assessee under the erstwhile VAT and other indirect tax levies to the Goods and Service Tax regime as well. The benefits that had been made available and that had been permitted to continue in the erstwhile taxing regime were thus meant to be continued.

20. EC was introduced in 2004, SHEC in 2007 and KK Cess in 2016. Upon introduction of the levy of EC in 2004, Section 95 of Finance Act, 2004 provided that EC would be levied in addition to service tax on taxable services and could be availed of and utilised against payment of EC alone. Likewise for SHEC, introduced in 2007, it was made clear that the benefits of SHEC on input were available to be utilised only as against the respective payments alone and not on the payment of

excise duty or service tax on manufactured goods or taxable services. Likewise for KK cess.

21. Both EC and SHEC were abolished with effect from 01.06.2015 and consequently the unutilised credit of EC and SHEC available could not be set off and accumulated. As far as KK cess is concerned there was no specific notification providing for its abolishing. However, since the CGST Act did not provide specifically for the levy of KK cess, as such there was no avenue to claim the same after 01.07.2017. In all three of the aforesaid cases the unutilised portion of EC, SHEC and KKC continued in the electronic credit ledgers of assesses, but could not be practically utilised in the absence of an enabling provision.

22. This issue can be clinched in favour of the petitioners for two reasons. The impugned order proceeds on the basis that the petitioner has no entitlement to claim set off of credit and thus denies it. However, such credit continues to be available till such time it is expressly stated to have lapsed. Lapsing is not a concept unknown to the respondents. In fact, there are multiple instances where the Board/Government provides for specified credits to lapse mentioning the exact point in time when the lapsing would commence and/or stipulating other conditions in this regard.

23. That the authorities are conscious of the provisions for lapsing of credit, having utilised them in several situations and instances, is clear from the following instance:

'F.No.137/72/2008-CX.4, dated 21-11-2008

Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi

Subject: Utilization of accumulated Cenvat credit restricted in terms of erstwhile Rule 6(3)(c) of Cenvat Credit Rules, 2004 – Regarding.

Kindly refer to your letter C.No. 715/Hqrs/Audit/08 dated 20-11-2008 on the subject mentioned above wherein the issue of utilization of accumulated Cenvat credit has been raised.

The matter has been examined and the following points emerged during its consideration.

Prior to 1-4-2008 [before the amendment in Rule 6(3)] the option available to the taxpayer, under rule 6(3), was that, he was allowed to utilize credit only to the extent of an amount not exceeding 20% of the amount of service tax payable on taxable output service. However, there was no restriction in taking Cenvat credit and also there was no provision about the periodic lapse of balance credit. This resulted in accumulation of credit in many cases.

W.e.f. 1-4-2008, under the amended rule 6(3), the following options are available to the taxpayers not maintaining separate accounts;

(i) **Option No.1** – In respect of exempted goods, he may pay an amount equal to 10% of the value of exempted goods; and in respect of exempted/non-taxable services, he may pay an amount equal to 8% of the value of such exempted/non-taxable service;

OR

(ii) **Option No.2** – He may pay an amount equivalent to Cenvat credit attributable to inputs and input services attributable to exempted goods and non-taxable/exempted services.

As stated earlier, many taxpayers had accumulated Cenvat credit balance as on 1-4-2008. The matter to be considered was whether this credit balance should be allowed to be utilized for payment of service tax after 1-4-2008.

As no lapsing provision was incorporated and that the existing Rule 6(3) of the Cenvat Credit Rules does not explicitly bar the utilization of the accumulated credit, the department should not deny the utilization of such accumulated Cenvat credit by the taxpayer after 1-4-2008. Further, it must be kept in mind that taking of credit and its utilization is a substantive right of a taxpayer under value added taxation scheme. Therefore, in the absence of a clear legal prohibition, this right cannot be denied.

Pending issues may be decided accordingly.'

24. In the present case, admittedly, there is no notification/circular/instruction that has expressly provided that the credit accumulated would lapse. Not only this, the credit has been carried forward manually and reflected in the returns from time to time and such accumulated credits stare the Revenue in the face. Having permitted the assessee to carry forward the credit, the authorities cannot now take a stand that such credit is unavailable for use. The provisions of sub-section (1) read with sub-section (8) of

section 140, and the Explanation thereunder make it more than clear that all

available credit as on the date of transition would be available to an assessee for set off.

25. The Full Bench of the Supreme Court, in fact, makes this position clear in the case of *Eicher Motors and another V. Union of India and others* (106 ELT 3) while considering the applicability of Rule 57F. The aforesaid Rule provided for the lapse of credit lying unutilised as on 16.03.1995 stating clearly that such credit would not be allowed to be utilised for payment of duty on any excisable goods, whether cleared for home consumption or export. The proviso to the Rule clarified that such lapsing would not affect credit of duty, if any, in respect of inputs lying in stock or contained in finished products lying in stock on 16.03.1995. The Bench opined that Modvat Credit lying to the balance of an assessee represented a vested right accrued or acquired by the assessee. The right in respect of the credit had become absolute at that point when the input was used in the manufacturing of the final product.

26. The Bench stated that when, on the strength of the available Rules and Regulations, certain acts were carried out, all logical consequences must follow in sequence. If any alteration is brought about to this Scheme, then it would have a deleterious effect. The alteration of a credit scheme loses sight of fact that the provision for facility of credit is as good as tax paid till such time the taxes are adjusted on future goods on the basis of commitments made commercially by the assessee. Thus, altering a scheme of credit would affect the rights of the assessee. The impugned Rule was thus quashed, the Bench stating that it cannot be applied to goods manufactured prior to 16.03.1995, where duty payment stood discharged and credit available for further manufacture.

'5. As pointed out by us that when on the strength of the rules available certain acts have been done by the parties concerned, incidents following thereto must take place in accordance with the scheme under which the duty had been paid on the manufactured products and if such a situation is sought to be altered, necessarily it follows that right, which had accrued to a party such as availability of a scheme is affected and, in particular, it loses sight of the fact that provision for facility of credit is as good as tax paid till tax is adjusted on future goods on the basis of the several commitments which would have been made by the assesses concerned.

6. We may look at the matter from another angle. If on the inputs the assessee had already paid the taxes on the basis that when the goods are utilised in the manufacture of further products as inputs thereto then the tax on these goods gets adjusted which are finished subsequently. Thus a right accrued to the assessee on the date when they paid the tax on the raw materials or the inputs and that right would continue until the facility available thereto gets worked out or until those goods existed. Therefore, it becomes clear that Section 37 of the Act does not enable the authorities concerned to make a rule which is impugned herein and, therefore, we may have no hesitation to hold that the rule cannot be applied to the goods manufactured prior to 16-3-1995 on which duty had been paid and credit facility thereto has been availed of for the purpose of manufacture of further goods.'

The ratio of this judgment is directly applicable to the facts and legal position before me.

28. Great reliance has been placed by the revenue upon the decision of the Division Bench of the Delhi High Court in the case of *Cellular Operators Association of India and others Vs. Union of India and Another* (W.P.(civil) No.7837 of 2016 dated 15.2.2018). At paragraph 5, the Bench records the crux of the petitioners' case as follows:

'5. 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 submitted 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."

The arguments stood rejected in the following terms:

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 57-F(4-A), 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 assessee. 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 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 57-F(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.

29. Reliance on the case of *Cellular Operators Association of India* (supra)

does not advance the case of the revenue. The Division Bench in that case was concerned with a prayer for quashing Notification dated 29.10.2015 and for a direction that the credit accumulated on account of EC and SHEC be permitted to be utilised for payment of service tax on telecommunication services. The Bench, right

at the outset, at paragraph 3, highlights the 'accepted and admitted case that

benefit of EC and SHEC 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 the premise on which the Bench has proceeded is that cross utilisation of EC and SHEC as against excise duty or service tax was impermissible in the context of the provisions and rules extant then.

30. The claim of the petitioner before the Delhi High Court was that a vested right to avail the benefit of unutilised EC or SHEC credit was available as on 01.03.2015 and 01.06.2015 as against payment of tax on excisable goods and services. Simultaneous therewith the petitioners also challenged Instruction dated 07.12.2015 that provided as follows:

B.21 - Hyderabad, Coimbatore, Vadodara, Vishakhapatnam, Delhi Zone- Cenvat Credit - Balance of Education Cess and Secondary & Higher Education Cess lying in the CENVAT Credit Account:

Issue:

Exemption from levy of Education Cess and Secondary & Higher Education Cess has been provided w.e.f. 01.03.2015 vide notification no. 14/2015-CE & 15/2015-CE both dated 01.03.2015, Sub-rule 7(b) of Rule 3 of CENVAT Credit Rules, 2004, specifies that CENVAT credit of specified duties shall be utilized for payment of those specified duties only. CENVAT Credit of Education Cess and Secondary & Higher Education Cess can be utilized only for payment of Education Cess and Secondary & Higher Education Cess, respectively. Consequent upon grant of exemption there is issue of utilization of the accumulated credit of the past. It is suggested that an amendment to sub-rule 7(b) of Rule 3 of CENVAT Credit Rules, 2004 may be made to allow the utilization of balance CENVAT Credit of Education Cess and Secondary & Higher Education Cess towards payment of either duty of excise or Service Tax.

Discussion & Decision The conference after discussion and briefing from the officers from the Board noted that it was Government's conscious policy ? decision to withdraw the Education Cess and Secondary & Higher Education Cess. It is a policy decision to not allow utilization of accumulated credit of education cess and secondary and higher education cess after these Cesses have been phased out. As these Cesses have been phased out and no new liability to pay such Cess arises, no vested right can be said to exist in relation to the accumulated credit of the past. The rule and notifications as they exist need to be followed and do not need any amendment.?

31. The argument advanced by the parties was crystallised at paragraph 5 of the decision to the effect that though the levy on EC and SHEC itself been abolished, they had been 'subsumed' within the rate of tax itself, since the rate of service tax had increased to 12%-14% and excise duty from 12% to 12.50%. Thus according to them since the cesses had been subsumed into the basic tax/duty rate, they should be allowed to set off the accumulated credit of EC and SHEC against the same.

32. This argument was rejected by the Division Bench, that held, after analysing the judgments of the Supreme Court in the case of i) *Hingir-Rampur Coal Company Limited and Others versus State of Orissa and Others*, ((1961) 2 SCR 537) , ii) *B.K. Industries and Others versus Union of India and Others*, (1993 Supp (3) SCC 621), iii) *Shashikant Laxman Kale and Another versus Union of India and Another*, ((1990) 4 SCC 366), iv) *Tarlochan Singh Flora versus Wakom (Heathrow) Ltd.*, ([2006] EWCA Civ 1103, Brooke LJ), that though cess may be of the nature of tax and not a fee, it would not be proper to treat either of the cesses as excise duty or service tax. The two cesses on the one hand and excise duty and service tax on the other were always to be treated as different and separate and cross utilisation was, according to the Bench, never permitted. Thus the use of the word 'subsumed' by the then Finance Minister, upon which great reliance was placed by the petitioners, was held not to be determinative of the true object of the Legislation.

33. In summary, the Division Bench rejected the prayer of the petitioners to quash notification dated 29.10.2015 denying them the direction sought.

34. I have carefully read the aforesaid decision relied upon by the Revenue.

The decision and the observations made therein have to be seen in the context of

the prayer advanced in that case and in the light of the statutory provisions/rules existing at the relevant point in time.

35. Firstly, the Instructions issued by the Central Board of Excise and Customs dated 07.12.2015, reveal a policy decision, not to allow utilisation of accumulated credit of EC and SHEC, but nowhere states that the credit has lapsed. The Board only says that the cesses have been phased out and since there is no new liability to pay these cesses, no vested right can be said to exist in relation to the past accumulated credit in the light of Rule 3(7)(b) of the Cenvat Credit Rules, 2004 which stipulates that Cenvat Credit shall be utilised only as against payment of specified duties. The request of the petitioner in that case has to be seen in this perspective and specifically in the light of the embargo placed by Rule 3(7)(b) as aforesaid. The Board could well have stated even at that juncture that the credit lapsed, but did not choose to do so.

36. Then again, the Division Bench while considering the rival contentions of the assessee and the Revenue has not anywhere indicated that the credit has lapsed, but only that, in the light of the embargo placed by Rule 3(7)(b), set off/credit as claimed could not be permitted.

37. Thirdly, even after the decision of the Division Bench, there has been no instructions/notification/circular from the Board till date to state that the accumulated credit has lapsed. Thus though there were a good many occasions that presented themselves to the Board to clearly stipulate that the accumulated credit had lapsed, this was not done. The petitioner had been permitted to carry forward the cesses in question without any move whatsoever to state that the credits could not be so carried forward, since they had lapsed. Not having done so, the provisions of Section 140 should be given full effect and meaning.

38. The revenue has placed reliance upon the conclusions of the Supreme Court in the cases of (i) *Jayam and Co. vs. Assistant Commissioner and Ors.* (AIR 2016 SC 4443) and (ii) *ALD Automotive Pvt. Ltd. V. The Commercial Tax Officer and Others* (AIR 2018 SC 5235), to state that the grant of ITC cannot be sought for as a right by an assessee and no such right vests in an assessee.

39. There is a material distinction between the cases relied upon by the revenue and the case before me. In *Jayam and Company and ALD Automotive Pvt. Ltd.* (supra), the Court was concerned with a claim of Input Tax Credit (ITC) by an assessee. It is in this context that the Benches state that the grant of ITC is a concession which is not admissible to all kinds of sales. Specified transactions are alone entitled to the benefit of ITC on specified situations and that too, upon satisfaction of conditions imposed. Thus no vested right could be claimed by an assessee in that regard.

40. In the present case, the situation is entirely different. The assessee only avails utilization of the credit accumulated, particularly since there is no prohibition in this regard either for the accumulation itself or for the utilization thereof under CGST.

41. A certain amount of planning and strategizing is undertaken by an assessee bearing in mind the credits and concessions available as well as liabilities imposed by a taxing Statute at any given point in time. The credit available in regard to EC, SHEC and KKC are no different. In strategising and conducting its business, the assessee would certainly have taken into account that credit was available for set-off against output tax liability. Such credit accumulated has not been stated to have lapsed. The impugned action of the assessing authority in rejecting the claim has however the consequence of insertion of a Rule/Regulation

to this effect, which, in my view, is impermissible.

42. A fiscal statute has to be read and understood, as seen. The interpretation should be on the basis of what is apparent, apart from being strict. These are settled principles that need no reiteration, nor support of case law. If one were to apply these propositions to the case on hand, the provisions of section 140(1) provide for the transfer of all credits and levies, barring those set out in the proviso, which is, (i) where the said amount of credit is inadmissible as ITC (ii) where an assessee has not furnished returns required under the existing law for six preceding months or (iii) where the said credit relates to goods manufactured and cleared under exemption notifications. These are the only three conditions/embargos that bar the transfer of accumulated credit. The language of section 140(1) and (8), both make it clear that an assessee to GST is entitled to transition of *'the amount of cenvat credit carried forward in the return relating to the period ending with the date preceding the appointed date'* and this in the present case includes accumulated credit of EC, SHEC and KKC.

43. Section 140(8) which specifically deals with centralised registration also provides for transition of credit conditional upon an original or revised return being filed within three months of the appointed date reflecting a carry forward of the credit from the closing balance available. The intention, to my mind, is clear, to the effect that the credit reflected in the earlier returns is sought to be permitted to be transitioned, except if specifically barred. The other two conditions under section 140(8) are that the credit should be admissible as ITC and that credit is freely transferrable inter se the units under centralised registration. These conditions also do not stand in the way of the claim of the petitioner.

44. Thus, in my view, the revenue has not made out any bar for the

transitioning of EC, SHEC and KKC into the GST regime and the petitioner satisfies all conditions both under sub-section (1) and (8) of section 140. The embargo placed by Rule 3(7)(b) is long gone with the introduction of GST. Certainly the powers-that-be are conscious of these factors in drafting the new legislation and the specific provision in question i.e., Section 140.

45. Reliance placed by Ms.Nandakumar upon the decision in the case of *Union of India and others. V. Uttam Steel Ltd.* ((2015) 13 SCC 209) does not impress. In *Uttam Steel* (supra) a Division Bench of the Supreme Court considered a claim for rebate. Originally and as per prevailing law, an assessee was required to file a claim for rebate within six months from the date of shipment. Admittedly, the claims were filed beyond the period of six months. Thereafter, Section 11B was amended on 12.05.2000, extending the period of limitation from six months to one year. The benefit of extension of time as sought by the assessee was granted and the assessee's appeal allowed. In appeal before the Supreme Court, the Bench held that the timeline of six months had expired on 20.11.1999 and 10.12.1999 respectively, whereas, the claims had been filed only on 28.12.1999. The provisions of amended 11B were held not to be applicable to revive a claim that was already beyond time. The Bench noted that the amendment would ordinarily be retrospective in nature. Thus the benefit of one year for filing claim for rebate would be available from 12.05.2000 when the limitation was extended from six months to 12 months. Moreover, the proviso had been added in the section itself to the effect that the amended provision would not have the effect of bringing to life a dead claim.

46. The judgments in the case of *S.S.Gadgil V. Lal and Co.* (AIR 1965 SC

778), *New India Insurance Co. Ltd. V. Shanti Misra* ((1975) 2 SCC 840, *T.Kaliyamurthi V. Five Gori Thaikkal Wakf* ((2008) 9 SCC 306), *Thirumalai Chemicals Ltd. V. Union of India* ((2011) 6 SCC 739 and *Mafatlal Industries Ltd. V. Union of India* ((1997) 5 SCC 536 were cited by the Supreme Court in allowing the Revenues' appeal and holding that a dead claim could not be revived by a subsequent benefit.

47. Thus the Revenue argues that the accumulated credit of EC, SHEC and KKC is dead and gone and there is nothing that the assessee could claim as having been carried forward. This argument is rejected. At the risk of repetition, accumulated credit cannot be said to have been wiped out unless there is a specific order under which it lapses. Though there may be embargos placed by the Statutes and Rules, such as the embargo against cross –utilisation placed by Rule 3(7)(b) of the CCR, the accumulated credit continue in the books of the assessee till specifically wiped out.

48. Finally, the Central Goods and Service Tax Act, 2018 has seen several amendments. Section 28 of CGST (Central Goods and Service Tax) Amendment Act, 2018 proposes the following amendment, which is reproduced below in entirety.

28. In section 140 of the principal Act, with effect from the 1st day of July, 2017,— (a) in sub-section (1), after the letters and word "CENVAT credit", the words "of eligible duties" shall be inserted and shall always be deemed to have been inserted; (b) in the Explanation 1— (i) for the word, brackets and figures "sub-sections (3), (4)", the word, brackets and figures "sub-sections (1), (3), (4)" shall be substituted and shall always be deemed to have been substituted; (ii) clause (iv) shall be omitted and shall always be deemed to have been omitted; (c) in the Explanation 2— (i) for the word, brackets and figure "sub-section (5)", the words, brackets and figures "sub-sections (1) and (5)" shall be substituted and shall always be deemed to have been substituted; (ii) clause (iv) shall be omitted and shall always be deemed to have been omitted; (d) after Explanation 2 as so amended, the following Explanation shall be inserted and shall always be deemed to have been inserted, namely:— '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.'

49. Significantly, Explanation (3) which clarifies that the expression 'eligible duties and taxes' excludes any cess not specified in Explanation (1) or (2), has not been notified.

50. In the light of the discussion above, the impugned order is set aside and this writ petition, allowed. No costs. Consequently, the connected Miscellaneous Petitions are closed.

Index: Yes/No
Speaking/Non-speaking order
Ska/sl

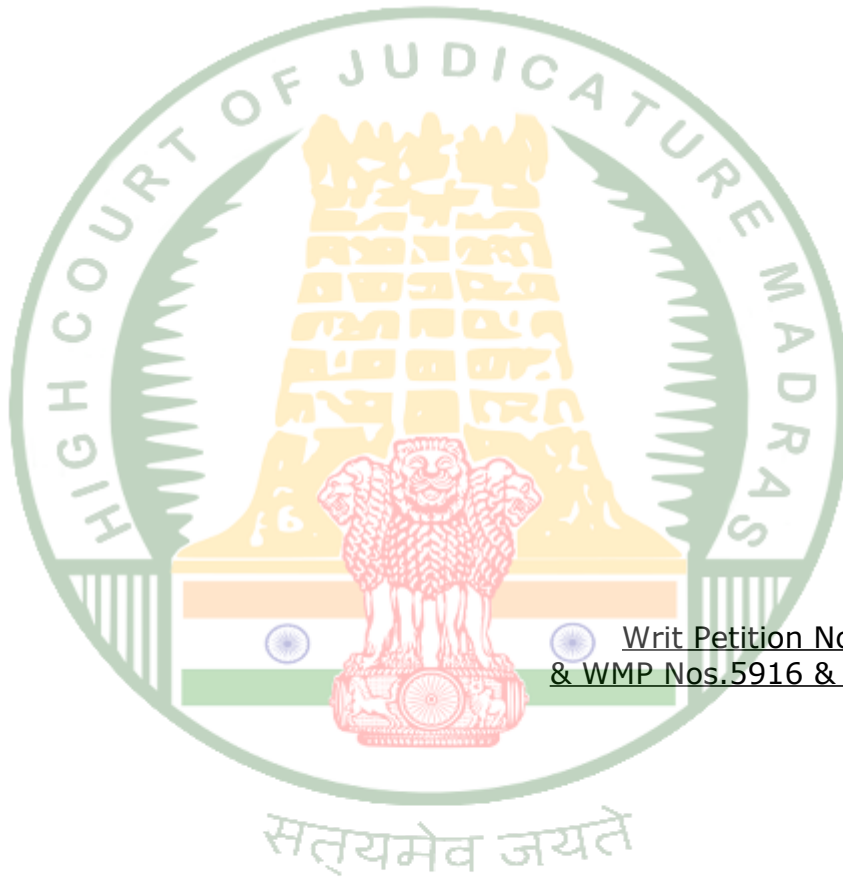
05.09.2019

To

1. Assistant Commissioner CGST and Central Excise,
Guindy Division, 3rd floor, EVR Periyar Maligai,
690, Anna Salai, Nandanam, Chennai-600 035.
2. Commissioner of CGST and Central Excise,
MHU Complex, V Floor, Anna Salai, Nandanam,
Chennai-600 035.
3. Government of Tamil Nadu,
Represented by its Secretary,
State Tax Department,
Fort St. George, Chennai – 600 009.
4. Union of India,
Represented by its Secretary,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi – 110 001.
5. Central Board of Excise and Customs,
815, Nehru Place, Market Road, New Delhi -110 019.
6. The Chairman, GSTN, East Wing, World Mark-1,
4th Floor, Tower B, Aerocity, Indira Gandhi
International Airport, New Delhi-110 037.

Dr.ANITA SUMANTH,J.

Ska/sl



Writ Petition No.4773 of 2018
& WMP Nos.5916 & 13148 of 2018

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